

SOUTH AFRICA / JUDGMENT

Lebra Development (Pty) Ltd and Others v Bester and Others (A154/2022) [2024] ZAGPPHC 1087 (21 October 2024) [2024] ZAGPPHC 1087

COURT

North Gauteng High Court, Pretoria

BEFORE

E van der Schyff, C Collis, A Le Grange

CASE / FILE NUMBER

A154/2022

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

CASE NO.: A154/2022

(1)

REPORTABLE: NO

(2) OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

Date: 21 October
2024

E van der Schyff
In

the matter between:

Lebra
Development (Pty) Ltd
First Applicant / Appellant
Hendrik
Christoffel Botha
Second Applicant / Appellant
Lisbeth
Johanna Louisa Botha
Third Applicant / Appellant
Gerhardus
Petrus Van der Westhuizen
Fourth Applicant / Appellant
Magdalena
Julya Geyser
Fifth Applicant / Appellant
and
Ben
Coetzee Bester
First Respondent
Marthinus
Murray Bester N.O.
Second Respondent
Johannes
Barend Bester N.O.
Third Respondent
Riaan
Becker N.O.
Fourth Respondent
Ben
Coetzee Bester N.O.
Fifth Respondent

JUDGMENT

Van der Schyff J

Introduction

- [1] The respondents herein approached the court a quo for relief in terms of Section 163 of the Companies Act 71 of 2008 (the 2008 Companies Act or the Act). On 24 March 2022, the court a quo granted them partial relief in their favour.
- [2] The appellants in this appeal—the respondents in the court a quo—applied for leave to appeal the judgment and order, which leave was granted to this court by the court a quo on 3 June 2022.

- [3] The appeal had lapsed because the appellants failed to timeously make a written application to the Registrar for a date for the hearing of the appeal, i.e. within sixty days after the delivery of the notice of appeal.[1]
- [4] The appellant's first hurdle is for condonation and the reinstatement of the appeal.
- [5] The parties are referred to as they are cited in this appeal, with the appellants as a group referred to as Lebra or the applicants.

Applicable legal principles

- [6] Rule 49(6)(b) provides that the court to which an appeal is made may, on good cause shown, reinstate the appeal. An applicant who approaches the court with an application to reinstate an appeal, essentially seeks condonation for its failure to comply with the Uniform Rules of Court.
- [7] The principles governing an application for condonation in the context of the reinstatement of an appeal have been stated previously. In *Mulaudizi v Old Mutual Life Assurance Co (South Africa) Ltd and Others*,[2] Ponnann JA stated:

‘What calls for an explanation is not only the delay in the timeous prosecution of the appeal, but also the delay in seeking condonation.

An appellant should, whenever he realises that he has not complied with a rule of this court, apply for condonation without delay. A full, detailed and accurate account of the causes of the delay and their effects must be furnished to enable the court to understand

clearly the reasons and to assess the responsibility. Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.’

- [8] Goosen JA reiterated in *Member of the Executive Council for Health, Eastern Cape Province v Y N obo E N*[3] that the touchstone for a reinstatement application is the interests of justice, which depends on the facts and circumstances of each case. He continued:[4]

‘The factors relevant to this enquiry include the nature of the relief sought, the extent and cause of the delay, the reasonableness of the explanation of the delay, the effect of the delay on the administration of justice and other litigants, and the prospects of success.’[5]

- [9] Goosen JA, qualified later in the judgment that although the prospects of success on appeal is generally an important consideration in relation to the reinstatement of an appeal,[6] it is not decisive. He stated:[7]

‘Where the degree of non-compliance is flagrant and substantial, condonation may be refused irrespective of the prospects of success. If the explanation for such flagrant and substantial non-compliance is manifestly inadequate or there is no explanation at all, the prospects of success need not be considered.’

