

SOUTH AFRICA / JUDGMENT

Malema and Another v Afriforum NPC and Another (89196/2016) [2023] ZAGPPHC 11 (17 January 2023)

[2023] ZAGPPHC 11

COURT

North Gauteng High Court, Pretoria

BEFORE

P M Mabuse

CASE / FILE NUMBER

89196/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER: 89196/2016

REPORTABLE:

YES / NO

OF

INTEREST TO OTHER JUDGES: YES / NO

REVISED

2023/01/17

In

the matter between

JULIUS

SELLO

MALEMA

First Applicant

ECONOMIC

FREEDOM FIGHTERS

Second Applicant

and

AFRIFORUM

NPC

First Respondent

AFRISAKE

NPC

Second Respondent

JUDGMENT

MABUSE J

- [1] This is an application by the Applicants for leave to appeal against the Court order (the order) that was granted by default against them on 7 March 2017. The said order was granted in favour of the current Respondents, who were the Applicants in the application that led to the said order. This application is opposed by the Respondents who were the Applicants on 7 March 2017. The current Applicants were the Respondents in that matter. For purposes of convenience, the parties herein shall be referred to as in the original application, in other words, the Applicants in this matter will be referred to as the Respondents, as they were cited in the original application, and the current Respondents will be referred to as the Applicants, as they were cited in the original application.
- [2] The parties herein did not have any reasons for the order of 7 March 2017. For reasons that I will point out later in this judgment, they were both prepared notwithstanding, to proceed with the application for leave to appeal against the said order. I found this to be at odd with convention. The furnishing of reasons by this court would have been otiose or without any useful purpose, as will be demonstrated herein below.
- [3] In his heads of argument, advocate K Premhid, counsel for the Respondents, who appeared in this application with advocate as S Mhlongo and Suhail Mohammed, a pupil, had stated, inter alia, that although the order was granted on 7 March 2017 to date no reasons for the order have been delivered to the parties. He stated furthermore that the respondents sought reasons for the order on 20 April 2021 pursuant to the Applicants' insistence. Of paramount importance he stated that despite the absence of reasons for the order, the application for leave to appeal was still competent. In other words, the court could proceed to hear the application for leave to appeal against a Court order even if no reasons were furnished for such an order. His motivation was that it is a trite principle that an appeal lies against an order of the court and not the reasons for that order. In this regard he found support in the following judgments:

[3.1] SA Metal Group (Proprietary) Ltd v The International Trade Administration Commission & Another

[2070] ZASCA 14 (17 March 2017) at para [15].

- [4] Paragraph [15] of SA Metal Group judgement on which counsel for the Respondents relies states as follows:

"[15] In my view, this case plainly falls into the latter of the two categories alluded to. As best as I could discern the argument, the discrete legal issue alluded to harked back to the price preference system, which, as I already pointed out, had been specifically

disavowed on the papers. What is more, as the orders had become moot and relief prayed for was no longer competent, the attack, in truth, became one that was directed at the reasoning of the court below. However, an appeal does not lie against the reasons for the judgement but rather against the substantive order made by a court.” (My own underlining)

The underlined sentence supports the approach adopted by counsel for the Respondents in this matter that an appeal lies against an order and not the basis for the order. For this purpose, the reasons are not vrequired.

[3.2] Neotel (Pty) Ltd v Telkom Soc and Others [2017] ZASCA 47 (31 March 2017) in paragraph [15]. He also found support in paragraph [15] of the judgement of Neotel which referred to the judgment of Western Johannesburg Rent Board v Ursula Mansions (Pty) Ltd 1948 (3) SA 352 (A). In the said paragraph [15] the Court had the following to say:

“[15] While accepting that an appeal does not lie against the reasons for the order.....”

[3.3] In Western Johannesburg Rent Board v Ursula Mansions (Pty) Ltd 1948 (3) SA 352 (A), the Court observed that:

“.....it is clear that an appeal can be noted not against the reasons for judgment but against the substantive order made by a Court.”

