

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

**Case No: A293/24
(Appeal)**

**Case No: 2679/19
(Magistrates' Court)**

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

In the matter between:

MARIA E VAN NIEKERK
(t/a Hansie en Grietjie Kleuterskool en Naskool)

Appellant

and

SEARTEC TRADING (PTY) LTD

Respondent

JUDGEMENT

- 1 The present appeal concerns an appeal from the Magistrates' Court that was noted on 11 April 2024. The appellant sought condonation for the late noting of the appeal as the appeal should, in fact, have been noted by 25 October 2024.¹
- 2 On 9 April 2024² the respondent brought an application to have the appeal struck. In response, the appellant launched an application for condonation. The primary basis for striking the appeal is that the appellant did not note the appeal in the Magistrates' Court before seeking to prosecute the appeal in the High Court. The respondent raised, as a further ground for the striking off, that the appellant failed to prepare the appeal record as prescribed in the rules and practice directives.
- 3 The respondent's case for the striking-off was based on the following: the attorneys for the respondent wrote to the attorneys for the appellant on 28 October 2024, pointing out that the last day for service of the notice of appeal was 25 October 2024, which they had failed to do. The appellant was informed that the noting of the appeal was out of time and that "there is no appeal pending." The respondent also pointed out to the appellant that she was uploading various documents onto Caselines, and that "should your client proceed without addressing the requirements of the relevant Rule, your client does so at her own peril."

¹ Rule 51(3) read with Rule 2(1) of the rules in terms of the Magistrates' Court Act, 44 of 1944

² i.e two days before the appeal was noted

- 4 The appellant's attorneys replied on 29 October 2024. They wrote, among others, that "We request an indication whether you maintain you (sic) stance that the Appeal was not properly noted in time in order for us to proceed with an application for condonation, alternatively an order confirming that the Appeal was launched timeously." The attorneys further stated that "We require an answer now at this stage so that this issue can be addressed initially thereby alleviating any further and unnecessary costs in the appeal process."
- 5 The response to this letter is dated 31 October 2024. It concludes with the following remark: "Kindly take notice that your office has to date not served a Notice to Appeal and as such, there is no pending appeal."
- 6 The appellant's attorney (Mr Hamann) deposed to the affidavit in support of the condonation application. He submits that although the Notice of Appeal had been filed at the Magistrates Court outside of the prescribed times periods, this non-compliance had no practical effect and could not prejudice the respondent. That was because the respondent was provided with the notice of appeal on 24 October 2024. He also explains that the non-compliance with Rule 51 came about "...in relation to my confusion as to the new practice directives, and was I (sic) under the impression that I had to obtain an Appeal Case Number before serving the Notice of Appeal."
- 7 The high water mark in explaining the delay in seeking condonation is the following: "On my letter dated 29 October 2024 I received no clear indication that the Respondent will take issue with the technicalities, and as such I did not regard it as necessary to proceed with an application for

condonation immediately as I gathered the position that the Respondent did obtain knowledge of the Notice of Appeal on 24 October 2024 and as highlighted in my letter dated 29 October 2024.” He then states, “It was only on 9 April 2025 when the application to strike the appeal was launched that I realised that the Respondent persisted with the allegation that they did not receive notice of the appeal timeously.”

- 8 In so far as the record is concerned, Mr Hamann essentially averred that he acted on the advice of an appeal clerk at the High Court in preparing the record. He also contended that the respondent failed to assist in preparing the record for use in the appeal.
- 9 The respondent, in its answer to the condonation application, pointed out that the appellant had always been represented by an attorney and counsel and that it was reasonable to expect them to familiarise themselves with the rules and processes applicable to the noting and prosecution of an appeal. It was contended on behalf of the respondent that the appellant’s acceptance that she was notified that the noting of the appeal was out of time was fatal to the condonation application. That was because nothing was done to ensure that the appeal was properly noted, and that the request for condonation was a reactive measure to the striking-off application.
- 10 The respondent pointed out that the appellant, in her letter of 29 October 2024, expressly stated that she would lodge a formal application for condonation if the respondent persisted with the view that there was no pending appeal. The respondent communicated its persistence in the letter

of 31 October 2024. The application for condonation was only filed almost 6 months later “when the shoe started to pinch.” There is no true reason for this delay and the inordinate delay in the launching of the application for condonation is not explained by the appellant.

