



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case no: A2024/052750

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

Date: 28 March 2025

In the matter between:

NAVASEN MOODLEY

Applicant

and

CRAZY PLASTICS (PTY) LTD

First Respondent

**BLACKTIP REEF SHARK
INVESTMENTS (PTY) LTD
t/a CRAZY PLASTICS LA LUCIA**

Second Respondent

JUDGMENT

DU PLESSIS J

Introduction

[1] This is an interlocutory application brought by the applicant, Mr Navasen Moodley, seeking a declarator that the respondents' appeal has lapsed in terms of Rule 49(6)(a) of the Uniform Rules of Court, alternatively, that the appeal be struck off the roll, together with a punitive costs order.

[2] The applicant obtained judgment in his favour on 5 January 2024. Dissatisfied with the outcome, the respondents applied for leave to appeal, which was dismissed on 6 February 2024. The respondents then petitioned the Supreme Court of Appeal (SCA) for leave to appeal, which was granted on 24 April 2024, with the appeal directed to be heard by a full bench of this Division, .

[3] According to Rule 49(2), the respondents had 20 days from 24 April 2024 to file their notice of appeal, which made 24 May 2024 the deadline. The respondents served their notice of appeal on 15 May 2024. The applicant contends that this notice was defective as it did not have an appeal case number, was not electronically stamped and was not correctly issued via the Court Online portal as required by the Revised Consolidated Practice Directive 1 of 2024.

[4] A case number was allocated on 16 May 2024, but the applicant persists that despite this, the appeal process is defective as it was not processed in terms of the Directives. It was not set down within 60 days as required by Rule 49(6)(a), and the respondents did not ask for condonation. This means that the appeal is deemed to have lapsed.

[5] The respondents, however, insisted that the appeal was properly noted. The respondents do not dispute that the notice of appeal, served on 15 May 2024, was not issued through Court Online and bore no case number or stamp. However, they assert that this was remedied when the Registrar allocated a case number on 16 May 2024,

and subsequent filings bore the correct details. They submit that the appeal was timeously noted within the 20 days, and that the omission of the stamp and case number on initial service was not fatal. They point to the founding affidavit where the applicant indicates that they were served with the application for a hearing date – they have thus taken steps to set the matter down.

[6] The applicant's case raises questions about procedural compliance and a single judge's appropriate role in appeal proceedings. The essence of the complaint is that the appeal notice was not properly issued in terms of the Practice Directive and that the appeal should, therefore, be regarded as a nullity or deemed to have lapsed. The court must determine whether these defects justify that conclusion. This requires a careful balance between the duty to enforce procedural rules and the obligation to ensure that technicalities do not unjustly impede the right of appeal. The key question is whether the non-compliance was so serious and incapable of cure that it renders the appeal fatally defective at this stage.

Law

[7] In *Genesis One Lighting (Pty) Ltd v Jamieson*¹ and *Nawa v Marakala*,² the courts recognised that a single judge may, in certain circumstances, declare an appeal to have lapsed, mainly where there has been a clear failure to file the appeal record or to apply for a hearing date. However, that principle must be applied with caution.

[8] Intervention by a single judge is warranted only where there is a clear and irreparable failure to prosecute the appeal. Ordinarily, questions regarding the lapsing of an appeal, particularly where issues of condonation or reinstatement may arise, are best determined by the full court seized with the appeal. The respondents have not applied for a set down in the present case, citing the pending interlocutory application. This has produced an unusual procedural posture: the appeal is not set down because its procedural validity is under challenge, yet part of that challenge suggests that the

¹ [2021] ZAGPJHC 862

² 2008 (5) SA 275 (BH).

matter is not properly set down. If the matter is not set down, then the appeal court is not seized with it, which is why it is before this court.

[9] Rule 49(6)(a)³ provides that an appellant must apply for a hearing date within 60 days of delivering a notice of appeal. If this is not done, and no application for set down is made by either party within 10 days thereafter, the appeal is deemed to have lapsed. This rule underscores the importance of timely prosecution of appeals. Non-compliance means that the appeal automatically lapses, and such a lapse does not require judicial intervention. This is because the appeal may be reinstated on application.

[10] Rule 49(6)(b) provides that the court "to which the appeal is made" may reinstate an appeal which has lapsed. This is at the discretion of the appeal court, which exercises its discretion judicially upon consideration of the facts. As was explained in *AYMAC CC v Widgerow*⁴ not every irregularity or delay is fatal. The defect must be such that it materially undermines the proper prosecution of the appeal of a gross disregard of the rules.