- [4] The Respondents’ counsel concluded by stating that, although reasons are important, the absence of reasons does not on its own render an otherwise appealable matter unappealable. He enlarged his argument and stated that although the Respondents are entitled to a fully reasoned judgement, they have been denied such reasons because the Applicants persisted with a threat of execution of an order that is the subject to this application for leave to appeal.
- [5] Counsel for the Applicants, Advocate J G C Hamman, seemed to have been less intrigued by the absence of the reasons for the order. He was instead more focused on the special defences the Applicants have raised in opposing the application for leave to appeal. He also was unconcerned about the argument by Premhid relating to the reasons of the order.
- [6] It is important though to point out that based on the judgments referred to above, the view expounded by Mr Premhid prevails. In summary, where an appeal is directed against an order of court and not the reasons for the order, the reasons are not required. Although the reasons for the judgment or order are important, the absence of such reasons does not prevent a court from hearing an appeal or an application for leave to appeal against such an order of court.

- [7] As pointed out earlier, the Respondents in this matter seek leave to appeal against an order granted by default against them. The matter originally came before the court on 17 March 2017. The papers before the court then were in order. The Applicants in that matter were Afriforum NPC, the first applicant and Afrisake NPC, the second applicant. They sought the following order against Julius Sello Malema (Mr Malema), then the first respondent and Economic Freedom Fighters (the EFF), then the second respondent:

“1. That the First and Second Respondents are interdicted from inciting and/ or instigating and/or commanding and/or procuring any individual/s to commit the crime of trespassing as described in Trespass Act 6 of 1959 and or to enter any land belonging to or in control of any individual or entity/entities without the required permission of the landowner/s or lawful occupants of land or a lawful entitlement to do so.;

2. The First and Second Respondents are ordered to pay the cost of the application on attorney client scale jointly and severally the one paying the other to be absolved, which cost shall include the cost of two counsel where so employed.”

- [8] Despite the fact that copies of the application had been served on the Respondents on 16 November 2016, despite furthermore the fact that the Respondents had both been warned that if they failed to deliver their Notice to Oppose the application, or, if their answering affidavit was not delivered in time, the application would be heard on 7 March 2017 at 10h00, there was no appearance for both Respondents on 17 March 2017 nor had the Respondents filed their papers. As under those circumstances nothing prevented to Applicants ‘application from proceeding, the court heard the matter accordingly and granted the order sought by the Applicants by default.

FURTHER DEVELOPMENTS AFTER THE DEFAULT ORDER OF 7ARCH 2017

- [9] On 7 April 2017 the Respondents delivered a Notice of Application- Rescission of Default Order. In the said Notice of Application, the Respondents had sought the following order:

“(a) rescinding the order of Mabuse J dated 7 March 2017.

- (b) costs to be costs in the main application, save in the event of opposition the party so opposing this recession application be ordered to pay the costs
- (c) further and or alternative relief.”

The application for rescission was predicated on the founding affidavit of Julius Sello Malema(Mr Malema) and furthermore on the supplementary affidavit by Thabo Sindisa Kwinana (Mr Kwinana) an adult male practitioner of the firm Kwinana and Partners Inc (KPI) ; then Respondents’ attorneys of record.

