



OF INTEREST

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

CASE NO. CA 120/2024

In the matter between:

GARY DAVID MEYERS N.O.

First Appellant

HILTON SAVEN N.O.

Second Appellant

JACK MEYERS N.O.

Third Appellant

and

NELSON MANDELA BAY

METROPOLITAN MUNICIPALITY

First Respondent

THE EXECUTIVE DIRECTOR:

ELECTRICITY AND ENERGY DIRECTORATE

OF THE FIRST RESPONDENT

Second Respondent

**JUDGMENT IN RESPECT OF OBJECTION RAISED
UPON APPEAL AND APPLICATION FOR CONDONATION**

HARTLE J

Introduction:

[1] When the appeal was called in this matter,¹ we were presented with an application by the appellants (“*the trust*”)² to condone “*the late delivery of (it’s) bond of security*”.

[2] This application was vigorously opposed by the respondents.

[3] The instinctive prompt for the application was that the respondents had raised a preliminary objection in the heads of argument filed on their behalf on 14 April 2025 (three court days before the anticipated appeal hearing)³ that the appeal was “*irregular for want of the appellant’s compliance with the provisions of Rule 49 (13)(a) of the Uniform Rules of Court and/or by failure to provide ‘good and sufficient security’*” their costs of the appeal. It was contended, in the heads of argument, that because of the trust’s failure to pay security, and in the absence of any condonation having been sought, the appeal fell to be struck from the roll with costs.

[4] The respondents in their heads of argument in support of their contention that such an outcome was inevitable, referred to a *dictum* in *L.G v J.G (“LG”)*⁴ which is to the following effect:

¹ The appeal was set down for hearing on 22 April 2025.

² The trust concerned is the Meyprop Trust, represented in these proceedings by its trustees. Where we refer to “*the appellants*” we mean the trustees in such capacity otherwise we refer to the trust where we mean the entity itself.

³ The Easter weekend interposed from 18 – 21 April 2025.

⁴ (32377/2012) [2023] ZAGPJHC 450 (28 April 2023) at [24] – [25].

“[24].... Rule 49(13) gives a respondent a ‘right to security’ and ‘obliges’ an appellant to provide security. As stated in *Carpe Diem*, ‘It is the right of a respondent on appeal to go into an appeal secured, at least to the extent provided by the Rules, against the inability of the appellant to pay costs if the appeal is unsuccessful’.⁵

[25] If security is not furnished, the appeal record may not be lodged. Without an appeal record, no date can be assigned for the hearing of the appeal (rule 49(7)(c)), and rule 49(7)(d) may apply. Moreover, if an appeal record was lodged without providing security first, it may constitute an irregular step (rule 30). As remarked in *Strouthos*:⁶

‘Obviously where no application is brought in terms of Rule 30 or where such an application is refused for whatever reason, the appeal will be proceeded with, and a respondent will then have to move for the appeal to be struck from the roll for want of compliance with the Rule as was done in *Boland Konstruksie Maatskappy (Edms) Bpk v Petlen Properties (Edms) Bpk* 1974 (4) SA 291(C) (“*Boland*”).⁷ This does not mean that an appellant is automatically released from his or her obligation to furnish security’.”

[5] Ironically the heads of argument in which the preliminary objection was made known were filed out of time, but the appellants indicated that they would make no fuss in this regard in the spirit of getting on with the appeal. We

⁵ This is a reference to *Carpe Diem Exploration (Pty) Ltd v Kasimira Trading 82 (Pty) Ltd & Others* (“*Carpe Diem*”), (601/14) [2016] ZAGPPHC 1099 (14 December 2016), at [12].

⁶ This is a reference to *Strouthos v Shear* 2003 (4) SA 137 (T) at 141 C – D (“*Strouthos*”).

