



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Reportable

CA NO: 72/2024

HC CASE NO: 4112/2023

In the matter between:

ZILWA ATTORNEYS INCORPORATED

1st Appellant

HYMIE ZILWA

2nd Appellant

THE SHERIFF: EAST LONDON

3rd Appellant

And

ROAD ACCIDENT FUND

Respondent

Neutral citation: *Zilwa Attorneys Incorporated V Road Accident Fund* (CA 72/2024).

Coram: NHLANGULELA AJP, MAJIKI J, NOBATANA AJ

Heard: 12 MAY 2025

Delivered: 28 AUGUST 2025

Summary: Appeal against orders suspending operation and execution of court orders, and granting stay of execution pending finalisation of an application for leave to appeal

– mootness – decision of merits in the interest of justice - appeal struck from the roll with costs in favour of the appellant.

ORDER

On appeal from: the judgment of Rugunanan J sitting as a court of first instance.

1. The appeal is struck from the roll with costs in favour of the appellant. Such costs include the costs of two counsel.
2. The order of the court a quo is set aside and replaced by the following order:
 - 2.1 The main application is dismissed with costs. Such costs include the costs of two counsel.
3. All the costs shall be paid in terms of scale B of Uniform Rule 67A.

FULL COURT JUDGMENT

Nhlangulela AJP (Majiki J and Nobatana AJ concurring)

Introduction:

[1] The issue for decision in this appeal is crisp. It is whether a belated application for leave to appeal a High Court decision may be regarded as lapsed, with the consequence that the judgment against which leave to appeal is sought is excluded from the operative effect of section 18 (1) of the Superior Courts Act 10 of 2013(the Act).

[2] The appeal arises from the following factual circumstances.

[3] The first appellant (appellant) is a law firm. It operates its business under the sole directorship of the second appellant. It legally represented several persons who

had claimed compensation against the respondent (RAF) for personal injuries arising from motor vehicle accident(s) as is contemplated under the provisions of s 17 of the Road Accident Fund Act¹. The claims were registered in this Court under the following case numbers: 1985/2019; 3790/2020; 4293/2018; 2575/2018; 2186/2021; 3638/2020; 1352/2022; and 2424/2020. The claimants having been successful, the Court made awards of damages and litigation costs against the RAF. However, the RAF failed to pay the taxed costs that were due and payable to the appellant. As a result, the appellant caused and pursued the execution of the judgments against the RAF.

[4] In 2023 the RAF brought an application for a stay of execution of the judgments, which Mjali J dismissed on 6 November 2023. The court also granted a counter-application brought by the appellant to declare as unlawful certain administrative directives of the RAF, contained in Board Notice 271 of 2022, that were raised to frustrate the execution of the writs. On 8 December 2023, the RAF brought a belated application² for leave to appeal the judgment and orders made by Mjali J. That application was later followed by another in which the RAF sought an order of condonation for its failure to bring the application for leave timeously.

In the court *a quo*:

[5] Confronted by persistent efforts on the part of the appellant to execute the writs, in February 2024, the RAF brought an urgent application for an interdict seeking, in the main, a suspension of the operation and execution of the orders made by Mjali J on 6 November 2023. When the application served before Rugunanan J, the issue of lapsing was answered in the negative, with the result that an order was made in favour of the RAF in the following terms:

¹ s 17 (1) of the Road Accident Fund Act No.56 of 1996 reads: 'The Fund or an agent shall- ... be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person caused by or arising from the driving of a motor vehicle by any person at any place within the Republic,...'

² In terms of Rule 49 (1) (b) of the uniform rules of practice in the High Courts, an application for leave to appeal a judgment/order shall be brought within 15 days after the date of the order appealed against, 'Provided that the court may, upon good cause shown, extend the aforementioned period of 15 days'.

- “1. The applicant’s non-compliance with the rules of court relating to the service and periods for the institution and hearing of applications is condoned.
2. Pending the finalisation of the application for leave to appeal and subsequent appeal against the order of the Honourable Madam Justice Mjali given on 06 November 2023, the respondents are interdicted and restrained from executing the court orders granted against the applicant in the following case numbers: 1985/2019; 3790/2020; 4293/2018; 2575/2018; 2186/2021; 3638/2020; 1352/2022; and 2424/2020.
3. The operation and execution of the orders in each of the abovementioned case numbers is suspended.
4. The first respondent shall pay the costs of the application.”

[6] The present appeal turns on the order made by Rugunanan J.

