



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2018/31237

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO

...*ML SENYATSI*.....

...24-11-2020.....

In the matter between:

MBITA CONSULTING SERVICES

Applicant

And

FREEWAY COACHES

Respondent

JUDGMENT

(Leave to Appeal Application)

SENYATSI J:

- [1] This is an application for leave to appeal the Judgment granted in favour of the respondent on 22 August 2020.
- [2] The summary judgment granted on 22 August 2020 was opposed by the applicant in these proceedings although there was no representation at the hearing. The opposing papers had been filed and considered in their totality.
- [3] Leave to appeal the judgment has been filed out of time in terms of the rules of this court. As a consequence, the applicant seeks condonation for the late filing of this leave to appeal application.
- [4] Further to the application for condonation of the late filing of this leave to appeal seeks leave to introduce further evidence into the record before this court.
- [5] As regards to the condonation for the late filing of this application Rule 49 (1) (b) of the Uniform Rules of this court provides that an applicant who requires leave to appeal shall make such an application and shall therefore within 15 days after the date of the order which it seeks to appeal.
- [6] The applicant brought the application for leave to appeal on 1 November 2019 fifty (50) days after the Judgment was granted. The application was therefore 35 days late.
- [7] One of the factors that must be considered whenever condonation is sought is the Applicant's prospects of success on the merits.¹ It should be borne in mind that the granting or refusal of condonation is not a mechanical process but one that involves the balancing of the competing factors. The weaker the prospects of success, the less satisfactory the explanation of delay will be. However, if the prospects of success are high even if the explanation for the delay is weak, condonation of the late filing may be favourably considered.²

¹ See *Valor IT v Premier, North West Province and Others* [2020] 3 All SA 397 (SCA) (9 June 2020)

² See *United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A) 720 E-G

- [8] The application for condonation must, in addition give a full explanation for the delay which must not only cover the entire period for the delay but must be reasonable.³
- [9] Counsel for the respondent, argued that the Court order was served on the applicant through its attorneys after it was granted. The applicant and its attorneys were not present in court when these submissions were made.
- [10] The warrant of execution of summary judgment was served on 11 October 2019. I have not seen any explanation of the delay from the 11 October 2019 or soon thereafter detailing why the application was not brought. No steps are mentioned by the applicant to prosecute the application for leave to appeal.
- [11] The applicant simply states that it was not aware that the application for summary judgment had been set down on 22 August 2019. This is highly unlikely as the applicant had attorneys who were aware after having been duly served with the notice of summary judgement application. The application for summary judgment was opposed through an affidavit signed on behalf of the Applicant. The Applicant contends that no advocate had been briefed to attend Court to argue the summary judgment. What this argument ignores is the fact that that the notice to oppose the summary judgment had been filed accompanied by an affidavit.
- [12] In the affidavit resisting the summary judgment the Applicant raised the following defences:
- 12.1. It disputed the amount claimed and stated that the respondent had charged a rate in the invoices which the parties did not agree to. It stated that the rate the parties had agreed to was the rate which the respondent had previously charged an erstwhile

³ See *Van Wyk v United Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 CC at 477 (A-B)

partner of the applicant, pursuant to a separate agreement for similar services which amount was R1300 per day;

- 12.2. It stated that the respondent breached the agreement on a number of occasions and was therefore not entitled to the amount claimed, and
- 12.3. It stated that it had requested documents from the respondents in terms of Rule 35 (1) of the Uniform Rules of the Court, which request had not been answered. It suggested that it was entitled to these documents before the summary judgment could be granted.

[13] The defences were dealt with by Counsel for the Respondents in this application. During the summary judgment application it was argued that the claim was based on a liquidated amount in money supported by invoices and statements of account pursuant to an agreement. As a consequence, summary judgment was granted.

[14] Having considered the explanation given for the delay in prosecuting leave to appeal and lack of prospects of success of the appeal on merits, I am not persuaded that condonation for late filing leave to appeal should succeed.

[15] The grounds of appeal are also not so clear from the papers before me. Section 17 of the Superior Court Act 10 of 2013 provides that in order for this Court to grant the applicant leave to appeal the applicant persuade this Court that another Court will differ from its decision in the summary Judgment. The threshold of discharging that onus has been raised.⁴

[16] In terms of the heads of argument, it is patently clear that the applicant wants to re-argue the case. The applicant does this by introducing new defences which were not before this Court in the summary judgment affidavit filed in resistance to the application.

⁴ See *S v Nobhokova and Another* 2016 ZASCA 112 (7 September 2016)

[17] In regards to leave to introduce further evidence into the record before this Court in terms of Section 18(5) of the Superior Court Act. I am not certain how this is sought to be achieved as the judgment is final and cannot be re-opened for obvious reasons.

[18] Section 18(5) of the Superior Courts Act provides as follows:

“(5) For the purpose of subsection (1) and (2), a decision becomes the subject of an application for leave to appeal or an appeal, as soon as an application for leave to appeal is lodged with the Registrar in terms of the order.”

[19] The intention of section 18 of the Superior Courts Act is to suspend the decision pending appeal. Nowhere in the section is the provision made to introduce new evidence.

[20] Having considered the application for leave to appeal as contained in the applicant's affidavit, I am of the view that the application for leave to appeal has failed to pass the muster as contained in the provisions of section 17 of the Superior Courts Act. The applicant has failed to discharge the onus that another will come to a different conclusion.

ORDER:

[21] The following order is made:

- [a] Leave for condonation of late filing of the leave to appeal is refused with costs.
- [b] Application for leave to appeal is refused with costs

ML SENYATSI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be 24 November 2020.

Appearances:

Attorneys for the Applicant: Mashabane & Associates Inc.

Counsel for the Applicant: Adv. JG Smit

Attorneys for the Respondent: Saleem Ebrahim Attorneys Inc.

Counsel for the Respondent: Adv. S Mothiba