⁷ The significance of the manner in which this had come to pass is that, at the hearing of the appeal in *Boland*, the court was seized with two interlocutory applications. The appellant had firstly filed a request to condone its shortcomings in other respects but had not asked for condonation regarding its failure to have filed security. Its counsel had asked at the hearing to be afforded an opportunity to file an affidavit explaining why security had not been entered into, and also stood poised to tender a cheque that was in his possession. He suggested that this would confirm his client’s desire at that point to give security. The respondent contrariwise filed a notice of application seeking to strike out the appeal for want of the appellant having filed security for its costs of the appeal, with costs, including the costs in connection with its opposing the appeal. It appears that when the respondent had been furnished with the appeal record, late and bereft in several respects, it had pertinently reserved its rights to object in respect thereof. Given the appellant’s breach of the rules of court in numerous other respects and the unfortunate state of affairs pertaining to the appeal record (which state the court referred to as “‘n ongelukkige toestand van sake”), the court struck it from the roll, with costs including the respondent’s costs of opposing the appeal, effectively to be borne by the appellant’s attorneys on a *de bonis propriis* basis. It further dismissed the appellant’s application for condonation, with costs.

granted the respondents' request (informally raised in their heads of argument) to condone their delay in the interest of justice.⁸

The application for condonation:

[6] The appellants, in initiating the last minute application to condone their own shortcoming (which they promptly purported to rectify), expressed the view that they did not consider it essential to in fact seek condonation, but submitted that were not doing so *ex abundanti cautela* (from an abundance of caution) to ensure that the appeal proceeded, confident that having by then provided security ("good and sufficient" as far as they were concerned), nothing else stood in the way of the appeal proceeding.

[7] It is firstly a misconception that an application for condonation would not be vitally necessary in such a situation. Any non-compliance with the Uniform Rules of Court would ordinarily make it incumbent on the litigant breaching the rule to seek condonation and to do so as hastily as possible.⁹ Indeed in *Boland*, the matter referenced in *LG* and relied upon by the respondents, the court noted the obligation on that appellant to have explained why the sub-rule (then 49 (12), amongst others), had not been complied with in a properly motivated application supported by an affidavit that spoke to its non-compliance with the applicable rule of court under consideration. It held that the respondent was entitled to be apprised of the specific reasons for the appellant's non-compliance with the rule, and afforded an opportunity to reply.¹⁰

⁸ The failure was owned by the respondent's legal representatives. Their local correspondent had failed to advise them that the appellant's heads had come in and as a result there was a delay in furnishing them to their counsel to prepare hers. We accepted the contention that the delay was due to a *bona fide* oversight, was not extensive, and had occasioned no prejudice to the trust.

⁹ *CIR v Burger* 1956 (4) SA 446 (AA) at 449, *Meintjies v Combrinck (Edms) Bpk* 1961 (1) SA 262 (AD), *Pilane v Northern Cape Tractors (Pty) Ltd* 1971 (3) SA 619 (NCD) at 621 A – B ("*Pilane*").

¹⁰ At par 293 D – F. See also footnote 7 to appreciate the relevant circumstances.

[8] Also contended is that it was “*legally impermissible*” for the respondents to have raised the objection a week before the hearing date, and that they should in any event have brought a substantive application to have the matter struck from the roll as opposed to seeking such an order in their heads of argument.

[9] In its affidavit filed in support of its application for condonation the trust made no bones about the fact that it had failed to provide security at the requisite moment. The realisation that it had fallen short however only dawned on the appellants and their legal representatives when the preliminary objection was raised in the respondents’ heads of argument for the first time. (It is abundantly plain that a similar realisation only entered the imagination of the respondents when their heads were being prepared by their counsel.)

[10] The explanation given by the trust for this unfortunate happenstance is that it was an oversight, plain and simple, that came about by a miscommunication between the appellants’ instructing attorney and their local correspondent attorney in Makhanda, for which they asked to be condoned. When the correspondent carried out the instructing attorney’s instructions to prosecute the appeal they were under the impression that the latter would resolve the issue of security directly as between themselves and the respondents’ attorneys. Since the bond of security does not form part of the record, so the appellants aver, the fact

that security had not been negotiated, or filed, was regrettably missed in the process.¹¹

[11] The trust further revealed that immediately the respondents' preliminary objection had objection came to light, its trustees were spurred into action to do what Rule 49 (13)(a) expects of an appellant to do. In this regard their attorneys provided a bond of security to the respondents' attorneys in which they, together with the appellants, interposed themselves as surety and co-principal debtor in favour of the respondents in an amount of R100 000.00. They related that they had requested the respondents to confirm that this was sufficient for their purposes and had asked if they were prepared to condone the late filing of the bond of security. To the first question they replied that the amount was inadequate. To the second question they responded that they should seek condonation from the court "*for the late filing of the bond of security*". They persisted with their view, earlier expressed in their Heads of Argument, that the appeal could not proceed to be determined on its merits.