In this Court:

Mootness:

[7] We were advised that the substantive relief sought by the appellant has been resolved administratively and, therefore, the application has become moot³, such that any substantive relief that may be granted by this Court will have no practical effect or produce practical results as is envisaged in s 16 (2)(a)(i) of the Superior Courts Act⁴. To that end, an application was brought on behalf of the RAF seeking the dismissal of the appeal with costs. Counsel for the appellant objected to that application on the basis, firstly, that neither the papers were served upon the appellant nor was the matter properly set down for hearing. Secondly, counsel submitted that although the appeal was moot, it still behoved the Court to decide the merits of the appeal in the interest of

³ *MEC for Education: Kwazulu-Natal and Others v Pillay* [2007] ZACC 21; 2007 (3) BCLR 287 (CC); 2007 (2) SA 106 (CC); (2007) 28 ILJ 133 (CC).

⁴ The provisions of s 16 (2)(a) (i) of the Superior Court Act 10 of 2013 read: ‘When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.’

justice. Having upheld the objection, and made an order striking the application from the roll, this Court, in the exercise of its discretion, decided to entertain the merits of the appeal because the issue on which the urgent application was decided raised a discrete legal issue of public importance. The Constitutional Court in the case of *Center For Child Law v Hoërskool Fochville & Another*⁵ stated as follows, at para.32:

‘This Court has, however, held that it may be in the interests of justice to hear a matter even if it is moot if ‘any order which [it] may make will have some practical effect either on the parties or others’

The law:

[8] In this appeal, the decision of the main issue implicates the provisions of s 18 (1) of the Act; and Rules 49 (1)(b) and 45A of the Uniform Rules of the High Courts. The provisions of these instruments read as follows:

Section 18 (1) of the Act:

‘Subject to subsection (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject matter of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.’

Rule 49 (1)(b) reads:

‘When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave will be made and grounds therefore shall be finished within 15 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

⁵ *Center For Child Law v Hoërskool Fochville & Another* [2015] ZASCA 155; 2016 (2) SA121; [2015] 4 All SA 571 (SCA), para 11.

made within 15 days after such later date: Provided further that the court may upon good cause shown extend the aforementioned period of 15 days.'

And Rule 45A reads:

'The court may, on application, suspend the operation and execution of any order for such period as it may deem fit: Provided that in the case of appeal, such suspension is in compliance with section 18 of the Act.'

[9] A cursory look at the legal provisions quoted in the preceding paragraph reveal that, for the RAF to succeed in its application in the court *a quo*, it had to show that the suspension of the operation and execution of the decisions by Mjali J was a subject of an application for leave to appeal brought in terms of Rule 49 (1) (b). Insofar as the power of the court *a quo* to suspend the operation and execution of a decision of a court derived from the provisions of Rule 45A, it was enjoined to suspend decisions that were the subject of an application in terms of Rule 49 (1) (b). The parties took differing positions regarding the interpretation of these instruments. In my opinion, the proper approach to be applied in the exercise of interpreting these instruments must be found in *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)*⁶, where it was held that in interpreting statutory instruments, including documents, the inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the instrument and the context of their creation.

[10] The submissions made on behalf of the appellant are threefold, which may be truncated in the following terms:

- (a) The application for leave to appeal was not brought strictly within 15 days as provided in Rule 49 (1)(b). For that reason, the RAF had no right to bring an application for leave to appeal as it did. Further, an application for condonation is not legally permissible as the precursor to it was the lapse

⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para.18; **Cool Ideas** 1186 CC v *Hubbard & Another* 2014 (4) SA 474 (CC).

of the right to apply for leave to appeal. Consequently, the late filing of an application for leave to appeal without having been permitted by an order of court to do so would not have the consequence of suspending the operation and execution of the judgment and orders issued by Mjali J.

- (b) The court *a quo* is bound by the decisions of the SCA, in *Cairns'Executors v Gaam*⁷ (*Gaam*); and *Federated Employers Fire and General Insurance Co Ltd and Another v Mackenzie*⁸ (*Mackenzie*), that the time limits of 15 days stipulated in Rule 49 (1)(b) constitute the safeguard for the interest of the judgment creditor, such as the Respondent, to execute the judgments legitimately obtained against a non-compliant and inactive judgment debtor.
- (c) Since the principle of *stare decisis*⁹ finds application to lower courts to follow settled law on the interpretation of s 18 of Act 10 of 2013 as stated by the Supreme Court of Appeal, it was not open to the court *a quo* to make the finding that a non-compliant application for leave to appeal suspended the judgment and order granted on 6 November 2023.

[11] Counsel for the Appellant referred to the cases of the *President of the Republic of South Africa v Modderklip Boedery*¹⁰ (*Modderklip*), *Myeni v Organization Undoing Tax Abuse and Another*¹¹ (*Myeni*) and *Panayiotou v Shoprite Checkers (Pty) Ltd & Others*(*Panayiotou*)¹², contending that since Rule 49 (1) (b) provides that an application for leave must be brought within a period of 15 days, the RAF had no right to bring the application and the application for condonation brought by it did not have the effect of

⁷ *Cairns'Executors v Gaam* 1912 AD 18.