- [10] On 13 April 2017 the Applicants delivered their notice of intention to oppose the Respondents' application for rescission. It was followed by the answering affidavit of one Catherina Cornelia Cooks (Ms Cooks), an adult female employed by the Applicants as safety coordinator, delivered on 5 May 2017.
- [11] On 11 June 2017 the Respondents served their replying affidavit on the Applicants' attorneys. It would appear that subsequently, the application for rescission was enrolled for hearing on 17 September 2017 and that the parties were aware of that date.
- [12] On 17 September 2017 the application for rescission was postponed sine die. The Respondents, the Applicants in that application for rescission, were ordered to pay the wasted costs on attorney and client scale, such costs to include the costs of two counsel. The reason for the postponement was, according to the Applicants' counsel, the failure by the Respondents' attorneys to file their counsel's heads of argument.
- [13] On 12 February 2018, the Respondents' application for rescission under case number 89196/16 was dismissed with costs, by the Court. The following order was made:
- "1) The application for rescission of the judgment of 7 March 2017 is dismissed with costs which costs shall include the costs of two counsel where so employed.*
- 2) Applicants to pay the costs jointly and severally the one paying other to be absolved."
- [14] On 13 November 2018 the Respondents delivered their application for leave to appeal against the order and judgment of 7 March
2017. The grounds upon which the Respondents sought such leave are set out in their application for leave to appeal as follows:
- "PLEASE TAKE NOTICE that the applicants will seek an order setting aside the order of the court a quo and replacing it with an order in the following terms;*
- (1) The application is dismissed with costs, including the costs of two counsel.
- TAKE FURTHER NOTICE that application for leave to appeal will be made on a date and at a time to be arranged in conjunction with the Registrar and the first and second respondents' attorney of record (Afriforum NPC and Afrisake N PC, respectively)
- TAKE FURTHER NOTICE that applicants contend that there is a reasonable prospect that another court will come to a different conclusion. The reasons upon which the judgment granted by default will be appealed arrest follows:
1. The Trespass Act NO, 6 of 1959 [the Act] is unconstitutional to the extent that it impermissibly serves to curtail free speech as guaranteed by section 16 of the Constitution.
 2. Specifically, the Act is unconstitutional to the extent that it creates an overly broad and overly inclusive category of prohibited speech that is at odds with the limited categories of prohibited speech as contained section 16[2] of the Constitution.

3. the Act, which is a pre-Constitutional statute, thus, has the effect of extending the terms of the Constitutional to categories of speech that the drafters of the Constitution never intended to be included in the prohibited categories of speech:
4. the Act, which is subservient to the Constitution, is, thus, unconstitutional to the extent that it is ultra vires the Constitution.

In particular, the effect of the Act that it serves to limit speech in toto, and not only where there is an imminent threat of violence or harm. This means that no matter how academic or remote speech maybe, it is susceptible to be banned on account of the fact that the terms of the Act are overly inclusive.

5. The Act, thus, serves to criminalise thoughts and ideas.
6. The Act does not survive a limitations clause type test (as contained in section 36 of the Constitution).
7. Thus, any factual findings that speech uttered by or conduct attributable to the applicants is patently incorrect. There is no legal basis, on the facts pleaded, to prohibit such speech. There was/is not imminent harm, and the respondents were in no way targeted as the subjects of unlawful conduct."

From the stage of the application for leave to appeal, the Respondents' attorneys were Ian Levitt Attorneys. The application for leave to appeal was accompanied by an affidavit by a certain Angelike Charalambous which served as the founding affidavit for an application for condonation for the late filing of the application for leave to appeal.

[15] On an unknown date, the Respondents sought reasons in terms of Rule 49 of the Uniform Rules of Court for the order of 7 March

2017. The reasons for the order were not forthcoming. That however, as shown above, did not deter the Respondents from proceeding with the appeal. But for the reasons that I now turn to, the Respondents hold the view, and it was so submitted on their behalf by their counsel, that the court should grant leave to appeal as another court seized with the facts of this matter, will decide it differently.

THE RESPONDENTS' CASE

- [16] It is the Respondents' case that in the main application the Applicants sought a final interdict that was anchored on the 'clear right' created by the combined operation of section 18 (2) (b) of the Riotous Assemblies Act 17 of 1956 (s 18(2) (b)) and section 1(1) of the Trespass Act 6 of 1959 (the TA). According to counsel for the Respondents section 18(2)(b) provided, in its original formulation, as follows:

"Any person who-

- (b) incites, instigates, commands, or procures another person to commit, any offence whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction for punishment to which a person convicted of actually committing that offence would be liable.”

This section quite obviously created a prohibition against incitement.

At the time s 1(1) of the TA provided as follows:

“Any person who without permission-

- (a) of the lawful occupier of any land or any building or part of a building; or
- (b) of the owner or person in charge of any land or any building or part of the building that is not lawfully occupied by any person, enters or is upon such land or enters or is in such building or part of a building, shall be guilty of an offence unless he has lawful reason to enter or be upon such land or enter or be in such building or part of a building.”

This subsection created the crime of trespassing. These two sections, in other words, section 18 (2)(b) and subsection 1(1) of the TA, represented the applicable law in force as at 7 March 2017. This is the law that the court applied on 7 March 2017 when the court granted the impugned order. There was at the time no other interpretation of the law as there is now.

