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REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE Number: 23082/22

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED: YES/NO

3/8/2023

In the application between:

**FIRSTRAND BANK LIMITED**

**APPLICANT**

and

**THULAGANYO MASENG**  
(ID NO.: 7[...])

**FIRST RESPONDENT**

**DIMAKATSO LUCRICIA MASENG**  
(ID NO.: 8[...])

**SECOND RESPONDENT**

**CITY OF EKURHULENI MUNICIPALITY**

**THIRD RESPONDENT**

**MIDSTREAM HILL HOME OWNERS'**  
**ASSOCIATION**

**FOURTH RESPONDENT**

**JUDGMENT**

This judgment was handed down electronically by circulation to the parties and or parties' representatives by email and by being uploaded to Caselines. The date and time for the hand down is deemed to be 3 August 2023

1. This is an application for leave to appeal in respect of a judgment that I handed down on 18 November 2022 in which I found in favour of the applicant, FirstRand Bank Limited ("FirstRand"). The first and second respondents a quo (collectively "the Masengs") had brought an application for leave to appeal the judgment. There is also an application for the condonation for the late filing of the application for leave to appeal.

2. Following my judgment on 18 November 2022 the Masengs, on 5 December 2022, issued out of this court and under the same case number an application in two parts. Part A, in essence, is to stay the effect of the court order of 18 November 2022 pending a rescission of "the default judgment granted" by me on 18 November 2022. The notice of motion is signed by "Lawyer for the Applicant Adv Christian N. Mosala". Mr Mosala is the counsel arguing this matter.

3. On 4 February the application for rescission was withdrawn and on the same date an application for leave to appeal was brought. The application for leave to appeal was accompanied by a "condonation affidavit" seeking condonation for the late filing of the application for leave to appeal.

4. Quite how the Masengs and their legal representatives<sup>1</sup> believed that a rescission application should be brought on the basis that my order of 18 November 2022 was given by default, I am unable to comprehend. It was, afterall, an opposed motion. In the condonation affidavit all that is stated in paragraph 9.1 of the condonation affidavit is that "... sometime in January 2023 were (sic) realised that the appropriate forum to hear the matter was the Appeal Court ...".

5. The condonation affidavit in paragraph 5 states the following:

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<sup>1</sup> I accept that the Masengs are lay persons insofar as the law is concerned and must have acted under legal advice.

**"NATURE OF THE APPLICATION: CONDONATION FOR LATE FILING OF LEAVE TO APPEAL APPLICATION."**

**5.1 PART A**

This is an application is a condonation application accompanying the leave to appeal application and requesting condonation for the late filing of the leave of appeal papers.

**5.2 PART B**

Is the request for leave to appeal the matter which is set out in the notice of motion".<sup>2</sup>

6. There is no "notice of motion" but only a **"NOTICE OF APPLICATION FOR LEAVE TO APPEAL"** which I take to be the notice of motion referred to. Part A of it asks for condonation and Part B of it asks for leave to appeal to the Full Bench of this court and after that follows the grounds upon which leave to appeal is sought.

7. The "condonation affidavit" in my view falls short of the standards required in matters of this nature in which a litigant seeks an indulgence. Nevertheless, terse and sparse as it may be, I will grant the condonation and deal with the merits of the application for leave to appeal. In view of the fact that the Masengs seek an indulgence, the costs of the condonation application are to be borne by them.

8. Before I do so, just a word as to why this application for leave to appeal was heard so late. I had no inkling that a leave to appeal was pending and the first time I heard of it was late March 2023 whilst I was out of the country. Upon my return I immediately attempted to arrange for a date which was to be 11 May 2023. At around 20H09 on 10 May 2023, Adv Mosala advised my registrar by email that he is unable to attend the leave to appeal hearing by virtue of the fact that he is engaged in another court. That hearing therefore did not take place.

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<sup>2</sup> There is no relief sought for the admission of a further affidavit and no case made out for it in terms of the authorities.

9. I advised my registrar to inform everyone that unless there is objection, the following order would be made:

"1. The application for leave to appeal which was set down for 11 May 2023 is postponed sine die.

2. Costs of 11 May 2023 are reserved".

10. There was no objection.

11. I am unaware of the aforesaid order actually having been formally made and I will do so in this judgment.

12. Eventually the date of 24 July 2023 was arranged and it was heard on that day.

13. The first three grounds of leave to appeal relate to the fact that I erred in disregarding the post office letters indicating that the section 129 notice never reached the Masengs. I apparently erred in requesting an affidavit from the post office employees. I did not request such an affidavit but expressed my concern that there were no affidavits from the authors of those letters to confirm the truth their content. An eminently reasonable concern in my view. In the application for leave to appeal it is said that "The law stipulates that the consumer simply needs to give an explanation in writing explaining why he / she did not receive a sec 129 notice and the requirement is not an affidavit as his Lordship requested".

14. The reason I disregarded the letters was this. The entire basis in the answering affidavit as to why the sec 129 notice apparently did not reach the Masengs is because of what is stated in the two post office letters. Those letters underpinned and formed the basis of the opposition. The letters state that during that period delivery was either erratic or non-existent. The truth of those statements clearly does not depend upon anything the Masengs can state in an affidavit. The truth of those statements depend upon affidavits from the authors of those

documents. It falls four-squarely within the definition of hearsay evidence in terms of section 3 of the Law of Evidence Amendment Act<sup>3</sup>.