⁸ *Federated Employers Fire and General Insurance Co Ltd and Another v Mackenzie*.

⁹In *Ex Parte Minister of Safety and Security and Others: In RE: S v Walters and Another* [2002], ZCC 6; 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC) at para. 57 the words *stare decisis* was said to be: '... an abbreviation of a Latin maxim, *stare decisis et non quieta movere*, which means that one stands by decisions and does not disturb settled points'.

¹⁰*Republic of South Africa v Modderklip Boedery* (Pty) Ltd 2004 (6) SA 40 (SCA).

¹¹*Myeni v Organization Undoing Tax Abuse and Another* (15996/2017) [2021] ZAGPPH 56 [15 February 2021]

¹² *Panayiotou v Shoprite Checkers (Pty) Ltd & Others*, [2015] ZAGPJHC 292;2016 (3) SA110 (GJ)C/N248/2016 (SCA) dd 17 December 2015.

reviving the application for leave. After discussing the cases of *Modderklip* and *Panayiotou* the court in *Myeni* made the following statement of law in para 18:

‘As such, an important question would then be what effect would the lodging of the petition after the right to appeal has lapsed then have on the principal judgements order full having regard to the case law, in light of the belated petition now filed by the appellant, the principal judgments order continues to remain operational for the mere fact that the service of an application to condone the late filing of the petition to the SCA does not suspend the operation and execution of any order. To conclude otherwise would give rise to an untenable situation in law, where, after an order has been operational for a number of months, a party could simply bring a condonation application which would result in such an order suddenly being suspended. Such a situation would clearly give rise to far-reaching consequences that this court cannot condone.’

[12] The Appellate Division (as it was then) in *Modderklip*, at 63, para 46, had the following to say about an application for leave to appeal that was brought outside the prescribed period of 15 days:

‘The second was based on Uniform rule 49 (11) [the equivalent of Rule 49 (1) (b) under consideration] which provides that, where an appeal has been noted on or an application for leave to appeal made, the operation and execution of the order is suspended. In this case, as will appear soon in more detail, the ‘Modder East Squatters’ lodged their application for leave to appeal together with an application for condonation some 18 months after the order had issued. The right to apply for leave to appeal, by then, had lapsed. Rule 49 (11) presupposes a valid application for leave to appeal to effect the suspension of an order. In this case, there was none.’

[13] The decided cases show that there will always be a good reason for giving a strict interpretation to Rule 49 (1) (b). In *Cairns'Executors v Gaam*¹³ the following was said at 193:

‘After all, the object of the rule is to put an end to litigation and to let parties know where they stand. It would be intolerable if there were no reasonable limits of time within which appeals might be brought, and it is to the interests of the public that the time should be limited. When a party has obtained judgment in his favour and the time allowed by law for appealing has lapsed, he is in a very strong position, then he should not be disturbed except under very exceptional circumstances.’

[14] Significantly, the case of *Modderklip* had already been decided when the court *a quo* issued judgment in this matter. For that reason, not only did it err in making the finding that a non-compliant application for leave to appeal suspended the judgment and order granted on 6 November 2023, it also acted in breach of its obligation to follow settled law in *Modderklip*.

[15] The principal submission advanced on behalf of the RAF is that there is no legal authority for the appellant’s submission that a belated application for leave does not have an operational effect of suspending an order as envisaged in s 18 of the Act. It was submitted on behalf of the RAF that the appeal falls to be dismissed with costs for the reason that there is inscribed in Rule 49 (1) (b) a right for a party to apply for condonation of the late application for leave to appeal. Therefore, a court hearing the application for leave to appeal has the power to condone the late delivery of the notice under subrule 49 (1) (b). These submissions are not in sync with the correct legal principles as set out in *Myeni*.

¹³ *Cairns'Executors v Gaam* 1912 AD 18. See also: *Federated Employers Fire and General Insurance Co Ltd and Another v Mackenzie* 1969 three SA-360-A at para 363A.

[16] It was contended further that since Rule 45A¹⁴ authorises the courts to decide whether, or not, to suspend the operation and execution of orders, it cannot be said that a belated application for leave to appeal does not have an operational effect of suspending the orders issued by Mjali J. Counsel for the RAF put the provisions of Rule 45A on the flip-side of the reliance on Rule 49 (1) (b), arguing strenuously that the RAF would have succeeded even without the aid of Rule 49. These submissions undermine the meaning of Rule 45A, which is that its utility depends on compliance with the provisions of s 18 (1).