- [17] The cornerstone of the Respondents’ case is the change in the law brought about by the judgment of *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services* 2020 ZACC 25 (EFF judgment), paragraph [25] thereof. Drawing support from the said judgment Mr Premhid stated as follows in his heads of argument that:

“But in the time between Mabuse J's order and now (meaning the day the judgment in the EFF appeal was delivered) s18(2)(b) of the Riotous Assemblies Act has been declared unconstitutional on the basis that it constitutes an unjustifiable infringement on the right to freedom of expression.”

- [18] In the EFF judgment the Constitutional court characterised the form of incitement referred to in section 18 (2)(b) as a form of expression ordinarily protected by section 16 of the Constitution. In paragraph [25] the court had the following to say:

“Section 18(2)(b) of the Riotous Assemblies Act criminalises incitement to commit “any offence”. And that kind of incitement is undoubtedly a form of expression that is ordinarily protected by section 16(1) in of the Constitution. It therefore constitutes a limitation of protected expression. Whether that limitation is reasonable and justifiable in an open and democratic side based on the values of human dignity equality and freedom is the question we must now wrestle with. And

“All of the above leave us with no choice but to invalidate section 18(2)(b) to the extent of the disproportionality of its societal benefit to its vast invasion of free expression and consequential inconsistency with section 16(1) of the Constitution. It is not reasonable and justifiable to limit free expression on the basis of crime prevention in circumstances where the criminalization of incitement of only serious offences would constitute a less restrictive means and help achieve the same objective.”

- [19] The Constitutional Court was obviously unhappy with the provisions of s 18(2)(b) to the extent that it criminalised the “incite” of another person to commit “any offence”. The basis for such unhappiness was that the crime it created offends against the Constitutional right to freedom of expression, in other words, it is inconsistent with section 16(1) of the Constitution. The Constitutional Court contended that s 1(1) of the TA sought to be interpreted with reference to the provisions of section 26(3) of the Constitution and also s 39(2) of the Constitution and Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).
- [20] The Constitutional Court’s target in s 18(2)(b) was the words “any offence”, part of that section. The High Court had declared part of section 18(2)(b) that deals with sanction constitutionally invalid because it contended that it compelled a court to impose the same sentence on the person inciting others to commit a crime, just like on the person who commits the crime.
- [21] What the Constitutional Court did in this matter was simply to invalidate the expression “any offence”. It found that the expression “any offence” in the said section would be out of proportion to the objective of crime prevention which could still be realised without any overly invasive provision that gives no recognition to the expression. The Court was alive to the fact that:

“[41] Despite its unjust foundations section 18(2)(b) of the Riotous Assemblies Act is, broadly speaking, one of many instruments suited to the achievement of a goal of crime prevention.” (One may add that it is an instrument that is best suited to prevent lawlessness in the country). The Court found that:

- [42] Free expression is thus a right or freedom so dear to us and critical to our democracy and healing the divisions of the past that it ought not to be interfered with lightly- especially where no risk of serious harm or danger exists.”
- [22] It is of paramount importance to point out that all that the Constitutional Court did regarding 18(2)(b) was to put the word “serious” between the words “any’ and “offence” in the section so that the proposed new section will read as follows:

“(2) any person who-

.....

- (c) incites, instigates, commands, or procures any other person to commit, any serious offence whether at common law or against a statute or statutory regulation shall be guilty of an offence and liable on conviction to punishment to which a person convicted of actually committing that offence would be liable.”

