IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO:4741/2006

In the matter between:

NEDBANK LIMITED APPLICANT	**FIRST APPLICANT**
PIETER ARNOLDUS CRONJE N.O.	
ENVER MOHAMED MOTALA N.O.	**SECOND APPLICANT**

AND

HILLCREST VILLAGE (PTY) LTD	**FIRST RESPONDENT**
CRYSAL COOPER DE LA PIERRE N.O	**SECOND RESPONDENT**

In re:

HILLCREST VILLAGE (PTY) LTD	**First Applicant**
CRYSAL COOPER DE LA PIERRE N.O	**Second Applicant**

And

WATERKLOOFS PRUITPROJECTS (PTY) LTD	**First Respondent**
THE REGISTRAR OF COMPANIES	
& CLOSE CORPORATION	**Second Respondent**
THE REGISTRAR OF DEEDS	**Third Respondent**
THE MASTER OF THE HIGH COURT	**Fourth Respondent**
PIETR ARNOLDUS CRONJE N.O.	**Fifth Respondent**
ENVER MOHAMED MOTALA N.O	**Sixth Respondent**
NEDBANK LIMITED	**Seventh Respondent**
THE GOVERNMENT OF	
THE REPUBLIC OF SOUTH AFRICA	**Eighth Respondent**

DRAFT JUDGMENT

MAVUNDLA J . ,

[1] Before me are three applications for leave to appeal to the Full Bench of this division or to the Supreme Court of

Appeal against the whole of the judgment I delivered on 29 April 2008.

[2] For purposes of this judgment I have cited the parties in the application for leave to appeal as they cited themselves in their respective applications for leave to appeal. Nedbank Limited is the seventh respondent in the main application. The seventh respondent in its application for leave to appeal referred to itself as the applicant. Its application for leave to appeal is dated the 9 May 2008 and was filed with the Registrar of this Court on 12 May 2008.

[3] The fifth respondent and the sixth respondent in the main application, namely respectively Pieter Arnoldus Cronje N.O. and Enver Mohamed Motala N.O have referred to themselves respectively in their application for leave to appeal as the first applicant and the second applicant. Their application for leave to appeal is dated the 22 May 2008. Their application for leave to appeal was filed with the Registrar of this Court on 22 May 2008. Their application for leave to appeal only found its way to my chamber on the morning of 23 May 2008.

[4] The seventh respondent in the main application, I have referred to him as the applicant for purposes of this application. An application for leave to appeal was filed on its behalf on 12 May 2008, which is within the time frames demanded by rule 49(1)(a) of the Uniform Rules of the High Court[1].

[5] Rule 49(1) (b) of the Uniform Rules of the High Court requires that an application for leave to appeal shall be made within 15 days after the grant of the judgment or order. Where the reasons are furnished later, the application for leave shall be made within 15 days from the delivery of such reasons. Rule 49(1) (b) is peremptory, vide Songono v Minister of Law & Order[2]. In casu the application for leave to appeal of the first applicant and the second applicant has been filed out of time. No good cause[3] has been advanced for such late filing.[4] With regard to good cause in the matter of Mutebwa v Mutebwa and Another[5] Jafta J, as he then was, said:

"[13] The terms 'sufficient cause' and 'good cause' mean the same thing. The only difference is that Rule 31(2)b refers to 'good cause' whereas under common law reference is made 'sufficient cause'. The requirements therefore are exactly identical. In Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) the Appellate Division had occasion to consider the requirements of 'sufficient cause'. At 765A-C Miller JA said: "The term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors require to be considered. (See Cairns' Executors v Gaarn 1912 AD 181 at 186 per Innes JA.) But it is clear that in principle and in the long-standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:

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1 49 Appeals From the Supreme Court (1) (a) When leave to appeal is required, it may on a statement of the grounds therefore be requested at the time of judgment or order, b) When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefore shall be furnished within fifteen 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 fifteen days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of fifteen days.

2 1996 (4) SA 384 (ECD) at 385J-386A.

3 Good cause , in my view places an onus on the applicant which he must discharge on a balance of probabilities, by showing that he was not in willful default and that there is a reasonable explanation for his failure to comply with the rules in good time.

4 In De Wet and Others v Webstern Bank Ltd 1979 (2) 1021 [AD] at 1042H Trengrove AJA said that:

"The onus of showing the existence of sufficient cause for relief was on the applicant in each case, and he had to satisfy the Court inter alia, that there was some reasonably explanation why the judgment was allowed to go by default." In my view this passage is apposite even in the instance relating to failure to bring the application for leave to appeal within the prescribed period of fifteen days.

