

SOUTH AFRICA / JUDGMENT

WH Civil Engineering (Pty) Ltd and Another v Vander Diamonds (Pty) Ltd and Others (3575/2020) [2025] ZAMPMHC 34 (4 July 2025) [2025] ZAMPMHC 34

COURT

Middelburg High Court, Mpumalanga

BEFORE

JL Bhengu

CASE / FILE NUMBER

3575/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION,

MIDDELBURG (LOCAL SEAT)

Case No.: 3575/2020

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

DATE 04 July 2025

SIGNATURE

In

the matter between:

WH
CIVIL ENGINEERING (PTY) LTD
First
Applicant
WHISKY
HENDRICK MATWALANE
Second
Applicant
and
VANDER
DIAMONDS (PTY) LTD
First
Respondent
DANIESE
ELAINE STEYN N.O.
Second Respondent
IZAK
JOHANNES BOSHOF N.O.
Third
Respondent
THE
MASTER OF THE HIGH COURT: MBOMBELA
Fourth
Respondent
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 04 July 2025 at 10:00.
Date heard: 29 May 2025.

JUDGMENT

BHENGU AJ

Introduction

- [1] Before me is an application for condonation for the late filing of an application for leave to appeal. The application is opposed by the first respondent. The second and third respondents are cited in their capacity as liquidators of the first applicant appointed by the Master of the High Court on 10 March 2021.

Brief background facts

- [2] On 08 February 2021, the first respondent (“Vander Diamonds”) obtained a winding up order by default against the first applicant (“WH Civil Engineering”) in terms of section 344 read with section 345 of the Companies Act, 63 of 1973 (“the old Companies Act”). The second applicant (“Mr Matwalane”) was the sole director of WH Civil Engineering. Mr Matwalane has since resigned as a director of WH Civil Engineering. Ms Maseko is now the sole director of the first applicant.
- [3] The applicants’ indebtedness to the respondent emanated from unpaid invoices dating back to February 2018, rendered by Vander Diamonds to WH Civil Engineering for the hire of plant and earth moving equipment in an amount of R502 455.00.
- [4] The applicants brought an application for rescission of the winding up order which was dismissed with costs by Mashile J on 18 July 2024.
- [5] On 21 August 2024 the applicants filed an application for leave to appeal Mashile J order dismissing their application for rescission. Their application for leave to appeal was however filed out of time.
- [6] The issue before the court is whether the applicants’ failure to file their application for leave to appeal timeously should be condoned.
- [7] At the outset of the hearing the applicants’ counsel submitted that he did not receive instructions to proceed with the matter. His instructions were to tender settlement to the first respondent. The parties had an opportunity to engage in settlement negotiations. However, the negotiations deadlocked. The applicants thereafter requested the matter to be postponed sine die in order for the applicants to explore all other avenues to try and settle the matter out of court.
- [8] The application for postponement was opposed by the respondents. The respondents’ counsel submitted that all the cost orders granted against the applicants relating to this matter remain unpaid and that postponing the matter with a cost order will be an exercise in futility. The first respondent submitted that the matter is not capable of settlement as the liquidators are precluded from entering into a settlement with only Vander Diamonds as a creditor to the exclusion of other creditors.
- [9] I dismissed the application for postponement on the basis that the applicants could not give any bona fide reasons why they were unable to proceed save to indicate that the matter is capable of settlement. The applicants failed to timeously bring a substantive application with full explanation of the circumstances that gave rise to the postponement application. I take note that it is the applicants who set the matter down for hearing when they knew very well that they did not intend to proceed. I further took note that the default judgment was granted against the applicants in February 2021, 4 years later the applicants are still

not ready to proceed with the matter. Proceedings cannot be prolonged indefinitely for no justifiable reason. The interest of justice

demands that there be finality to legal proceedings.

Preliminary Issues

[10] The respondents raised two points in limine against the legal standing of Ms Maseko as the deponent of the founding affidavit in the condonation application as well as her authority to instruct attorneys to act on behalf of the first applicant. I will first deal with these legal points raised by the respondents before venturing into the merits of the condonation application.

