



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 1316/23

In the matter between

PHILLIP TSHEPISO MOTSIMA

FIRST APPELLANT

THANDIWE PATIENCE MOTSIMA

SECOND APPELLANT

and

LIPHAPANG ALBERT KOPA

FIRST RESPONDENT

NTHABISENG MOSOEU-KOPA

SECOND RESPONDENT

**THE TRUSTEES FOR THE TIME BEING
FOR THE C&D INVESTMENT TRUST**

THIRD RESPONDENT

**THE REGISTRAR OF DEEDS,
FREE STATE PROVINCE**

FOURTH RESPONDENT

**THE TRUSTEES FOR THE TIME BEING OF
THE VAN DER MERWE FAMILY TRUST**

FIFTH RESPONDENT

Neutral citation: *Motsima and Another v Kopa and Others* (Case no: 1316/23)

[2025] ZASCA 144 (7 October 2025)

Coram: SCHIPPERS, KATHREE-SETILOANE, SMITH and
KEIGHTLEY JJA and MODIBA AJA

Heard: 18 August 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 7 October 2025.

Summary: Application for condonation – failure to prosecute appeal – reinstatement of lapsed appeal – inordinate delay – long periods of delay unexplained – litigants entitled to finality – no prospects of success – not in interests of justice to grant condonation.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Musi JP, Mbhele DJP and Van Rhyn J, sitting as court of appeal):

The appeal is dismissed with costs.

JUDGMENT

Schippers JA (Kathree-Setiloane, Smith and Keightley JJA concurring)

[1] In 2017 the appellants sold their property in Woodland Hills Wildlife Estate, Bloemfontein (the property) to the third respondent, C&D Investment Trust (the C&D Trust) for R1 575 000. In 2018 the C&D Trust sold the property to the first and second respondents, Mr Liphapang Albert Kopa and Ms Nthabiseng Mosoeu-Kopa (the Kopas) for R1 830 000. In 2019 the appellants instituted an action in the Free State Division of the High Court (the High Court) against, among others, the C&D Trust and the Kopas for an order declaring both these sales unlawful, against public policy and void, on the ground that they were simulated transactions (the action).

[2] The High Court dismissed the appellants' claim and granted them leave to appeal to a full court. However, they failed to prosecute the appeal as a result of which it lapsed. They applied to the Full Court for condonation of their failure to prosecute the appeal and for its reinstatement. The Full Court dismissed that application. The issue in this appeal, which is with the leave of this Court, is whether the Full Court was correct.

The facts

[3] The basic facts can be briefly stated. In 2010 the appellants acquired the property as vacant land and utilising a mortgage bond from a bank, built a house on it. Subsequently, the first appellant's contract of employment was terminated and the appellants could not meet their financial obligations. To avoid a foreclosure on the property by the bank, the appellants concluded a deed of sale and lease agreement with the C&D Trust. In terms of the deed of sale (the C&D agreement), they sold the property to the C&D Trust for R 1 575 000, the amount then required to settle their debts. The lease agreement commenced on 28 July 2017 and provided for the rental of the property from the C&D Trust for 12 months at R20 475 per month. In that agreement the appellants were given an option to purchase the property for the sum of R1 830 000 from the C&D Trust, which had to be exercised during the tenure of the lease.

[4] Before expiry of the lease with the C&D Trust, the appellants realised that they would not be able to exercise the option to purchase the property. In July 2018 they approached the Kopas and concluded an oral agreement with them. The terms of that agreement were these. The Kopas would pay the outstanding rent owed by the appellants to the C&D Trust. The Kopas would buy the property from the C&D Trust; hold it on behalf of the appellants who would rent it, with the option to buy it back at the same price that the Kopas paid to the C&D Trust, plus the interest and expenses incurred by the Kopas. There was no agreement as to when the appellants would buy back the property from, or the rental payable to, the Kopas.

[5] Following the oral agreement, the appellants gave the C&D Trust written approval to sell the property to the Kopas. The Kopas and the C&D Trust concluded a deed of sale in respect of the property (the Kopas agreement) at a purchase price of R1 830 000, in settlement of the appellants' indebtedness to the

C&D Trust. After taking transfer of the property, the Kopas sent a lease agreement to the appellants at a rental of R20 000 per month. The appellants refused to sign the agreement; they contended that it was not in accordance with the oral agreement between the parties. Subsequently, their attorneys wrote to the Kopas' attorneys and asked the Kopas to indicate when the loan and interest should be repaid and to confirm that the Kopas would not sell the property.