5 2001 (2) SA 193 (Tk HC) 198I- 199 A-B.

(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
(ii) that on the merits such party has a bona fide defence which, *prima facie,* carries some prospect of success...." In my view, the consideration of prospects of success do not necessarily come into play in the consideration of the compliance or non compliance with Rule 49(1)(b), vide para [6] herein below.

[6] In the matter of Beira v Raphaely- Weiner and others [6] Harms JA stated as follows:
"There is no explanation on the papers for the delay between the second and third dates. In the circumstances of this case this is fatal, even should there be prospects of success, because an application for condonation must be made as soon as it is realised that the Rules have not been complied with; the petitioner is required to give a full and satisfactory explanation."

[7] The first applicant and the second applicant were supposed to have filed their application for leave to appeal not later than 20 May 2008. There has been no application for condonation filed on behalf of the first applicant and the second applicant. There has been no objection raised by the respondents (i.e. the first and the second applicants in the main application). Condonatio is not there for mere take.

[8] The grant of condonation is a matter in the discretion of the Court, upon good reasons being advanced. In casu the respective counsel of both these applicants, i.e. the first and second applicants (who are respectively the fifth respondent and sixth respondent in the main application)did not address the issue of the late filing of the application for leave to appeal. I must however confess that I did not invite them to do so. I how did place on record the fact that the relevant application for leave to appeal only reached my chamber that very morning of the application. It may well be that there are good grounds for such late filing of the aforesaid notice of application for leave to appeal. However these were not placed before me. As the result I am disinclined to close an eye to the fact that there has been no compliance of the Rules on the part of the first and second applicants. The Court cannot exercise its discretion in vacuum. Facts must be placed before the Court for it to then exercise its judicial discretion.[7] In casu no such facts have been placed before me. Vide also Saloojee & Ano. v Minister of Community Development[8] where Steyn CJ said that: "It is for the applicant to satisfy this Court that there is sufficient cause for excusing from compliance." Vide also R v Lembada and Another[9] Oglivie Thompson J.A. said: "In this connection it must be realised by practitioner and their clients alike, that unexplained delays in seeking relief for failure to comply with time limits fixed by Statute or Rule of Court can militate against, and may often prove fatal to, the granting of the indulgence sought (R v Mkize, 1940 AD 211 at p. 212; Mentjies v Combrink (Edms.) Bpk 1961 (1) SA 262 (AD. 10th November, 1960))."

[9] In the circumstances and in the light of the authorities cited herein above, I am of the considered view that the application for leave to appeal of the first applicant and the second applicant are fatally defective for non-compliance with the rules and therefore stand to be dismissed with costs. For the sake of clarity I am referring to the applications for leave to appeal brought by Mr. PIETR ARNOLDUS CRONJE N.O, Fifth Respondent and Mr. ENVER

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6 1997 (4) SA 332 (SCA) at 337C-E.
7 In S v Tsedi 1984 (1) SA (1) SA 565 (AD) at 567A- The Appellate Division said: "The "good cause" referred to in s 316 (1) of Act 51 of 1977, where condonation is required from Provincial Division as a trial Court, and the "good cause" referred to in Rule 27 (3) of the Uniform Rules of Court, should be interpreted in regard to those factors which excuse and adequately explain the failure to comply with the relevant provisions."
8 1965 (2) SA 135 (AD) at 138E-F.
9 1961 (1) SA 411 (AD) at 418C.

MOHAMED MOTALA N.O. Sixth Respondent.

[10] The application for leave to appeal of **NEDBANK LIMITED, Seventh Respondent in the main application, as I have already indicated herein above is dated** the 9 May 2008 and was filed with the Registrar of this Court on 12 May 2008. I am of the view that in this instance the application for leave to appeal has been brought in compliance with the Rules of Court. In the matter of Westing house Brake & Equipment v Bilger[10] Corbett JA stated as follows: "The general principle is that an applicant for special leave to appeal must show, in addition to the ordinary requirements of reasonable prospects of success, that there are special circumstances which merit a further appeal to the Appellate Division. This Court will be the arbiter as to whether such circumstances exist. By way of illustration - and I stress again that these illustrations are not exhaustive of the concept of special circumstances — I would cite the following types of case as constituting special circumstances:

(1) Where, in the opinion of this Court, the appeal raises a substantial point of law. Often, probably ordinarily such a case would not have been referred to the Full Court in the first place, would have been directed to the Appellate Division. Nevertheless, the Court making the reference might, despite the point of law, have considered the case as one not meriting the attention of the Appellate Division; or the point of law might have arisen as a new development after leave to appeal to the Full Court had been granted (2) Where the matter turns mainly on factual issues, is of very great importance to the parties or of great public importance. Various concrete examples of this can be visualized.