In par. [49] the constitutional Court gave the following justification for its proposition of adding the word “serious” as pointed out above:

- [49] Section 18(2)(b) is sought to be saved from invalidation merely because, like all other criminal legislation, it serves the common or ordinary purpose of crime prevention. What is, however, required is that the purpose of criminal legislation, like the Riotous Assemblies Act, be much more than the ordinary need to protect society from potential ‘harm,’ to pass constitutional muster. Additional to being legitimate, the purpose must still be specific, pressing, and substantial for that legislation to be regarded as reasonable and justifiable in its limitation of free expression.
- [50] There can be no doubt that we need the criminalization of certain categories of incitement. What all matters is that the nature, extent, or effect of what others are being incited to do must be serious to save legislation from invalidation. The prohibition of incitement is thus to be countenanced in circumstances where it seeks to prevent the commission of a serious offence. The limitation must demonstrably be in the interest of the public and appropriately tailored so as not to deny citizens their fundamental rights where this could have been avoided.
- [23] The Constitutional court provided some guidance in paragraph [71] as to what would be considered as a serious crime. It referred to schedule 1,2 (parts II and III) and 5-8 of the Criminal Procedure Act 51 of 1977 (CPA). It then added a rider that its attempt at defining “serious offences” might not include the complete list of the relevant offences. The crime of trespassing though is still to be regarded as such for the purposes of crime incitement. In paragraph [51] the Constitutional Court held that”
- [51] The limitation must not extend to minor offences or offences that threaten no serious harm or danger either individuals, society or public order, property, or the economy....”

Quite clearly this is an indication that the limitation could and should extend to cases where serious harm and danger was threatened to the property, the economy, individuals, or public order.

- [24] In paragraph [63] it was held that the incitement of crimes that are “potentially serious” could still be justified. The Court had the following to say:

“[63] It must be emphasised that a less restrictive means for proscribing constitutionally objectionable incitement is the exclusion from its range, of those offences that are minor but not necessarily de minimis in character. As stated, that could be achieved by criminalising the incitement of only those offences that are potentially serious. Perpetrators of any offence would still be

prosecuted and punished. Accomplices would still face the wrath of the common law. The exclusion of inciters of minor or lesser offences and targeting inciters of serious offences cannot undermined the important objective of crime prevention as feared by the state. The value of circumscribing this limitation is that the right to free expression would be protected, respected, promoted, and fulfilled as the Constitutional Court demands of the state, and serious crime would still be effectively combated.

Schedule 1 of the CPA determines the seriousness of an offence by the type of sentence that a court may impose on conviction of a person who committed such an offence.

It states as follows:

“Any offence except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately

hereunder, the punishment wherefor maybe a period of imprisonment exceeding six months without option for fine.”

According to the Schedule 1 of the CPA, according to the Constitutional Court’s interpretation, incitement of the crime of trespassing still constitutes a serious crime despite considerations of free speech. Section 2(1) of the TA provides as follows”

“2(1) Any Person convicted of an offence under section 1 shall be liable to a fine not exceeding R2000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

Therefore, imprisonment without the option of a fine that exceeds six months in duration, can still be imposed for the crime of trespassing without the alternative option of a fine.

[25] In my view, there is no merit in the Respondents’ counsel argument that the underlining crime of incitement has been curtailed and found to be constitutionally impossible. One merely must look at paragraph 5 of the Court Order to see how flawed Mr Premhid’ argument is. The phrase “inciting and/or instigating and/or commanding and/or procuring any individual /to commit” has not been abolished. It still constitutes part of the proposed section 18(2)(b). The Constitutional Court has made it abundantly clear that the arguments by counsel for the Respondents have no merit.

[26] The conclusion therefore is inescapable that there are no reasonable prospects success that, if granted leave to appeal, the Respondents would have any reasonable prospects of success.

OTHER GROUNDS UPON WHICH THE APPLICATION SHOULD BE REFUSED.

[27] The Applicants contend, upon other grounds, that the Respondents’ application for leave to appeal should be refused. They have mentioned the following further grounds as the reason they contend that the application for leave to appeal should not be granted:

[27.1] lack of a proper application for condonation for the late filing of the application for leave to appeal coupled with lack of proper, and complete explanation for the delay.

[27.2] no appeal lies against a judgement or order granted by default.

CONDONATION

[28.1] This part of the judgment deserves the background of the matter.

[28.2] The history to this matter is dealt with in paragraphs [8] to [16] supra. In paragraph 14 supra I pointed out that on 13 November 2018 the Respondents delivered their application for leave to appeal against the order of 7 March 2017. Firstly, this application for leave was out of time, hence an attempt at bringing an application for condonation for the late filing of the application for leave to appeal. According to counsel for the Applicants there are two fatal problems with the application for leave to appeal. Firstly, there was no notice of motion accompanying the affidavit of Angelike Charalambous and secondly, the said affidavit was characterised by a paucity of essential details.