[6] In their reply, the Kopas stated that the parties had agreed that they would buy the property from the C&D Trust and put it on the market to enable the appellants to obtain funds; and insisted that there must be a signed lease. The parties could not reach agreement. Subsequently, the Kopas sold the property to the VDM Trust for R2.5 million (the VDM agreement).

[7] On 16 May 2019 the appellants instituted the action in which they sought an order declaring that both the C&D and Kopas agreements are unlawful and void, because neither the C&D Trust nor the Kopas had any intention of becoming owners of the property. The appellants also sought an order that they be directed to repay the Kopas the sum of R1 830 000, together with all amounts which the Kopas had expended in the registration of the property into their names. In the event of them failing to pay these amounts, the appellants asked for an order that the value of the property be determined by a professional valuer and that the Kopas be ordered to pay the difference between that value and the sum of R1 830 000, and the costs of registration of the property incurred by the Kopas.

[8] The respondents defended the action and filed conditional counterclaims. The Kopas denied that the C&D Trust and Kopas agreements were simulated transactions. In their conditional counterclaim, filed in the event of the court finding that the agreement was void, the Kopas sought payment of the purchase price of R1 830 000, transfer costs, levies and all amounts paid to the C&D Trust

on behalf of the appellants. The VDM Trust, in its conditional counterclaim, sought repayment of the estate agent's fees and transfer costs. By agreement, the action proceedings and those relating to the conditional counterclaims were separated.

[9] While the action was pending, the appellants discovered that the property had been sold in terms of the VDM agreement. On 4 July 2019 they obtained an urgent interim order from the High Court, interdicting the transfer of the property from the Kopas to the VDM Trust, pending the finalisation of the action.

[10] On 8 February 2021 the High Court dismissed the action with costs. Consequently, the interdict lapsed. On 15 July 2021 the appellants were granted leave to appeal to the Full Court. In the interim, on 7 May 2021 the property was transferred to the VDM Trust.

[11] On 16 July 2021 the appellants applied to the High Court for an urgent interdict to prevent the VDM Trust from selling the property. The application was instituted after the appellants became aware that the VDM Trust had advertised the property for sale. The interdict was sought pending the finalisation of their appeal to the Full Court. That application was dismissed with costs. An application for leave to appeal that decision, was refused with costs.

[12] On 8 November 2021 the appellants filed the appeal record but took no steps to prosecute the appeal. On 15 July 2022 the Registrar of the High Court notified the parties that the file had been inactive and that if any of them intended to proceed with the appeal, they had to notify the Registrar in writing within five days, failing which the file would be archived.

[13] The appellants did not respond to the Registrar's notice. On 14 November 2022 the respondents informed them that they had failed to prosecute the appeal despite the Registrar's notice of 15 July 2022. The appellants responded on 7 December 2022, stating that they would apply to the High Court for condonation of their failure to prosecute the appeal, and an order that it be reinstated.

[14] Five months went by. The application for condonation and reinstatement was only filed on 11 May 2023. As stated, that application was dismissed by the Full Court with costs. Further, the VDM Trust has sold the property, and it has been transferred into the name of the purchaser. This is common ground.

Was the full court correct in refusing condonation?

[15] It is settled that the standard for considering an application for condonation is the interests of justice. In *Van Wyk*,¹ the Constitutional Court said:

‘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.’

The Court went on to say:

‘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.’

¹ *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) (*Van Wyk*) paras 20 and 22.

[16] Applied to the present case, the appellants' failure to prosecute the appeal can only be ascribed to slackness. They have not given a full explanation for the delay; neither does their explanation cover the full period of the delay. There is no explanation for their failure to respond to the Registrar's letter of 15 July 2022, nor why they did not then immediately prosecute the appeal.

[17] On 7 December 2022 – nearly five months later – the appellants informed the respondents that they would bring an application for condonation. Despite this, the application for condonation and reinstatement was brought only on 11 May 2023 – more than five months later and nearly a year after the Registrar's letter of 15 July 2022. It is trite that an explanation must be given for any delay in seeking condonation.² Here there is none. Further, there is no explanation for the appellants' inertia between 30 June 2022 and 18 August 2022 – close to two months – when leave to appeal against the interdict to prevent the VDM Trust from selling the property was refused and the appeal was enrolled.

[18] Aside from the absence of any explanation by the appellants for the extent and cause of the inordinate delay, the parties to this appeal, more specifically the Kopas, are entitled to closure of this litigation. It appears from the evidence that their assistance to the appellants was purely an act of kindness. Despite this, the appellants had not paid any amount, whether for rental or otherwise, to the Kopas prior to the sale of the property to the VDM Trust. What is more, two years after the C&D agreement the appellants could not raise the funds to repurchase the property. It is thus not surprising that the Kopas sold the property to the VDM Trust in April 2019. The Trust, in turn, has sold it to a bona fide third party.