15. In this technically advanced day and age letters and letterheads can be fabricated with great facility. In saying so I am not, in any manner, casting aspersions on the honesty of the Masengs. I am however of the firm view that evidence should be properly presented in an admissible manner in terms of our authorities and legislation. Not doing so would result in standards slipping in the quality of evidence our courts will deem acceptable. This is something the justice system can ill afford. I make no credibility finding against the Masengs.

16. It was argued that the law requires that the Masengs simply need to give "*an application in writing*" as to why the section 129 notice was not received and that an affidavit was not required. There is, of course, no merit in this contention as any explanation has to be by way of affidavit and the evidence regarding the post office letters and their content can only be proven by an affidavit from the authors of those letters. The Masengs are in no position to testify that the contents of those letters are true.

17. Mr Mosala argued that court cases relating to the National Credit Act are not subject to the normal rules of evidence regarding hearsay. I asked him for authority for this proposition. Unsurprisingly, he conceded that he has none.

18. The condonation affidavit now contains affidavits from the post office. However, there is no formal application to admit these affidavits together with an explanation as to why these affidavits were not filed in the initial answering affidavit of this case. There is no explanation as to why these affidavits could not be obtained at the time the answering affidavit was prepared. After all, the Masengs were able to obtain these letters from the post office.

19. In paragraph 9.3 (iii) of the condonation affidavit it is stated that "In most decisions the Court has accepted the letters of the post office explaining the delivery

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<sup>3</sup> 45 of 1988.

of a section 129 notice was successful or not and has admitted these letters as an acceptable explanation in line with the requirements of the Act (NCA) and the authorities". The probabilities are that this statement was made on legal advice. On whose legal advice I am not sure, but the point remains that not one such authority was presented in argument.

20. In paragraph 5 of the application for leave to appeal it is stated as a ground:

"His Lordship erred by disregarding submission made by the counsel for the applicants (defendants in the court a quo) (sic) that he can provide cases he himself litigated in indicating that affidavits are not a requirement in proving non-delivery of a section 129 notice that letters from the post office will suffice".

21. However, no such judgments were ever presented to me, not during the hearing of the application and neither at the hearing of the leave to appeal.

22. In paragraph 4 of the application for leave to appeal it is stated that I disregarded the request to have the matter stand down and provide the said affidavit. I regret to say that I don't believe this ground for leave to appeal to be true. It is dealt with comprehensively in paragraph 22 of my judgment. This was also the recollection for counsel for FirstRand, as mentioned by him in argument. In any event, the matter did commence the following day and the court file will reflect that there was no application for postponement to lead further evidence. In any event, there would have to be a formal application to seek this indulgence and all of the principles regarding a postponement of the matter would have to be met. There is none on file, because it did not happen.

23. Paragraph 6 of the application for leave to appeal states that I had disregarded Constitutional Court authorities relating to the service of a section 129 notice. There is no indication in the application for leave to appeal how I had disregarded any Constitutional Court authority.

24. It is common cause that FirstRand had done everything it should have. This is apparent from the record. The sole contention was whether or not the Masengs had

received the notification. Therefore there is no merit in this ground for leave to appeal.

25. In paragraph 7 of the application for leave to appeal it is stated that non-compliance of the service of a section 129 notice, apparently, clearly indicate that legal action can't commence. However, the Constitutional Court authorities upon which I relied in my judgment clearly state that the proceedings are not a nullity and that it is simply that the proceedings are to be adjourned. At no stage was there any argument as to why an adjournment was required. As mentioned in my judgment, it is common cause that the section 129(1) notice was attached to the founding papers and also common cause that the Masengs had picked up the section 129(1) notice from the post office on 9 June 2022. It was also common cause that this is longer than 20 business days prior to the hearing of this application.

26. I set out in detail why I was bound by the Full Bench decision in *Benson and another v Standard Bank of South Africa (Pty) Ltd and others 2019 (1) SA 152 (GJ)*. The Benson case clearly states that an adjournment should not just be given for its own sake if there is no point to it. At no stage have the Masengs said what they want to do should the adjournment be given and what rights they would want to exercise. Not at the main hearing, nor at the hearing for leave to appeal. They had the notice for a considerable period of time prior to the hearing.

27. The *Benson* case is not in any manner contrary to any other Constitutional Court decisions as it, in fact, dealt with all of those decisions but considered a different point, one which had never been decided upon by the Constitutional Court.

28. The application for leave to appeal is to be dismissed with costs. In addition, should there be any wasted costs of 11 May 2023, they are to be borne by the Masengs. It was their counsel who, after 20:00 the evening before the hearing sent an email that he was not available the following day. All costs to be on attorney and client scale.

## **ORDER**

29. It is confirmed that the matter on 11 May 2023 was adjourned *sine die* with costs reserved.

30. The condonation application for the late filing of the leave to appeal is granted.

31. The application for leave to appeal is dismissed with costs, which costs include any wasted costs that might have been incurred for the scheduled hearing of 11 May 2023 as well as all the costs for the condonation application.

32. All costs are to be on an attorney and client scale.

**REINARD MICHAU**  
ACTING JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA

Date of hearing: 24 July 2023

Date of judgment: 3 August 2023

**Appearance**

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On behalf of Masengs      Adv Mosala  
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