[28.3] an application for condonation must satisfy the following requirements:

[28.3.1] it must be clear, succinct and to the point

[28.3.2] the applicant must furnish all such information as may be necessary to enable the court to decide the application. In this disregard see in *Uitenhage Transitional Local Council v so South African revenue services* [2003] 4 ALL SA 37; 2004(1) SA 292 (SCA) par 6. In this paragraph the court per Heher JA, and Zulman and Nugent JJA agreed with him, had to say the following:

“[6] One would have hoped that the many admonitions concerning what is required of an application in a condonation application and affidavit

in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to

this court: condonation is not to be had for the asking ; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the court to understand clearly the reasons and assess their responsibility. It must be obvious that, if the non-compliance is time related then the date, duration, and extent of any obstacle on which reliance is placed must be spelt out”

[28.4] The principle set out in the foregoing paragraph does not apply to applications for condonation or appeals only. It is a principle of general application. It applies in all instances involving all sorts of applications for condonation, including the instant application.

[28.5] As I pointed out earlier the Respondents’ condonation application is predicated on affidavit by one Angelike Charalambous, an attorney in the offices of the Respondents’ attorneys of record. According to counsel for the Applicants, this affidavit is not accompanied by any notice of motion. I deal with this aspect later in this judgment. The said affidavit states as follows:

“1. I am an appointed attorney of record for the First and Second respondent in this application, in the employ of Ian Levitt Attorneys, situated at 19th Floor, Sandton City Office Towers, corner 5th and Rivonia Roads, Sandton.

2. The allegations contained in this affidavit are true and correct. They also fall within my person knowledge and belief, except where the context indicates otherwise.

.....

.....

13 Later that day, the mandate of Kwinana Attorneys was terminated in the matter, and they were requested to urgently file a Notice of Withdrawal of Attorneys of record. A copy of the termination letter is attached thereto as 'AC7'.

14. On Monday, 12 November 2018, we arranged a consultation with the attorneys who were previously dealing with the matter, Kwinana Attorneys as well as the applicants (who by this time, had become our clients in this matter] in order to determine what had transpired in regard to this Application and the non-filing of an Application for Leave to Appeal. With thereafter were immediately instructed to draft an Application for Leave to Appeal and proceed act on behalf of our clients.

15. We proceeded to serve and file our client's Application for Leave to appeal the very next day being Tuesday, 13 November 2018 and same will be filed with the registrar of the High Court by the morning of 14 November 2018.

16 We accordingly seek condonation for the late filing of our client's Application for Leave to Appeal and request that the Court allow for the late filing of same."

[28.6] The Respondents' attorneys became involved in this matter only on 12 November 2018, when they were instructed to file an application for leave to appeal, which they did on 13 November 2018. The affidavit of Charalambous only covers the delay from 12 November

2018. There is no affidavit from the Respondents' erstwhile attorneys in which they explain the delay up to the 11 November 2018. I found it very strange that the current attorneys of the Respondents have not taken any steps to obtain from former attorneys of the Respondents an affidavit in which such attorneys explain the delay in filing an application for leave to appeal while they were still overseeing the Respondents' matter. This is even though they consulted with such attorneys on 12 November 2018. For this reason, the explanation why, there was delay in timeously filing an application for leave to appeal is incomplete. Based on the evidence of Charalambous there is no acceptable explanation why the application for leave to appeal was not filed within 15 days as required by the rules of court. This vital information should, in my view, have been covered by the affidavit from KPI. In terms of Rule 49(1)(b) the Uniform Rules of court:

"When leave to appeal is required and it has not been requested at the time of the judgement or order, application for such leave shall be made and the grounds therefor shall be furnished within 15 days after the date of the order appealed against; Provided that when the reasons or the full reasons for the court's order are given on a later date than the date of the order, such application may be made within 15 days of such later date; provided further that the court may upon good cause extend the aforementioned periods of 15 days."