The explanation for the failure to apply for a hearing date timeously

- [10] The applicants’ explanation for the delay in timeously prosecuting the appeal is deceptively simple. They claim that their attorney, Mr. Fouché, whose services have since been terminated, believed that the Uniform Rules of Court applicable to the prosecution of civil appeals did not apply, as it was superseded by a directive issued by Judges Potterill and Tolmay in April 2018 (“the Directive”). In holding this belief, the applicants’ counsel submitted that Mr. Fouché did not act mala fide.
- [11] The applicants, however, face some hurdles. The applicants’ explanation for the delay in prosecuting the appeal timeously is given by the deponent to the founding affidavit, Ms. Geyser. In the said affidavit, the deponent informs this court of the interpretation formed by Mr. Fouché in regard to the Directive mentioned above. Mr. Fouché, their erstwhile attorney, merely deposed to a confirmatory affidavit, and as such, his voice is not heard. The applicants lay the blame for the lapsing of the appeal squarely and solely on Mr. Fouché’s shoulders.
- [12] In *Eskom Holdings Soc Ltd v Masinda*[8] the Supreme Court of Appeal criticised the ‘slovenly practice’ of adducing evidence by way of hearsay allegations in a main affidavit, supported by a confirmatory affidavit by a witness who should have provided the necessary details but who merely sought to confirm what had been said in the main affidavit ‘insofar as reference [has been] made to me’. In *Drift Supersand (Pty) Limited v Mogale City Local Municipality*, [9] the Supreme Court of Appeal referred to the ‘sloppy method of adducing evidence by way of a hearsay allegation’, and stated:

‘This might be an acceptable way of placing non-contentious or formal evidence before court, but where, as here, the evidence of a particular witness is crucial, a court is entitled to expect the actual witness who can depose to the events in question to do so under oath.’

- [13] According to the applicants, Mr. Fouché’s conduct and omissions caused the appeal to lapse. Mr. Fouché’

merely states in the confirmatory affidavit that ‘I confirm the content of the founding affidavit in support of the application for the reinstatement of the appeal insofar as it relates to me’. The evidence is deprived of the depth and nuances necessary for its validation.

- [14] The court was, among others, not informed

- (i) how and when the Directive came to Mr. Fouché’s knowledge, (ii) whether this is the first appeal he had to launch at all or, since the Directive was ostensibly issued, and whether he was at liberty in any previous appeal to apply for a hearing date after the sixty day period

lapsed; (iii) why he unwaveringly held the opinion that it superseded the applicable rules of court, (iv) why he ostensibly did not follow his own counsel's advice and also ignored the widely shared note published by the appeal section on 10 October 2022, (v) why he himself did not follow the Directive to the

letter seeing that he considered it to have superseded the provisions of rule 49, and (vi) when he informed his clients about the Directive and that the appeal had, according to him, been properly prosecuted and that he would apply for the assignment of a date for the hearing of the appeal once he had received the appellants' heads of argument. The court was also not informed when counsel was briefed to prepare heads of argument and how and when Mr. Fouché applied 'pressure' on counsel to provide him with heads of argument.

[15] An inconsistency in the applicants' version becomes evident when paragraphs 9, 79, and 80 of the founding affidavit are considered. In paragraph 9 of the founding affidavit, Ms. Geyser states:

'... unbeknown to the applicants, the applicants' attorney did not make written application to the Registrar for a date to be assigned for

the hearing of the appeal within the period prescribed by Uniform Rule 49(6)(a).' [My emphasis.]

[16] In paragraphs 79 and 80, however, Ms. Geyser informs the court that after Mr. Fouché delivered the notice of appeal, served and filed the requisite number of copies of the appeal record, and confirmed that an amount was available in his trust account for security for the costs of the appeal, he–

'... assured the applicant (sic) that the appeal had been properly prosecuted and that, once he had received the appellant's heads of argument, he will make application for the assignment of a date for the hearing of the appeal.