² *Darries v Sheriff, Magistrate's Court, Wynberg and Another* 1998 (3) SA 34 (SCA) at 40J.

[19] As was reiterated in *Van Wyk*, the ‘principle of finality in litigation is intended to allow parties to get on with their lives’.³ The Kopas are entitled to assume that the appellants, given their inordinate and unreasonable delay, did not intend to prosecute the appeal. The principle of finality would be undermined if condonation is granted for the excessive delay, without explanation, on the part of the appellants.⁴

[20] What remains are the appellants’ prospects of success. They seek an order declaring that the C&D and Kopas agreements are unlawful, against public policy and void; and that the property be registered into their names. However, these agreements are a matter of history, and this relief cannot be granted. The same applies to the VDM agreement. In fact, the appellants have not challenged the VDM agreement. And the property has been transferred to a bona fide third party, whose ownership of the property has also not been challenged. In these circumstances, the appellants prospects of success are remote, if not non-existent.

[21] For all these reasons, the Full Court was correct in refusing condonation and the reinstatement of the appeal to it. It was not in the interests of justice to grant condonation. Consequently, the appeal is dismissed with costs.

A SCHIPPERS
JUDGE OF APPEAL

³ *Van Wyk* fn 1 para 31.

⁴ *Ibid.*

Modiba AJA

[22] I have read the first judgment. I agree that the appeal should be dismissed with costs, but for different reasons which I set out hereunder. The facts are set out in the first judgment and do not require repetition. In what follows, I refer to the appellants as the Motsimas.

[23] In my view, there are two issues in this appeal. The first issue is whether the order sought in the lapsed appeal, and accordingly, the order sought in the present appeal, will have no practical effect. If so, then the question arises whether this Court should exercise a discretion in the interests of justice to determine the present appeal. Otherwise, the present appeal falls to be dismissed solely on the question of mootness in terms of s 16(2)(b) of the Superior Courts Act 10 of 2013.⁵ The second issue, which only arises if the lapsed appeal is not moot, is whether the Full Court was correct in dismissing the condonation application.

[24] The Constitutional Court, in *Minister of Tourism and Others v Afriforum NPC and Another*⁶ held that:

‘A case is moot when there is no longer a live dispute or controversy between the parties which would be practically affected in one way or another by a court’s decision or which would be resolved by a court’s decision. A case is also moot when a court’s decision would be of academic interest only.’

[25] When the Motsimas applied for condonation and reinstatement of the appeal in May 2023, a series of events had taken place, that are not only indicative of their intention not to prosecute the appeal but also show that they were aware

⁵ Section 16(2)(a)(i) provides as follows: [W]hen 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. See also *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* [2012] ZASCA 166; 2013 (3) SA 315 (SCA) (*Qoboshiyane*) para 5.

⁶ *Minister of Tourism and Others v Afriforum NPC and Another* [2023] ZACC 7; 2023 (6) BCLR 752 (CC) para 23. See also *Qoboshiyane* fn 5 paras 5 to 6.

that the appeal would not be of practical effect. They were aware that the Kopas intended on-selling the property from as far back as November 2018. In an email the attorneys for the Kopas sent to the attorneys for the Motsimas on 5 November 2018, the Kopas disputed that they agreed to give the Motsimas an option to purchase the property back as alleged. They stated that they purchased the property from C&D Trust to sell it on the open market as soon as possible to assist the Motsimas to obtain money. The Motsimas' attorneys did not dispute this. In a response by email on 12 November 2018, they stated that their clients would attempt to obtain a loan to purchase the property, failing which, prior to 31 May 2019, they would give instructions for the property to be sold. Ultimately, the Motsimas lacked the means to buy it. This remains the case. Yet, they interdicted the Kopas from selling the property on the open market, and contrary to their undertaking, did not give instructions for the property to be sold.

[26] Against this background, the Motsimas instituted the action to impugn the C&D and Kopas agreements and unravel their implementation and obtained the first interdict to prevent the sale of the property to the VDM Trust. When the action was dismissed, there was no impediment to the property being transferred from the Kopas to the VDM Trust and the Motsimas did nothing to prevent such transfer. Further, in the action, they did not impeach the VDM agreement and sought no relief against the VDM Trust. Only when they became aware that the VDM Trust was in the process of selling the property to a third party, did they apply for the second interdict. When they did not succeed, they pursued an application for leave to appeal.