[28.7] We now know that the Respondents did not require the reasons for the order to appeal. They had only intended to appeal against the court order. They did not need reasons for that purpose. If the Respondents intended appealing against the order of 7 March 2017 only, as they

claim that was their intention, they were obliged to file their application for leave to appeal within 15 days after 7 March 2017, which they failed to do. The affidavit of Charalambous fails to explain why there was such a long delay to file the application for leave to appeal between 7 March 2017 and 12 November 2018. As shown in *Beweging vir Christelike-Volkseie Onderwys v Minister of Education* [2012] 2 ALL SA 462 (SCA), an application for condonation must explain the delay. It must furnish the court with a complete, reasonable, and acceptable explanation for the delay. The explanation must cover the whole period of the delay. The affidavit of Charalambous falls dismally short of this requirement. In my view, just on this point alone the application for condonation cannot succeed.

Thirdly and finally, the applicant must, in his application for leave to appeal, deal with the merits of the case as far as is necessary for the purpose of explaining and supporting his grounds upon which the application is sought. The purpose of this exercise would have been to determine whether or not the appeal has any prospect of success. The explanation must be contained in the affidavit. Affidavits contain facts. These facts may be disputed in other affidavits. The affidavit of Charalambous does not deal with the merits of the case. It does not explain and support the grounds upon which the condonation is sought.

NO NOTICE OF MOTION FOR THE APPLICATION FOR CONDONATION

In the place of notice of motion, the respondent had filed a document called:

FILING SHEET: AFFIDAVIT IN SUPPORT OF THE LATE FILING OF THE FIRST AND SECOND APPLICANT'S APPLICATION FOR LEAVE TO APPEAL.

This document stated as follows;

"Kindly take notice that the 1st and 2nd applicants here by present for service and filing. affidavit in support of the late filing of the first and second applicant's application for leave to appeal."

Quite obviously the affidavit that was intended to be used in support of the late filing of the application for leave to appeal was not even identified in the filing sheet. The filing sheet was then followed by an affidavit by the said Charalambous that was used in support of the application for condonation for the late filing of the application for leave to appeal.

[30] According to counsel for the Applicants, the feet of clay with a so-called application for leave to appeal is that there was no notice of motion. This was contrary to the rules of court in particular rule 6(1) of the Uniform Rules of Court which provides that:

"Save where proceedings by way of petition are prescribed by the law, every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief."

[31] According to Mr Hamman, in bringing their application for condonation the Respondents should have followed the procedure set out in Rule 6(1). They should have brought it on a notice of motion supported by an affidavit. The contention by Mr Hamman is not correct. The application for condonation was brought in terms of Rule 6(11) of the Uniform Rules of Court which provides as follows:

“Notwithstanding the foregoing sub-rules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at the time assigned by the register or as the directed by a judge.”

Notice does not mean “notice of motion.” According to *Yorkshire Insurance Co. Ltd v in sub rule 6(11)* as opposed to the *Reuben 1967 (2) 263 [E.L.D] 265E-G*, the court stated as follows:

“There is to my mind a substantial difference between an application being brought on notice and an application brought on notice of motion. It could never have been intended when parties are already engaged in litigation and have complied with such formalities as appointing attorneys and giving addresses for service of documents in the proceedings, that in further applications incidental to such proceedings, the parties would be required to go through all the same formalities again with all concomitant and unnecessary expense.”

I am satisfied that the use of the word ‘notice’ “notice of motion” in other sub-rule to Rule 6 indicates clearly that interlocutory and other applications incidental to pending proceedings were not intended to be brought by way of formal notice of motion in the same way as applications initiating proceedings. I am also satisfied that rule 6(11) was not enacted solely for the purpose of prescribing a different procedure as regards set down as has been suggested by Mr Melunsky and that the use of the word “notice” in contra-distinction to notice of motion was a deliberate one.”

All that is required is notice to the other side stating that an application will be brought on a date assigned by the register or directed by a judge. In this current matter the application for condonation would be heard on the day on which the application for leave to appeal would be heard. It was therefore incidental to the pending proceedings. The Respondents’ attorneys had made it clear when they stated in the application for leave to appeal that the application would be heard on the date arranged with the registrar.