- 11 The respondent took issue with the appellant’s explanation for the state of the appeal record, and that the appellant did not prosecute the appeal in accordance with the Uniform Rules of Court. In its letter to the appellant dated 27 November 2024, the respondent pointing out in summary how the appeal record was to be made up. But its advice was not heeded. Instead, the appellant’s attorneys in their reply, stated that they acted on the advice of the registrar of appeals. The respondent took issue with this, pointing out that the registrar of appeals does not assist parties in ensuring the substance and compliance of a record of appeal.
- 12 The respondent’s letter to the appellant’s attorneys on 5 December 2024 further remarks on the shortcomings with the record and, once again on 13 December 2024, repeated the requirements for a compliant appeal record. The respondent pointed out in this correspondence that the respondent was prejudiced should the appellant persist in prosecuting the appeal on a defective record. The respondent mentioned that it would seek dismissal of the appeal, alternatively, an appropriate cost order. The appellant did not reply to the letter of 13 December 2024.
- 13 The respondent wrote yet another letter, on 7 January 2025, repeating its views on defects in the record of appeal. It suggested that non-compliant documents be removed from Caselines and that a properly prepared appeal

record be served and filed. The appellant was given the opportunity to make corrections by 14 January 2025. Unfortunately, the appellant did not take-up the invitation. Instead, she proceeded to randomly file irrelevant documents on Caselines. The respondent argues that the appeal record, remains defective.

- 14 The appellant did not file a reply to address issues raised by the respondent in its answering affidavit.
- 15 The appellant contended that she would be prejudiced if condonation is refused. The respondent denied that the issue of prejudice arises because the appellant was the maker of her own misfortune in that there was negligent disregard and carelessness by her legal representatives, who failed to establish the correct position and to apply the requisite provisions of the Rules of Court and of the Practice Manual. The respondent also contended that the failure to note the appeal, contrary to the stance by the appellant, was not a mere technicality.
- 16 The appellant contends in the condonation application that she "... has excellent merits in the appeal and does a (sic) strong prospect of success exist [...]."
- 17 The appeal arises in the following circumstances. The parties concluded two agreements: the first is a rental agreement in which the appellant had the use of a copier machine belonging to the respondent; the second agreement concerned the cost of copies from the use of the rental machine.

- 18 The appellant sold her business to Mr Phillip Bester during April 2016. The appellant never notified the respondent of the change of ownership. It was common cause that the respondent was unaware of the sale and continued dealing with the appellant as if the appellant was still running the business.
- 19 The respondent claimed that the appellant defaulted on her obligations under the two agreements. The respondent claimed R2,418.03 under the rental agreement and claimed R95,196.98 under the cost per copy agreement. The appellant denied liability. She raised several defences, and those pursued at trial were that (i) she sold the school to Mr Bester, who kept the copier machine identified in the agreements and continued to use the machine; (ii) that the invoices for the cost per copy agreement referenced a machine that was not contracted for in the original agreement she had signed; and (iii) she was liable only for equipment contracted for by the parties.
- 20 The Magistrate found the appellant liable both for the rental and for the cost per copy claims. The appellant was ordered to pay costs. That is the order that is the subject of the current proceedings.
- 21 It was submitted on behalf of the appellant, in relation to the prospects of success, that the record spoke for itself. It was also submitted that the appellant had not breached the agreement because the respondent failed to prove that the invoiced amounts were in respect of the machine reflected in the actual agreements. Counsel for the appellant submitted that an affidavit on behalf of the respondent, in rescission proceedings between the parties, recorded that the machine on the premises was not the machine specified

in the agreement, with the result that the respondent failed to establish that the appellant had breached the agreement.

- 22 It was submitted for the respondent that the import of clause 3.2 of the agreement on the cost of copies was that it was sufficient for the respondent to show that the appellant was in possession of a machine and had the use of the machine, which then rendered the appellant liable to the respondent. Counsel for the appellant did not address the import of clause 3.2 of the agreement in his reply.

