

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: A7/2025

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 29 April 2025

E van der Schyff

In the matter between:

TIYANI STANLEY MACHEKE

Appellant

and

MPHO RACHEL POOE

Respondent

JUDGMENT

Van der Schyff J (Bam J *et* Moshwana J concurring)

Introduction

- [1] This is an appeal against the order and judgment handed down in case number 72144/2018 by Mudau J, on 8 November 2023. Leave to appeal was granted by the Supreme Court of Appeal on 27 June 2024. The notice of appeal is dated and was served on the respondent on 26 August 2024. The appellant's heads of argument were filed on 28 March 2025.
- [2] The respondent raised several points in *limine* in her heads of argument:
- i. The respondent contends non-compliance with Rules 10 and 12 of the Supreme Court of Appeal Rules;
 - ii. Uniform Rule 49(2) requires that where leave to appeal is granted to a Full Court of a Division of the High Court, the notice of appeal must be delivered within 20 days from the granting of leave to appeal. The notice of appeal was filed only on 26 August 2024, and it was not accompanied by a condonation application seeking the reinstatement of the appeal. The respondent contends that the appeal has subsequently lapsed;
 - iii. Uniform Rule 49(13) requires an appellant to furnish security for the respondent's costs unless such costs are waived by the respondent.
- [3] The three points *in limine* are of a technical nature. It relates to procedural issues and not to the merits of the appeal. The first point *in limine* is to be dismissed out of hand. This appeal was heard by a Full Court of the High Court, Gauteng Division. The Rules of the Supreme Court of Appeal do not apply.
- [4] The second point *in limine*, raised by the respondent, is that the appeal has lapsed. This point was raised in the heads of argument filed, but not restated as a point for consideration in the joint practice note filed, a practice note that was only signed by the respondent's attorney of record. Counsel for the respondent submitted, however, that the respondent did not abandon its reliance on this point *in limine*. Since no extension -, condonation -, or reinstatement application was filed, the question of whether the appeal was timeously prosecuted remains alive.
- [5] Uniform Rule 49(2) provides as follows:

'If leave to appeal to the full court is granted the notice of appeal shall be delivered to all the parties within twenty days after the date upon which leave was granted or within such longer period as may upon good cause shown to be permitted.'

- [6] The relevant timeline indicates that leave to appeal to the Full Court was granted by the Supreme Court of Appeal on 27 June 2024. The notice of appeal thus had to be filed on or before 25 July 2024. The notice of appeal is dated 26 August 2024 and was served on the respondents on the same day. No application was brought for the extension of time.
- [7] The respondent's counsel submitted that the issue of the timely filing of the notice of appeal was discussed between him and his co-counsel. He said that based on a date stamp on the order granted by the Supreme Court of Appeal, they believed that the notice of appeal was filed in time. Since the date stamp on the order is illegible on the order filed on the Caseline file, I requested counsel to email a clear copy to this court's registrar. This was not done, nor was a clearer copy of the document uploaded to the electronic case file. Despite the court's inquiry into this aspect, no application for postponement to allow for the filing of a condonation application was forthcoming.
- [8] Be that as it may, the order of the Supreme Court of Appeal granting leave to appeal to this court is dated 27 June 2024. The correspondence addressed to the appellant's attorneys by the registrar of the Supreme Court of Appeal, to which the order was attached, dated 8 July 2024, likewise, confirms that the order was granted on 27 June 2024. It is also stated in the notice of appeal that leave to appeal to the Full Court of this Division was granted on 27 June 2024. No confusion could reasonably have existed as to the date on which leave to appeal was granted.
- [9] In the absence of an application for the extension of time or a subsequent condonation or reinstatement application, the court is not in a position to determine whether good cause existed that would justify the extension of the time for delivering the notice of appeal. In the absence of an application for the extension of time or a

condonation application brought when the appellant became aware of the point *in limine* being raised, the appeal cannot be said to have been prosecuted as provided for in terms of the Uniform Rules of Court. At best for the appellant, it can be said that the appeal lapsed.

- [10] Rule 49(6) provides that a court may, on good cause shown, reinstate an appeal which has lapsed. Goosen JA explained in *Members of the Executive Council for Health, Eastern Cape Province v Y N obo E*,¹ that the touchstone for a reinstatement application is the interests of justice, which depends on the facts and circumstances of each case. He qualified that although the prospects of success on appeal are generally an important consideration in relation to the reinstatement of an appeal, it is not decisive. He continued:²

‘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, the prospects of success need not be considered.’

- [11] As said above, no reinstatement application was issued. A court cannot, on its own accord, grant an extension of time under rule 49(2) or reinstate an appeal that has lapsed in terms of rule 49(6). To do so would deprive a respondent of the opportunity to raise grounds opposing the extension of time or reinstatement of the appeal. The appeal thus stands to be struck off the roll with costs.
- [12] In light of the above, it is not necessary to determine the third point *in limine*.
- [13] A shortcoming in this appeal not raised by the respondent, is that no proper appeal record was filed. The appellant’s legal team seems to have been under the impression that, since all papers were previously filed on the Caseline’s file, preparing an appeal record as required in Rule 49 was unnecessary. To make matters worse, no appeal record index was filed.

¹ (056/2021) [2023] ZASCA 32 (30 March 2023) at para [7].

² *Member of the Executive Council for Health, Eastern Cape Province, supra*, at para [14].

- [14] When an appeal is not prosecuted timeously as provided for in the Uniform Rules of Court, the court has no jurisdiction to consider the matter on appeal. A lapsed appeal is deemed to have ended, and the court's jurisdiction to hear it ceases unless an application for reinstatement or condonation is granted. In the circumstances, it would not be appropriate for this court to consider the appeal on the merits. We pause to note, however, that we hold the view that there are no prospects of success on the merits. It is a well-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly misdirecting itself and was clearly wrong.³ On our reading of the transcribed record, there is no reason to substantiate a view that Mudau J, who was steeped in the atmosphere of the trial, and applied the applicable legal principles, was wrong.

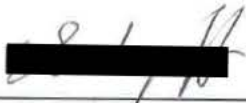
ORDER

In the result, the following order is granted:

1. The appeal is struck from the roll with costs.

I agree.

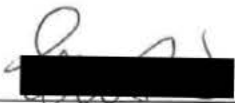
I agree



 E van der Schyff
 Judge of the High Court



 N Bam
 Judge of the High Court



³ *S v Pistorius* 2014 (2) SACR 315 (SCA) para [30], *R v Dhlumayo* 1948 (2) SA 677 (A).

N Moshwana
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 appellant:	Adv. D.D. Mosoma
With:	Adv. T.I. Ngwana
Instructed by:	Denga Incorporated

For the respondent:	Adv. Z. Rasekgala
Instructed by:	Mothemane Given Attorneys

Date of the hearing:	14 April 2025
Date of judgment:	29 April 2025