Mr. Fouché informed the applicants that a practice directive had been issued by the Honourable Madam Justice Potterill on 17 April 2018 ("the Potterill J Directive") and that according to this directive, an application for the allocation of a date for the hearing is no longer regulated by the Rules of Court. ...' [My emphasis]

[17] The applicants' version is thus inconsistent regarding their knowledge of the failure to apply for a hearing date. If paragraphs 79 and 80 of the founding affidavit are considered, it is evident that the applicants were fully aware that their attorney did not apply for a hearing date for the appeal within the period prescribed by Uniform Rule 49(6)(a) long before the application for costs for the lapsed appeal was filed by the respondents.

[18] This is confirmed if regard is had to Ms. Geyser's answer to the respondents' claim that she does not have the requisite personal knowledge to have attested to the founding affidavit. Ms. Geyser states:

‘I was tasked by the applicants to monitor and to provide instructions to the applicants’ attorney in the appeal. I was therefore

personally involved in all matters relating to or in connection with the procedure of the applicants’ appeal. I consequently have personal knowledge of everything that occurred since the court a quo granted leave to appeal until the date on which I deposed to this affidavit. I can accordingly positively swear to the content of the founding affidavit

and this affidavit.’ [My emphasis]

[19] Ms. Geyser, a practicing attorney involved in the prosecution of the appeal, failed to explain to the court when she first became aware of Mr. Fouché's reliance on the Directive. She further fails to explain how she interpreted the Directive. She also failed to inform the court when counsel was briefed to draft the heads of the argument. Ms. Geyser was tasked by her co-applicants to instruct the attorney in the appeal and to monitor him. She claims that she had personal knowledge of everything that occurred. Yet she fails to explain why the note filed by the Registrar on 10 October 2022 and the letter subsequently received from the respondents’ attorney in February 2023 did not raise red flags and why she did not insist on seeking a second opinion already at that stage. It was only when the respondents filed an application to claim the costs of the lapsed appeal in June 2023 that the applicants suddenly acted. The applicants are shifting the blame all too easily to Mr. Fouché, not explaining themselves, to obtain the advantage of the authorities which are sympathetic – not to penalise a client for the sins of their representative.

[20] In casu, there are too many generalisations and lacunae in the applicants’ papers. Details are glossed over. The reinstatement application was only launched after the respondents filed an application seeking an order directing them to pay the respondents’ costs of the lapsed appeal. The explanation for the failure to timeously apply for a hearing date is unreasonable and unconvincing.

[21] Another reason for holding that the explanation provided by the applicants is unreasonable arises when the question is considered whether the interpretation attached to the Directive was reasonable. In dealing with this aspect, I accept, for purposes of this application and without making any finding in this regard, that the

Directive was operational at the time because, on the papers before us, I cannot determine whether the Directive was indeed

operational. Counsel for the applicants indicated that he was unaware of such a Directive and did not know where Mr. Fouché found the Directive, and why he considered it to be of any force and effect or binding. The applicants did not endeavor, neither did the respondents, to clarify the issue by explaining to this court whether the Directive is indeed in operation, for example, by seeking guidance or input from the Civil Appeals’ Registrar.

[22] In paragraph 2 of the Directive, the purpose and aim of the directive is stated:

‘This action is taken to facilitate proper placement ensuring that appeals are placed on the earliest possible dates, but with the requisite that there is enough time allocation to accommodate the appeals on a certain date.’ [My emphasis]

[23] The requirements prescribed in the Directive that need to be met before the Registrar may be approached to have the matter set down are onerous, and hinge on the filing of heads of argument. There is, however, no suggestion in the Directive that it supersedes Rule 49(6)(a) of the Uniform Rules of Court. The Directive provides for the Deputy Judge President to direct, of his own accord or on request from a party, that the parties deliver heads of argument otherwise than as provided for in the Directive. This provision is indicative thereof that when an appellant realises that the heads of argument will not be obtained timeously to be filed within the sixty-day period after the notice of appeal was delivered, such appellant can approach the Deputy Judge President for an alternative directive regarding the filing of heads of argument. The applicants' interpretation of the Directive was thus unreasonable.