[27] Given that they had pursued the second interdict and the application for leave to appeal against its dismissal and concurrently prosecuted the lapsed appeal between July and December 2021, their failure to enrol it is illogical. Their explanation for not enrolling the appeal timeously, being that they had devoted

their efforts to obtaining the second interdict, is also incongruent with the efforts they had taken in prosecuting the appeal. Enrolling the appeal for hearing is the last step in prosecuting it to prevent it from lapsing. It did not require as much time and costs relative to the other steps they had taken in prosecuting the appeal.

[28] In July 2022, the high court registrar notified them of their inaction in the appeal and gave them five days to rectify it. By then, the application for leave to appeal against the dismissal of the application for the second interdict had been dismissed and nothing stood in the way of the transfer of the property to a third-party purchaser. Yet, they did not respond to the registrar. When the respondents informed them on 14 November 2022, that the appeal had lapsed, it took them three weeks to respond that they would seek condonation, which they only applied for in May 2023. They were aware of the pending sale and transfer of the property to a third-party purchaser but still did not amend their particulars of claim to ensure that the relief they seek in the lapsed appeal remained practical.

[29] In its judgment delivered on 30 June 2023, the Full Court noted the then pending sale of the property to the third-party purchaser and said:

‘. . . should the property be sold to a bona fide third party, [the Motsimas] will not be able to recover the property from such third party, even if they were eventually successful on appeal. The appeal would be rendered moot in the event of the property being transferred from the current owner, . . . to the *bona fide* third party.’⁷

[30] During oral argument, we were informed that the sale and transfer of the property to the third-party purchaser was common cause between the parties. This brings the present application in the realm of s 16(2)(a)(i) because if the present and lapsed appeals were to succeed, the impeachment orders and consequential relief sought in the action would effectively unscramble the parties’ performance

⁷ *Motsima and Another v Kopa and Others* [2023] ZAFSHC 260 paras 6-7.

in terms of the impugned agreements, to restore ownership of the property to the Motsimas. With the ownership of the property having been transferred to the third-party purchaser, unscrambling the impugned agreements will have no practical effect. The Kopas cannot restore ownership of the property to the Motsimas as they are no longer its registered owners.

[31] When this issue was raised with counsel for the parties at the hearing, counsel for the Motsimas argued that if successful in the present appeal, the Motsimas would amend their particulars of claim to seek relief that is practical in effect. The intention to amend their pleadings was mentioned in response to a question from the bench without any particulars of the intended amendment. As stated, the Motsimas were aware of the sale of the property to the third-party purchaser since July 2021 but did not amend their pleadings.

[32] This leads to the second question in this appeal, whether the court should exercise its discretion in the interests of justice to determine the lapsed appeal. It is trite that the court may exercise the discretion, if it is in the interests of justice to determine the appeal despite its mootness. This Court, in *Qoboshiyane*,⁸ stated that:

‘The court has a discretion in that regard and there are a number of cases where, notwithstanding the mootness of the issue as between the parties to the litigation, it has dealt with the merits of an appeal. With those cases must be contrasted a number where the court has refused to deal with the merits. The broad distinction between the two classes is that in the former a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required, whilst in the latter no such issue arose.’

[33] The present matter falls in the latter category of cases. From the record before this Court, there is no discrete legal issue of public importance that would

⁸ *Qoboshiyane* fn 5 para 5.

affect matters in the future and on which the adjudication of this Court is required. There is therefore no basis for this court to exercise its residual discretion to traverse the merits.

[34] Even if the Motsimas were to amend their pleadings, they would do so only to seek practical relief to cure the mootness of the appeal and not to raise a discrete legal issue of public importance that would affect matters in the future. In any event, they will need the leave of the court, which could be granted if they meet certain requirements, including providing a reasonable explanation for the delay in amending their pleadings. Such an explanation is not apparent from the appeal record.

[35] For all the above reasons the present appeal fails, because, if it was upheld, the lapsed appeal will not be of practical effect. Therefore, the appeal falls to be dismissed with costs. With the present appeal dismissed, the respondents' counterclaims remain withdrawn in terms of the order of the High Court. Therefore, no issue remains for adjudication.

L T MODIBA
ACTING JUDGE OF APPEAL

Appearances:

For appellants: S Grobler SC and R Van Der Merwe

Instructed by: Van Aardt & Van Der Walt Attorneys, Bloemfontein

For respondents: S J Reinders

Instructed by: Van Wyk & Preller Inc, Bloemfontein