Lack of locus standi and authority for Ms Maseko

[11] The respondents averred that Ms Maseko had no locus standi to institute the current condonation application and / or the application for leave to appeal for the following reasons: -

11.1 That WH Civil Engineering had been finally wound up and placed in the hands of the Master in terms of the winding up order dated February 2021. They averred that it was not possible for Miss Maseko to become a director for the company which was placed in the hands of the Master of the High Court as section 353(2) of the Companies Act 1973 provides that from the commencement of a voluntary winding-up all the powers of the directors of the company ceases except sanctioned by the liquidator. In this regard the respondents argued that Ms Maseko therefore did not have authority to instruct the applicants' attorneys or to bring the leave to appeal proceedings and subsequent condonation application. She also could not purchase the shares in the company that vests in the hands of the liquidators.

11.2 That Mr Matwalane who was cited in his capacity as the director of WH Civil Engineering in the winding up proceedings failed to depose to the founding affidavit for condonation application. The respondents contended that Ms Maseko allegedly became a director on 10 April 2024, three years after the winding up order was granted and that she had no personal knowledge of the events leading up to the winding up of WH Civil Engineers contrary to what she averred in her founding papers.

[12] The respondents served a Uniform Rule 7(1) notice challenging the authority of the applicants' attorney of record to represent the applicants in these proceedings. The applicants' attorneys responded by filing a special power of attorney signed by Ms Maseko on 30 July 2024 and another special power of attorney signed by the second applicant dated 19 August 2024.

Discussion

[13] It is common cause that Ms Maseko was not a party to the default judgment application, the winding up proceedings nor the application for rescission of judgment which is the subject matter for the application for leave to appeal. I therefore agree with the respondents that she has no personal knowledge of the events leading to the winding up order. I however note that the second applicant, Mr Matwalane who was cited in the main proceeding as the sole

director of WH Civil Engineering at the time did depose to a confirmatory affidavit confirming the contents of the averments in Ms Maseko's affidavit. I am therefore of the view that the lack of Ms Maseko's personal knowledge is cured by the confirmatory affidavit by Mr Matwalane. The outstanding issue is whether Ms Maseko had the necessary legal standing and authority to bring the condonation application and the application for leave to appeal.

- [14] She averred that she was duly authorised by a confirmatory affidavit of Mr Matwalane. The confirmatory affidavit by Mr Matwalane stated that "I have read the contents of the founding affidavit made by Vuyani Dolphinah Maseko and I confirm the contents thereof in so far as they relate to me". No resolution was filed authorising Ms Maseko to act on behalf of the first applicant nor was she joined in the proceedings.
- [15] It is common cause that Ms Maseko was appointed as a director of the first applicant approximately three years after the winding up order was granted. In the founding affidavit she averred that she bought into the business interest of the first applicant on 10 April 2024 whilst the judgment on the winding-up of the first applicant was still pending due to the application for rescission of judgment. She further stated the following:

"At all the relevant times there and then the judgment was made against the first applicant I was unaware of the situation and the status quo of the first applicant."

- [16] What complicates issues for Ms Maseko is that even if I accept that she bought shares from WH Civil Engineering and became a director on 10 April 2024 as per the CIPC director amendment form, that does not assist her as she is still not a party to these proceedings. In *Judicial Service Commission and Another v Cape Bar Council and Another*[1] the SCA stated the following regarding direct and substantial interest: -

"If a party has a direct and substantial interest in any order the court might make in proceedings, or if such order cannot be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings unless the court is satisfied that he has waived his right to be joined. The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder objection".

- [17] It is not explained why Ms Maseko did not apply to join in the proceedings as the third applicant. She seems to rely on the confirmatory affidavit by Mr Matwalane. The confirmatory affidavit by Mr Matwalane only confirmed the averments made in Ms Maseko's affidavit and did not confer any right upon her to institute the appeal process on behalf of the company. Mr Matwalane is no longer a director of the first applicant and by virtue of that fact he could not authorise any proceedings on behalf of the first applicant.
- [18] In *Eriksson v Hollard Insurance Company Limited and others*[2], the Court held that:

“To establish the authority to provide a mandate, a court will require the resolution of the entity, which can either provide the representative with a general authority or a specific authority to appoint attorneys to institute proceedings against a defendant or defendants”.