[32] I am therefore satisfied that it was not necessary for the Respondents to follow the procedure set out in Rule 6(1) when they brought this application for condonation and that they have followed correctly the procedure set out in Rule 6(11) of the Uniform Rules of Court. There is no merit therefore, in Mr Hammond's contention that the Respondents should have brought their application for condonation in terms of rule 6(1).

DEFAULT ORDER NOT APPEALABLE

[33.1] It is the Applicants' case that it is trite law that the orders granted by default cannot be appealed against. In support of this principle, they put reliance on *Pitelli v Evergreen Gardens Projects CC*, 2010 (5) SA 171 (SCA) (Pitelli), the unanimous judgment by the Supreme Court of appeal.

[33.2] On 7 March 2017 the main application came before court for hearing. The matter was unopposed as the Respondents had not filed their papers even though copies of the application had been properly served on them nor was there any appearance for them. The Applicants took the order unopposed. Default judgement was therefore granted against the Respondents accordingly.

[33.3] Immediately thereafter, and on 5 April 2017, the Respondents brought their application to rescind or set aside that order. That application was opposed by the Applicants who filed not only their notice to oppose but also their answering affidavit on 5 May 2017.

[33.4] The application for rescission was set down for hearing on 12 September 2017 before Baqwa J. On the 12th of September 2017, the matter was postponed by order of court sine die. The Respondents were ordered to pay the wasted cost on attorney and client scale. Such costs were to include costs of two counsel. It is important to point out that the matter was postponed on 12 September 2017 primarily because the Respondents' attorneys had failed to file their counsel's heads of argument.

[33.5] The application was again re-enrolled for hearing on 12 February 2018. On this day still there was no appearance for the Respondents despite having been notified of the date of hearing. On this day Acting Judge Nathan dismissed, with costs the Respondents' application for rescission of the order of 7 March 2017. The order was therefore obtained by default.

[33.6] In paragraph [27] the Court in *Pitelli* made the following statement:

'An order is not final for the purposes of an appeal merely because it takes effect unless it is set aside. It is final when the proceedings of the court of first instance are complete, and that court is not capable of revisiting the order. That leads ineluctably to the conclusion that an order taken in the absence of a party is ordinarily not appealable (perhaps there might be cases in which it is appealable, but for the moment I cannot think of one). It is not appealable because such an order is capable of being rescinded by the court that granted it, and it is thus not final in its effect. In some cases, an order that is granted in absence of the party might be rescindable under rule 42 (1)(a) and if it is not covered by that rule it is in any event capable of being rescinded under the common law.'

The SCA cited other judgments with approval. For instance, it stated as follows:

"[28] That an order granted in absence of a party is not appealable was held as early as 1877 in Ross v Dramat 1877 Buch.132 at 13 when De Villiers CJ said, in respect of such an order, that

“the defendant is premature in applying to this court [to appeal against the order] until the Magistrate has been asked and has refused to re-open the case.” See also Sparks v David Pollack & Co. (Pty) Ltd 1963 (2) SA 491 (T) (Pitelli).

[29] By launching an application for rescission of the default judgement on 5 April 2017, the Respondents acted appropriately for at that stage, according to Pitelli, the court order could still be set aside. The proceedings that led to the order of 7 March 2017 were not complete. The court was still at large to revisit them and set the order aside. But once the court dismissed the application for rescission on 12 February 2018, those proceedings were complete and confirmed. From that stage there was no way other than through Rule 42 (1)(a) of the Uniform Rules of Court or under common law that the order could be rescindable. No appeal lies against such an order:

“.....an order taken in the absence of a party is ordinarily not appealable.” See Pitelli above.

[30] The judgement of Pitelli strikes a death knell to the Respondents’ application for leave to appeal. It dissipates any hope the Respondents might have of claiming that they have reasonable prospects that, if granted leave, they would have reasonable prospects of success. I am satisfied that the application for leave to apply stands to be dismissed. Accordingly, I make the following order:

The application for leave to appeal is hereby dismissed, with costs.

P M MABUSE

JUDGE OF THE HIGH COURT

Appearances

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