(3) Where the matter turns mainly on factual issues and lacks the qualities referred to in (1) and (2) above, but the prospects of success are so strong that the refusal of leave to appeal would probably result in a manifest denial of justice. In this regard it must be appreciated that the concept "reasonable prospects of success" covers a fairly wide spectrum, ranging from the minimum needed to establish reasonable prospects to virtual certainty of succession for leave to appeal of the seventh respondent in the main application. This is particular so in factual matters involving the evaluation of (conflicting) evidence."

[11] I do not intend to traverse the points contained in the application for leave to appeal of the seventh respondent. Some of the points forming the basis upon which my judgment is being assailed, relate to fundamental issues and points and of law. For instance, one of the points taken, is that in my holding *inter alia* that "The applicants need to make a prima facie case to persuade me to grant them the relief they seek." It is contended on behalf of the applicant, that in this regard I have employed a wrong test and materially departed from the traditional test to be employed in opposed motions.

[12] The test to be employed in opposed motions, has since crystallized to be known as the Plascon-Evans Paints, which is

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10 Engineering 1986 (2) 555 (AD) at 564H.

well articulated by Corbett JA in the matter of Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) SA 623 (AD) at 634G-H as follows:
"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's which have been admitted by the respondent, together with the facts alleged by the respondent justify, justify such an order."

[13] I do not intend to sit in review or judgment of my own judgment. It suffices to state that the points raised are arguable and are of importance not only to the parties concerned but also to the general jurisprudence. Of particular importance are the points of locus standi and the reopening of an account already approved by the Master. A further point of importance is the awarding of costs against trustees. On broad principle it is reasonable possible that another Court might conclude differently as to how I have decided. In the premises I am of the view that it is in the interest of justice that leave to appeal be granted to the seventh respondent, whose application for leave to appeal was lodged in compliance with the rules, without placing any restriction on the grounds it has been advised to challenge. The Court will, however, more readily grant leave to appeal where a matter of principle is involved — see *Divine Gates & Co v Press & Co* 1931 CPD 143; 1 1

[14] In the premises I make the following orders:
The Court will, however, more readily grant leave to appeal where a matter of principle is involved — see *Divine Gates & Co v Press & Co* 1931 CPD 143; *Lakofsky v 'Reilly* 1933 WLD 126; cf *Langverwacht Farming Co v Sedgwick & Co* Ltd (2) 1942 CPD 155 at 168; and see also *Kruger Bros & Wasserman v Ruskin* (supra) at 69).

(1). That leave to appeal to the Supreme Court of Appeal against the whole of my judgment handed down on 29 April 2008 is granted to the applicant, in particular the seventh respondent Nedbank Limited in the main application.
(2) That the applications for leave to appeal to the Supreme Court of Appeal against the whole of my judgment handed down on 29 April 2008 by the fifth respondent and the sixth respondent in the main application is tuned down.
(3) That the costs of this application shall be costs in the appeal

N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

HEARD ON: 23 MAY 2008
DATE OF J U D G M E N T : 6 JUNE 2008.

APPLICANT(SEVENTH RESPONDENT)' ATT: MR SJ OOSTHUIZEN

APPLICANT(SEVENTH RESPONDENT)' ADV: MR JG WASSERMAN SC

FIRST APPLICANT (FIFTH RESPONDENT)' ATT: MR S.A TINTINGER

FIRST APPLICANT (FIFTH RESPONDENT)' ADV: MR M VAN DER MERWE

SECOND APPLICANT (SIXTH RESPONDENT)' ATT: MR S.A TINTINGER

SECOND APPLICANT (SIXTH RESPONDENT)' ADV: MR S NAUDE With : MS S HASSIM

FIRST AND SECOND RESPONDENTS' ATT: MR KOBUS BOSHOFF

FIRST AND SECOND RESPONDENTS' ADV : MR D A BREGMAN SC