[12] In the latter respect, despite the appellant's endeavours to make good the trust's non-compliance with the provisions of Rule 49 (13)(a), at the doors of the court so to speak, the respondents (as elaborated upon in their answering affidavit) did not share their view that it had complied with the provisions of the sub-rule that requires an appellant to enter into "*good and sufficient*" security

¹¹ The appeal panel could not have known of the shortcoming in this respect, although the Registrar could reasonably have been expected to have asked the appellants at the time of the filing of the appeal record whether security had been entered into. The Registrar, for some reason, ticked as "*complied with*" the requirement of security listed on the standard case management form utilised for civil appeals as if this had been taken care of, thus assuring the panel that the appeal was in all respects ready to be proceeded with. In *Ngaka Modiri Molema District Municipality v Quantibuild (Proprietary) Limited* (CIV APP FB12/2022; 3352/2019) [2024] ZANWHC 101 (12 April 2024) ("*Quantibuild*") a full court, in an application to reinstate an appeal, referenced a judgment of the full court preceding its own dated 8 December 2022 in which it, "*made it clear*" that: "*It is imperative that the Registrar should not set an appeal on the roll without a power of attorney being filed and security for costs being put up*". [16]. (It appears that that appeal was first enrolled on 7 October 2022 before the first full court when the parties argued whether the appeal should be removed or struck from the roll, or be deemed to have lapsed. The culmination of that argument is the judgment of 8 December 2022 that concluded that it could not be so deemed unless *Quantibuild* pertinently applied for relief seeking such an order.)

for a respondent's costs of appeal by the time the appeal was called. This is because Rule 49 (13)(b) clearly qualifies that it is the amount fixed by the Registrar in the event of failure by the parties to agree thereon, that is ultimately required to be entered into as security.

[13] Indeed the respondents explained in correspondence exchanged in the week leading up to the hearing that in the event of them prevailing in the appeal, the costs on taxation would definitely exceed the amount tendered, hence their view that the bond of security failed to satisfy them that it constituted “*good and sufficient*” security as portended by the sub-rule.¹²

[14] It was accordingly confusing that they suggested to the trustees that they should at that juncture seek condonation for their non-compliance with Rule 49 (13) that was in a sense still ongoing as far as they were concerned, rather than simply encouraging them to remove the matter from the roll, to approach the Registrar to fix the amount of the security, and thereupon to apply for reinstatement of the appeal and condonation in due course.¹³ This expectation notwithstanding, the opening gambit of Mr. Dyke, who appeared for the trust, was to confirm the contention between the parties that the security was supposedly not sufficient which is “*where the matter (had) ended*” as between themselves. This issue was however seemingly laid before the court to resolve on the basis of Mr. Dyke's insistence that the appeal stood poised to be heard on the merits on the basis of the trust's contention that the security was “*good and sufficient*”, which contention we were encouraged to accept in the scheme of getting along with the appeal. Also sought to be urged upon the court was the

¹² The reason why they say it is insufficient for their purposes hardly matters. The important point is that they notified the appellant that the amount of the security is an issue of contestation. This stance ought to have invoked the unique consequence made provision for in rule 49 (13) (b).

¹³ It does not seem to have occurred to anyone that the Registrar could perhaps have been prevailed upon that morning to make a call on the contended issue of the adequacy of the security. However, since it was the first court day back after the Easter weekend, such a prospect is perhaps optimistically stated.

contention that since the parties were ready to proceed it would be “*a tragic waste of legal resources, including the Court’s time,*” to strike the matter from the roll.