The interest of justice

[24] Legal certainty requires a party aggrieved by an order of court to prosecute its appeal speedily. In the interest of justice, appeals should be heard as soon as possible. Parties must be able to continue with their lives post-litigation without the possibility of legal action indefinitely hanging over their heads. To facilitate legal certainty, the effect of Rule 49(6)(a) is that an appeal is ipso facto deemed to have lapsed after the expiry of the periods provided in the Rule. An interpretation of the Directive that the appeal process is stalled ‘indefinitely’ to allow the appellant to file heads of argument at its leisure does not accord with the spirit of Rule 49. Such an interpretation is unreasonable, does not promote legal certainty, and is not in the interest of justice.

The prospect of success on appeal

[25] The applicants aver that they have excellent prospects of success on appeal. They hold the view that the respondents failed in the court a quo to establish the jurisdictional prerequisites or facts necessary to invoke the remedy provided for in section 163(1) of the Companies Act 71 of 2008 (the 2008 Companies Act or the Act) as a result of which they are not entitled to the relief granted.

[26] Section 163 of the 2008 Companies Act essentially permits a shareholder or director of a company to approach a court if any act or omission by the company, or a person related to the company, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards, the interests of the applicant. To trigger the court's remedial power in terms of the section, the court must be satisfied that (i) the relevant conduct or omission exists on the facts before it and (ii) the relevant conduct or omission was either oppressive or unfairly prejudicial or unfairly disregarded the interests of the applicant.

- [27] Since the proceedings in the court a quo were motion proceedings, this court can have regard to the papers filed of record in considering the merit in the applicant's contentions. Comprehensive heads or argument were filed on behalf of the applicants and the respondents, and these were duly considered.
- [28] It is evident from the judgment and order handed down by the court a quo, that partial relief was granted pending the finalisation of the application. It was ordered that an independent chartered accountant should conduct a forensic audit in general, and specifically to ascertain issues highlighted in the order. The chartered accountant was also instructed to determine the fair value of Lebra's authorised and issued share capital, and the prayers relating to the sale of the shares were postponed.
- [29] I am alive to the critique raised against some of the factual findings made by the court a quo. The applicants failed to show that the factual errors or discrepancies are prejudicial to their case in that it has practical and identifiable consequences.
- [30] Kooverjie J was, however, mindful that various wide divergent concepts of 'oppressive conduct' existed.[10]
- [31] Mr. Bester claimed that he was excluded from the decision-making processes regarding Lebra, among others, because Mr. Botha refrained from disclosing the content of the draft 'Invicta agreement' to him, being a co-director at the time, despite having been requested to do so. Mr. Bester had specific concerns in respect of the direct risks he perceived it to pose to Lebra. The applicants conceded (in the court a quo) that these agreements were only provided to Mr. Bester after it was concluded. Mr. Bester was also not provided with all the information he requested in paragraph 37 of the shareholder's representation dated 18 October 2019.
- [32] Other conduct that is not in line with fairness is the loans granted by the two directors to themselves without the consent, involvement, and knowledge of their co-director (Mr Bester), something which sections 45(2) and 45(3)(a)(ii) of the Companies Act clearly seeks to prevent. It may well be argued that there was acquiescence when Mr Bester signed the financial statements, but this remains after the fact. The unilateral actions and exclusion of a director at the time of a decision(s), is of concern and more so, when questions arose, it was glossed over and not adequately explained.
- [33] The applicants provided Mr. Bester only with the information and explanations they regarded to be sufficient.[11] They also expected him to merely accept that they would manage Lebra to the best of their judgment and ability –
- ‘... dus sal ons Lebra bestuur na die beste van ons oordeel en vermoë.’