[11] Rule 49(7)(d)⁵, in contrast, deals with cases where a party has applied for a hearing date but fails to file the appeal record within 40 days. In such cases, the opposing party may apply to the court for an order declaring that the application for a hearing date has lapsed. Importantly, this is not automatic. Judicial intervention is required, and it typically falls within the jurisdiction of a single judge.

³ "49(6)(a) Within sixty days after delivery of a notice of appeal, an appellant shall make written application to the registrar of the division where the appeal is to be heard for a date for the hearing of such appeal and shall at the same time furnish him with his full residential address and the name and address of every other party to the appeal and if the appellant fails to do so a respondent may within ten days after the expiry of the said period of sixty days, as in the case of the appellant, apply for the set down of the appeal or crossappeal which he may have noted. If no such application is made by either party the appeal and crossappeal shall be deemed to have lapsed: Provided that a respondent shall have the right to apply for an order for his wasted costs."

⁴ 2009 (6) SA 433 (W).

⁵ "49(7)(d) If the party who applied for a date for the hearing of the appeal neglects or fails to file or deliver the said copies of the record within 40 days after the acceptance by the registrar of the application for a date of hearing in terms of subrule (7)(a) the other party may approach the court for an order that the application has lapsed."

[12] The distinction between Rule 49(6) and Rule 49(7) was clarified in *MDM v LBM*, (“*MDM*”)⁶ where the court held that a single judge could not dismiss an appeal already on the roll of the full court, as that would fall within the exclusive jurisdiction of the appeal court. In terms of Rule 49(6)(a), where no application for a hearing date is made within 60 days, the appeal lapses automatically by operation of the rule and any application for reinstatement must be brought before the appeal court. By contrast, Rule 49(7)(d) allows a single judge to declare that an application for a hearing date has lapsed where the appellant has failed to file the appeal record after requesting a hearing date. The court in *MDM* confirmed that this authority rests with a single judge and not with the full court. In the Rule 49(6) context, reinstatement can be sought from the full court, while Rule 49(7) contemplates a single-judge inquiry into the lapsing of the hearing date application, which includes the completeness of the records, as required by the Rules and set out in the Practice Directives.

[13] The Practice Directive requires that all new matters, including appeals be initiated and issued via the Court Online system. It further provides that the full appeal record, properly indexed and paginated, with the appellant's heads of argument and a practice note, must be issued before being served. Thereafter, the appellant must apply for a date of set down.

[14] While compliance with the Practice Directive is obligatory, and its purpose is to promote orderly and efficient progression of litigation, it is not statutory. It does not itself prescribe consequences equivalent to those set out in the Rule. As such, a failure to comply with the Practice Directive does not automatically render the proceedings a nullity, particularly where the procedural misstep can be or has been cured and no prejudice has been demonstrated.

[15] The question in this matter is whether the defect in the service of the notice rendered the appeal fatally defective. A single judge may only intervene where the lapse is plain, the defect is irremediable, and prejudice evident. That is not the case here.

⁶ [2023] ZAGPJHC 960 paras 16 and 17.

[16] The notice of appeal was served within the prescribed period, albeit without a case number. The case number was obtained the next day. The applicant was at all times aware of the respondents' intention to prosecute the appeal. The absence of a stamp and case number, later corrected, does not warrant a finding that the appeal has lapsed in the context of Rule 49(7). To do so would elevate form over substance and run contrary to the constitutional right of access to courts, which includes the right to appeal.

[17] I am thus not persuaded that the procedural defects were so grave as to justify nullifying the appeal process at this stage. If condonation is required in the context of Rule 46, it may yet be sought. That is for the full court to decide.

[18] This judgment does not imply that the non-compliance is condoned. Whether condonation is necessary or appropriate is a matter for the full court when the appeal is properly enrolled. Nothing in this judgment precludes the full court from making such directions as it deems fit.

Order

[19] The following order is made:

1. The application is dismissed with costs to be cost in the appeal.

WJ du Plessis

Judge of the High Court Gauteng Division,
Johannesburg

Date of hearing;	14 February 2025
Date of judgment:	28 March 2025
For the applicant:	DHP Weste instructed by Robert Sousa Attorney
For the respondent:	D Kela instructed by Mkhize attorneys