Analysis

- 23 A request for condonation is considered as follows:

This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.³

³ Van Wyk v Unitas Hospital and Another 2008 (2) SA 472 (CC), para 20

- 24 The appellant has not, in my view, made a case for the Court to condone the late noting of the appeal. The appellant also failed to put a proper appeal record before this court.
- 25 Similarly, Mr Hamann's explanations for the late noting of the appeal cannot be upheld: first, he says the respondent was not clear whether it persisted in saying no appeal had been noted; second, he says that he laboured under the misapprehension that he first had to obtain an appeal case number from the High Court before noting the appeal.
- 26 But the appellant attorney was told on 31 October 2024 that the respondent maintained its view that the appellant had not noted an appeal. Yet, the appellant waited until the eve of the hearing before seeking condonation for her late noting of the appeal.
- 27 The explanation that the appellant's attorney was "confused" as to the appeal procedure is equally unsound. The appellant's attorney did not point to a provision in a practice directive that a litigant must first obtain an appeal case number from the High Court before noting an appeal in the Magistrates' Court. There is also no indication that Mr Hamann was unfamiliar with Magistrate's Court Rule 2(1) and 51(3), and thus there is no proper explanation for his failure to comply with (at least) these rules.
- 28 The appellant's attorneys, in any event, already had an appeal case number when they wrote their letter of 29 October 2025. The appellant should, on this view, have noted an appeal because the appellant had obtained an appeal case number by 24 October 2024. Even were this mistaken view to

have been accepted, by then the date for noting an appeal had lapsed. I find that the stated confusion and the need for the prior obtaining of an appeal case number is a rationalization after the fact. The explanation is unreasonable.⁴

29 The appellant's attorneys struck the Court as having taken a view that rules governing the noting of an appeal were a mere formality. This is illustrated by the remark that the filing in the Magistrates' Court, although prescribed, had no practical effect in relation to the respondent. But the noting of an appeal in the Magistrates' Court is not a mere formality - it is a jurisdictional requirement for prosecuting an appeal before the High Court. This stance is all the more puzzling and problematic because the appellant was represented by attorneys and counsel throughout all the proceedings. It is incumbent upon all legal practitioners to properly acquaint themselves with the rules of court, regardless of the particular court.

30 But as has been stated supra, the delay in seeking condonation is inexcusable. 'An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable.'⁵ There is no credible justification for the appellant have waited for six months – and this after having been warned on more than one occasion that the appeal had lapsed – to bring the application for condonation.

⁴ van Wyk, para 22

⁵ van Wyk, para 22

- 31 The appellant says she “...has excellent merits in the appeal and does a (sic) strong prospect of success exist.” The existence of prospects of success is an important factor in favour of granting condonation.⁶ A litigant may not simply assert that he has excellent merits. A court needs to examine the bases for the assertion. An applicant is required to make out a case in the founding affidavit, detailing the bases for why the applicant says he has “excellent merits in the appeal.” In this appeal, the averment on the merits and prospects of success is an unsubstantiated declaration.
- 32 I consider this application an instance where there is no need for the Court to consider the prospects of success. This is because of the inordinate delay in seeking condonation, together with the absence of a sound explanation for the delay.⁷ Even if the merits were considered, the appellant had no answer to the case made for the respondent regarding the import of clause 3.2 of the agreement underpinning the respondent’s claim.
- 33 The overriding consideration in an application for condonation is the interests of justice.⁸ The appellant cannot escape the consequences of the neglect by her attorneys.⁹ The attorneys were aware of the need to seek condonation by 31 October 2024. They only sought condonation on 11 April 2025. The attorneys were, in addition, repeatedly informed of defects in the appeal record. The record remained defective when the matter came

⁶ *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC), para 3

⁷ *Grootboom v National Prosecuting Authority and Another* (2014) 35 ILJ 121 (CC), para 51

⁸ *Grootboom*, para 22

⁹ *Saloojee and Another, NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141C - E

before Court on 5 August 2025. Compliance with the rules of court is fundamental to the proper administration of justice. The courts have repeatedly cautioned of the need for such compliance.¹⁰

34 I make the following order:

- (1) Condonation is refused.
- (2) The appeal is struck from the roll.
- (3) The appellant is ordered to pay costs, being costs in the striking off application, condonation application, and the costs of proceedings on 6 May 2025.
- (4) The appellant is further ordered to pay costs of counsel, on Scale B.


MOOKI J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree:


NEUKIRCHER J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

¹⁰ Van Wyk, para 33; Ethekewini Municipality v Ingonyama Trust 2014(3) SA 240 (CC), para 26 - 27

Appearance:

On behalf of the Appellant:

E J van Rensburg

Instructed by:

Hamann & Botha Attorneys

On behalf of the Respondent:

D Hewitt

Instructed by:

Wiese and Wiese Attorneys

Date of Hearing:

5 August 2025

Date of Judgement:

15 August 2025