- [34] Section 66 of the Act is clear, a company must be managed collectively by its directors. It is also the directors' fiduciary responsibility to manage a company to the best of their ability. To execute the fiduciary responsibility ascribed to a director, directors must be included in the company's management. Whether one or more of the directors holds the view that the minority shares are not considered critical does not detract from the aforesaid. Mr. Bester's exclusion from the management and with that ipso facto, the minority's interests, followed by inadequate explanations, were prejudicial and unfair.
- [35] Counsel for the applicants before this court submitted in their written heads of argument that since Mr. Bester was removed as a director of Lebra, any conduct that may possibly have oppressed him qua director, ceased the moment he was removed and that relief in terms of section 163 was consequently no longer possible in respect of that alleged conduct.
- [36] Mr. Bester was, however, only removed as a director subsequent to the institution of these proceedings and after the notice of motion and founding papers were served on the company. It cannot be that the mere removal of a director after the very director instituted legal proceedings in terms of section 163 of the Act will bring the litigation to a close. This scenario is distinguishable from the scenario where a director is relieved of directorship prior to the institution of proceedings in terms of section 163 of the Act. The timing of and persistence with his removal after the application was instituted and served per se casts a cloud on the applicants' bona fides.
- [37] Having regard thereof that 'oppression' may take various forms,[12] the wide discretion afforded to a court in terms of section 163(2) of the Act, the terms of the order granted by Kooverjie J and the fact that she postponed the adjudication of the relief sought relating to the sale of shares, the applicants would not have any prospect of success in an appeal if condonation is granted and the appeal is reinstated.
- [38] As a result, the reinstatement application stands to be dismissed.

Costs

- [39] The principle that costs follow success applies. Both parties employed two counsel. A case was not made out for a punitive costs order to be awarded.

ORDER

In the result, the following order is granted:

1. The application for the condonation and the reinstatement of the appeal is dismissed with costs. Costs to include the costs of two counsel where so employed, on scale B.

Judge of the High Court

I agree, and it is so ordered.

C Collis

I agree.

A Le Grange

Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the applicants: Adv. J.L. Myburg With: Adv. L. Kotze Instructed by: Snyman De Jager
Incorporated For the respondents: Adv. J. Sullivan With: Adv. D. Keet Instructed by: Van Dyk
Steenkamp Attorneys Date of the hearing: 21 August 2024 Date of judgment: 21 October 2024

[1] Rule 49(6)(a) of the Uniform Rules of Court.

[2] 2017 (6) SA 90 (SCA) at para [26].

[3] (056/2021)

[2023] ZASCA 32 (30 March 2023) at para [7].

[4] Member of the Executive Council for Health, Eastern Cape Province, *supra*, at para [8].

[5] Also see *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008

(2) SA 472 (CC).

[6] See, *inter alia*, *Mosselbaai Boeredienste (Pty) Ltd v OKB Motors CC* (1216/21)

[2023] ZASCA 91 (9 June 2023), as authority for the view that strong prospects of success on appeal may trump and unsatisfactory explanation.

[7] Member of the Executive Council for Health, Eastern Cape Province, *supra*, at para [14].

[8] 2019

(5) SA 386 (A) at para [3].

[9] [2017] 4 All SA 624 (SCA) at para [31].

[10] *Aspek Pipe Co (Pty) Ltd v Mauerberger and Others* 1968 (1) SA 517 (C) referred to with approval in *Grancy Property Ltd v Manala and Others* 2015 (3) SA 313 (SCA) at para [22].

[11] E.g., Counsel for the applicants explained that '[t]o the extent that certain information was not provided to Mr. Bester, namely the bank statements relating to the period before the AFS for the year ended 31 March 2017 was approved and signed by him, such conduct could never have been found to have been 'unfair'. This is so as the information relating to these bank statements were incorporated in Lebra 2017 AFS which was prepared by Logista and approved and signed by Mr. Bester'. In answer to Mr. Bester's request to obtain specific bank

statements the response was that ‘...third respondent in an email told first applicant that the aforesaid statements as communicated on several occasions, comprised of all statements which were excluded from the audited and signed Financial Statements for the year ending 31 March 2017.’

[12] Parry v Dunn-Blatch and Others (394/2022)

[2024] ZASCA 19 (28 February 2024) at para [22].

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