

SOUTH AFRICA / JUDGMENT

## Mpumalanga Economic Growth Agency v Nemorango Consulting Engineers CC (2029/2020) [2021] ZAMPMBHC 32 (22 July 2021) [2021] ZAMPMBHC 32

COURT

Mbombela High Court, Mpumalanga

BEFORE

B A Mashile

CASE / FILE NUMBER

2029/2020

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(MPUMALANGA

DIVISION, MBOMBELA)

(1)

REPORTABLE:NO

(2)

OF INTEREST TO OTHER JUDGES:NO

(3)

REVISED: YES

22/07/2021

CASENO:

2029/2020

In the matter

between:

MPUMALANGA

ECONOMIC GROWTH AGENCY

Applicant

and

NEMORANGO

CONSULTING ENGINEERS CC

Respondent

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**JUDGMENT****MASHILE J:**

- [1] This is an application for leave to appeal the order and judgment of this Court granted on 25 May and reasons thereof supplied on 10 June 2021 respectively. The order and judgment concerned application to condone delivery of a plea and counterclaim after a provisional sentence claim had become final and the Applicant in principle barred from taking any further step. The finality of the provisional sentence claim notwithstanding, the Applicant still proceeded to deliver a plea and counterclaim. The Respondent objected to this on the ground that it constituted an irregular step as intended in Uniform Rule of Court 30(1) in consequence of which he launched proceedings requiring the Applicant to withdraw the plea and counterclaim.
- [2] On 21 May 2021, the Applicant served its Notice of Intention to Oppose the application in terms of Rule 30(1). No affidavit was filed in support of the Notice of Intention to Oppose. Instead, on 24 May 2021 the Applicant delivered the application for condonation of the irregular step. The Court considered the application and satisfied that it lacked merit, dismissed it with costs. The Court went on to deliberate on the Rule 30(1), which was not opposed and directed that the delivery of the plea and counterclaim indeed constituted an irregular step and set it aside. The leave to appeal pertains to the condonation application and the irregular step order and judgment are not impugned.
- [3] The question that arises is, should the Court grant leave to appeal given these simple background facts, which the Applicant would have this Court believe require aberrant solution despite their plainness. It is settled that the question whether or not to grant leave to appeal is regulated by the provisions of Section 17(1) of the Superior Courts Act, 10 of 2013, which lays down that:

"Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a)

(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

[4] This Court is particularly interested in the provisions of Section 17(1)(a)(i) and (1)(b). To a very large extent therefore I will limit the Court's interest to those provisions. The Court must, however, not be construed to be proposing that the other provisions do not find application. The idea is merely to isolate the most relevant provisions of the Section so that the Court can arrive at a solution effortlessly. It has been stated that an applicant for leave to appeal must convince the Court that there is a reasonable prospect of success on appeal and that the success of such an application depends on, amongst others, the prospects of eventual success of the appeal itself. The Court hearing the application for leave to appeal must be of the opinion that another court will differ from its judgment. See, *Zuma v Democratic Alliance*

[2021] ZASCA 39 of 13 April 2021 and *The Mont Chevaux Trust v Tina Goosen and 18 Others* 2014 JDR 2325 (LCC).

[5] For the Applicant to have succeeded in its application for condonation it would have had to show that it had satisfied all the requirements for condonation. Those are the following:

5.1 A full and reasonable explanation for the failure to comply;

5.2 Prejudice if condonation is not granted and absence of prejudice as far as the Respondent is concerned;

5.3 Prospects of success in the main proceedings; and

5.4 The interests of justice must favour the granting of condonation.

[6] It is trite that these must be met conjunctively. Thus, demonstration that an applicant has satisfied one or two of these will not suffice. In the circumstances, it might be prudent for this Court to single out one of these requirements to show the respects in which it was not satisfied. One such requirement that the Applicant clearly did not establish is existence of reasonable prospects of success in the main case. Showing that no reasonable prospects of success exist in the main case will necessarily mean that there are no reasonable prospects that another court would reach a different decision from that of the Court *a quo*.

[7] The Applicant did not challenge the application to set aside the irregular step. As a result, judgment in favour of the Respondent was granted and it stands. The Applicant reasoned that the application for condonation of the irregular step would undo not only the judgment in the irregular step application but it will also have the effect of reversing the provisional sentence judgment. This is completely fallacious as the provisional sentence has become final. Concomitant with the finality of the judgment is payment of the amount that the Applicant had undertaken to pay by 16 November 2020.

[8] This Court is not sitting as a court of appeal. Its powers are not as wide as to reconsider the judgment or order of Sigogo AJ. Thus, I have to agree with the Respondent that if the Court were to condone the irregular step, it will not have any practical effect because condonation is not an appropriate manner of challenging a court order. An order of court can be

rescinded and set aside or it can be set aside on appeal and be substituted for a decision of the Court of appeal. That said, it would appear that the Applicant has missed the opportunity of appealing the order of Sigogo AJ. Moreover, it also seem that the Applicant did not have any defence to the irregular step application as a result of which the order granted in that respect too presents an insurmountable hurdle for the Applicant.

- [9] Leave to appeal is refused on two grounds. Firstly, no reasonable prospects exist that another court would reach a different decision from that of this Court. Secondly, even if condonation were to be granted, which would in itself be irregular, it would have no practical effect because condonation does not constitute a manner of challenging a court order. In the result, it is befitting to make the following order:

The leave to appeal is dismissed with costs.

B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 22 July 2021 at 10:00.

APPEARANCES:

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Instructed by:

Merrrs Weavind & Weavind Inc

Date of Hearing:

13 July 2021

Date of Judgment:

22 July 2021

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