[17] It was argued further that the express mention in uniform rule 49 (6)¹⁵ and Rule 8 (3)¹⁶ of the rules of the Supreme Court of Appeal that an a failure to prosecute an appeal within 60 days and to file an appeal record within prescribed time, respectively, resulting in deemed lapsing of the appeals, is the basis for the interpretation that the intention of the Legislature in Rule 49 (1) (b) is not to regard applications for leave brought outside the period of 15 days as having lapsed.

[18] The case of *Modderklip* is the binding authority for the proposition that an application for leave to appeal brought outside the prescribed period of 15 days is invalid. The RAF's argument that the existing application for condonation revives an invalid application for leave was given a short shrift in the case of *Myeni*¹⁷, where the court, with reference to *Panayiotou*, held to the effect that where an application for leave to appeal is filed out of time, and all that is before the court is an application for condonation whose fate is unknown, the result of such failure is that the appeal lapses. The judgments in cases of *Panayiotou* and *Myeni* emanate from the Gauteng Division of the High Court. They state good law on the interpretation of the provisions of Rule 49

¹⁴ Rule 45A read as follows: 'The court may, on application, suspend the operation and execution of any order for such period as it may deem fit: Provided that in the case of an appeal, such suspension is in compliance with section 18 of the Act.'

¹⁵Uniform Rule 49(6) provides that if the parties fail to apply for a date of set down for a hearing of their appeal and /cross-appeal within a prescribed time, the appeal and cross-appeal are deemed to have lapsed, but the court to which the appeal is made may reinstate the appeal/cross appeal on good cause shown.

¹⁶Rule 8(3) of the SCA rules provide: 'If the apparent fails to lodge the record within the prescribed, or within the extended period, the appeal shall lapse

¹⁷ Ibid at para. 25.

(1) (b) and are, in my opinion, persuasive authority to this Court. That said, the existence of the application for condonation cannot be said to have revived the application for leave from the effect of invalidity.

[19] The provisions of Rule 45A confer discretion to a court to suspend the operation and execution of an order if the suspension is of the kind contemplated under s 18 of the Act. Since the operation and execution of a decision under s18 must be the subject matter of an application for leave to appeal, the provisions of Rule 45A can only be construed in the context of applications for leave in terms of Rule 49 (1) (b).

[20] The law as stated in *Panayiotou*, confirmed in *Myeni*, is clearly that an application for leave that does not comply with the time frame of 15 days as prescribed in Rule 49 (1) (b) lapses, with the result that an application for extension of time not made, or brought but not granted, by a court cannot revive the application for leave. In the context of proper management of appeals, the case of *Panyiotou* demonstrates that appeal matters that do not comply with Rule 49 (6) and Rule 8 (3) of the SCA rules are treated in the same manner. Inevitably, it is the language used, context and jurisprudence evolved around Rule 49 (1) (b) and Rule 49 (6) and Rule 8 (3) that warrant applying the same interpretation to these instruments. As shown in the cases of *Gaam and McKenzie*, a decision taken by the court to suspend its decision must always take into account the interests of the litigant who received the judgment in the proceedings now sought to be interfered with.

Conclusion:

[21] The interpretation of s 18 (1) of the Act, read with Rules 49 (1) (b) reveal that a precondition for suspension of operation and execution of a judgment or order is the existence of an application for leave to appeal that was brought within 15 days after judgment; or within such extended time thereafter that would have been authorised by the court as envisaged in Rule 49 (1) (b). Having found that the application for leave does not comply with Rule 49, coupled with the non-existent order of a court extending

15 days, the operation and execution of the orders by Mjali J was not the subject of an application for leave to appeal, or an appeal, as contemplated by the legislature in s 18 (1). Therefore, the belated application for leave to appeal a High Court lapsed, with the consequence that the judgment against which leave to appeal is sought is excluded from the operative effect of section 18 (1).

Costs

[22] The appellant has achieved substantial success in this appeal. Therefore, it is entitled to costs. The costs incurred in the court *a quo* must follow the result that the main issue for decision favours the appellant:

Order

[23] In the result, the following order shall issue:

1. The appeal is struck from the roll with costs to be paid by the RAF. Such costs to include costs of two Counsel.
2. The orders made in the court *a quo* are set aside, and are replaced by the following order:
 - 2.1 The urgent application is dismissed with costs.
3. The costs incurred in this Court and court *a quo* shall be paid on scale B referred to in Uniform Rule 67A.

Z. M. NHLANGULELA
ACTING JUDGE PRESIDENT OF THE HIGH COURT

I concur:

B. MAJIKI
JUDGE OF THE HIGH COURT

I concur:

M NOBATANA
ACTING JUDGE OF THE HIGH COURT

Appearing for the respondents:

Instructed by:

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