- [19] It is common cause that no such resolution exists in this matter authorising Ms Maseko to institute proceedings on behalf of WH Civil Engineering or to appoint the attorneys. Based on the available information, Ms Maseko has failed to satisfy this court on a balance of probabilities that she has the requisite locus standi to institute these proceeding and as such I find that both the respondents’ point in limine should be upheld.

Condonation

- [20] The test for condonation was restated by the Constitutional Court in *Steenkamp v Edcon Limited*[3], as follows: -

“The principle is firmly established in our law that where time limits are set, whether statutory or in terms of the rules of court, a court has an inherent discretion to grant condonation where the interests of justice demand it and where the reasons for non-compliance with the time limits have been explained to the satisfaction of the court”.

- [21] In exercising its discretion, the court considers various factors including length of the period of delay, an explanation for the delay, prejudice that either party will suffer should condonation be granted or refused and the prospect of success in the appeal.

Explanation for the delay

- [22] The judgment dismissing the rescission application was handed down on 18 July 2024. According to Ms Maseko, she was not aware of the judgment until it was brought to her attention by Mr Matwalane on 29 July 2024. She immediately approached her then attorneys of record, Mushwana Incorporated to proceed with an application for leave to appeal.
- [23] The explanation proffered by Ms Maseko for delay was that the applicants’ correspondent attorney attempted to file the notice for leave to appeal on 20 August 2024 but were allegedly turned away by the judge’s secretary for late filing. They eventually filed the application on 21 August 2024, seven days late.
- [24] The application for condonation was subsequently filed on 30 August 2024, also seven days later.
- [25] Miss Maseko stated the following in motivation for condonation:

“This is clearly a minimal delay, which mitigates in favor of granting condonation. The prejudice that the applicants stand to suffer if this application for condonation is not granted is immense in that the first applicant would be finally wound up and will no longer be in the position to conduct its business. There can be no prejudice on the part of the respondents as they have by now been served with the application for leave to appeal and they are aware of the merits thereof”.

[26] The respondents contended that the condonation application as well as application for leave to appeal is meritless, ill-advised and amount to an abuse of court process. The respondents deny Miss Maseko's assertion that the respondents will not suffer any prejudice if the condonation application is granted as the respondents have already incurred substantial legal fees to

oppose all the ill-advised applications meant to avoid the inevitable.

Have the applicants shown good cause?

[27] The applicants brought this application in terms of Uniform Rule 27(1) which require the applicant for condonation to show good cause for the indulgence to be granted. The applicants' counsel submitted that the explanation for the delay was reasonable and that the applicants acted without delay in launching the application for leave to appeal.

[28] The applicants relied on the decision of *Mulaudzi v Old Mutual Life Assurance Company South Africa Ltd & Others*[4] where Ponnann J stated the following:

"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 so as 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."

[29] Although the applicants correctly relied on this judgment, it appears that they failed to comply with the requirements set out by the very judgment they relied upon. The applicants attributed the delay to the change of their previous attorneys of record to an attorney based in Limpopo. The applicants failed to give a full, detailed and accurate account for each day up until filing of

the application. No explanation whatsoever was provided for the delay in launching the application for condonation. The applicants stated the following in their replying affidavit:

"There is no need to overburden the Honourable Court with correspondence between my legal representative and the appointed correspondent attorney, an inference can simply be drawn from the factors on the founding affidavit".

[30] It is clear from the above statement that the applicants are oblivious to the consequences of their failure to provide the court with a proper explanation for the delay. They seem to believe that just because the delay is less than 10 days then condonation should be granted. This is not so.

- [31] It is trite that condonation is not there for the mere asking by the defaulting party and that the applicant must make out a case for condonation. Holmes JA, in *Melane v Santam Insurance Co. Ltd*[5] stated the following regarding the test for good cause:

“In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the facts and, in essence, is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are inter-related; they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion ...”.

- [32] Even if I were to accept that there was no undue delay in launching the application for leave to appeal, the condonation application is missing averments on the applicants’ prospect of success in the appeal. The applicants averred that “prospects of success are not an issue in condonation”. This assertion is clearly incorrect and ill advised. I noted that the applicants’ counsel fully addressed prospects of success, prejudice and the importance of the matter in his heads of argument. These issues however cannot be addressed for the first time in the heads of argument without reference to the founding papers. The applicants’ counsel conceded that the papers did not address these issues.

Leave to appeal

- [33] Section 17(1)(a) of the Superior Courts Act 10 of 2013 provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.
- [34] The respondents’ counsel correctly referred to the SCA judgment in *Ramakatsa and Others v African National Congress and Another*[6] where the Court held as follows:

“If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist”

- [35] It is clear from the authorities that prospect of success is a weighty factor in determining whether leave to appeal should be granted. The applicants did themselves a disservice by failing to address this requirement. It is common cause that the main ground of appeal relied upon by the applicants is that the Court erred in its finding that the applicants owed an amount of R502 455.00 to the first respondent instead of a revised down amount of R203 550.00. It is clear from the applicants’ own version that WH Civil Engineering was indebted to the first respondent in an amount of at least R203 500. It is common cause that a period in

excess of four years have lapsed since judgment was granted in February 2021. The applicants have to date not been able to satisfy the judgment debt or the amount that they conceded to owing the respondents.

- [36] Section 345 empowers a creditor who is owed a debt in excess of R100.00 to bring an application for liquidation on the basis that despite a demand for payment, the company is unable to satisfy its indebtedness. In this regard, I'm of the view that the ground relied upon for leave to appeal does not afford the applicants even a remote prospect of success.

Conclusion

- [37] I am of the view that regardless of the minimal delay in launching the application for leave to appeal, there are other factors that weigh against the applicants from obtaining the relief sought. The first one being the lack of locus standi of Ms Maseko to bring this application for condonation and leave to appeal. The second is the assertion by the applicants that prospect of success is not required for condonation. The third is the submission by the applicants' counsel at the outset of the hearing that he was briefed only to settle the matter. This is a strong indication that the applicants do not genuinely intend to proceed with the appeal and are using the court processes to delay the liquidators from proceeding with their mandate.

Costs

- [38] The respondents asked for costs on a punitive scale against the applicants' legal representative and Ms Maseko in their personal capacity. The request was founded on the basis that the attorneys accepted instructions from a director who was appointed 3 years after a final order for liquidation was granted. They argued that the estate of the first applicant should not be burdened with costs.
- [39] I take note of the applicants' counsel's submissions that the court should consider that the current attorneys of record were not there from the inception of the matter and were only engaged when the papers were already filed in the matter. Regardless of the irregular appointment of Ms Maseko as a director of the first applicant three years after a winding up order was issued; I have no reason to doubt her assertion that at the time of her appointment she was not aware of the winding up order. As such I am of the view that a normal cost order on a party and party scale is appropriate.

- [40] In the result, I make the following order: -

1. The special plea is upheld.
2. The application for condonation is dismissed with costs on a Party and Party scale B.

JL Bhengu

Acting judge of the High Court

Mbombela Main Seat

Appearances

For the applicants: Adv ZS Hadebe Instructed by Mzuzu Attorneys info@mzuzuattorneys.co.za
Ref: BN Mzuzu/C1602/2025 For first respondents: Adv AA Basson Instructed by Barnard & Patel
Inc. c/o Gerrie Groenewald Attorneys Inc litigation@bpinc.co.za / danie@bpinc.co.za Ref: Gerrie
Groenewald/HB0431 Date of hearing: 29 May 2025 Date of judgment: 04 July 2025

- [1] Judicial Service Commission and Another v Cape Bar Council and Another [2013] 1 All SA 40 (SCA), 2013 (1) SA 170 (SCA) at para 12.
- [2] Eriksson v Hollard Insurance Company Limited and others, [2023] JOL 57407 (GJ) para 24
- [3] Steenkamp v Edcon Limited [2019] ZACC 17 para 26
- [4] Mulaudzi v Old Mutual Life Assurance Company South Africa Ltd & Others 3 ALL SA 520 (SCA) 2017 para 26
- [5] Melane v Santam Insurance Company Limited 1962 (4) SA 531 (AD) at 532 C - F
- [6] Ramakatsa and Others v African National Congress and Another (724/2019) [2021] ZASCA 31at para 10.

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