[15] The respondents rebuffed any notion that it was improper for them to have raised their objection *when* they did, or that when they did that they were constrained to have done so on notice of motion. The further denied any legal obligation on them to have drawn attention to the absence of entered security. They especially refuted that their own nescience of the trust’s failure to have done so somehow vitiated the peremptory provision of the rule or their substantive entitlement to security for their costs of the appeal. Indeed they took umbrage at the trust’s attempt to shift the blame to them for failing to have demanded security any earlier.

[16] According to them, once apprised of the absence of any security having been entered, it had been in order for them to have simply taken the point as they did in their heads of argument, at the doors of the court in effect. They maintained that it was appropriate (following court custom) to seek a striking off of the appeal in all the circumstances without any formal application towards this end.

[17] In answer to the actual condonation application, they contended in reply that the trust had failed to successfully establish the legal requirements for condonation, recently reiterated by the Supreme Court of Appeal in *MEC for Health v A[...]* *S[...]* *OBO S[...]* *S[...]*¹⁴ to which Ms. Ntsepe, who appeared for the respondents, referred.

¹⁴ 842/2023 [2025] ZASCA 2 (15 January 2025), incorporating the footnotes as they appear in the Supreme Court of Appeal’s judgment.

[18] For convenience those requirements are repeated here:

“[19] It is trite that the high court has an inherent right to grant condonation for a failure to comply with the rules of court where the interests of justice demand this. The discretion to do so is extensive,¹⁵ but it must be exercised judicially. A party seeking condonation must give a full explanation for the failure to comply with the rules and this explanation must be reasonable.¹⁶ The court must weigh all relevant factors including, depending on the facts of each case, the degree of non-compliance, the explanation therefor, the importance of the case, the avoidance of unnecessary delays in the administration of justice and the prospects of success.¹⁷ These factors are interrelated and must be weighed one against the other. For example, a slight delay and a good explanation might compensate for weak prospects of success.¹⁸ However, in a case of flagrant or gross non-observance of the rules, a court may refuse condonation regardless of the prospects of success.¹⁹

[20] Where an attorney is to blame for the non-compliance, a blameless litigant may escape penalisation,²⁰ but there is a limit beyond which she or he may be indemnified against the attorney’s lack of diligence and absence of a reasonable explanation.²¹ The negligence of the attorney is weighed together with the other relevant factors in considering whether condonation is justified.²²”

[19] They argued that the explanation advanced by the trust was not satisfactory and to the contrary demonstrated a “*flagrant*” breach of the rules

¹⁵ *Cairn’s Executors v Gaarn* 1912 AD 181 at 186.

¹⁶ *Van Wyk v Unitas Hospital and Another* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) para 22.

¹⁷ *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 682E.

¹⁸ *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720E-G.

¹⁹ *Ferreira v Ntshingila* [1989] ZASCA 149; [1990] 2 All SA 47 (A); 1990 (4) SA 271 (A) at 281J-282A (*Ferreira*).

²⁰ *Reinecke v Incorporated General Insurances Ltd* 1974 (2) SA 84 (A) at 92F.

²¹ *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141C-E.

²² *Regal v African Superslate (Pty) Ltd* 1962 (3) SA 18 (A) at 23B.

even if the blame lay with its legal representatives. They contended that the application should be dismissed with costs.

The hearing of the preliminary issues:

[20] After hearing argument on the preliminary issues that solely occupied the court's attention all morning, an interim order was issued in the following terms:

- “1. The court's rulings in respect of the respondents' *in limine* objection and the appellants' application for condonation are reserved.
2. The appeal (whatever its status) is postponed pending the court's ruling on the issues aforesaid.
3. The parties are invited to file supplementary Heads of Argument by the end of April 2025 on the issues argued before the court today.”²³

[21] The reason for this stance adopted was because the parties appeared ill-prepared to address the effect of the quandary that had presented itself since, by the morning of the hearing, the trust had purported to enter into security but its adequacy remained in issue. (There appears to be no contention regarding its form at least.) The respondents were of the view that the trust had not completely acquitted itself of the obligation to have filed security. As far as they were concerned, security had only been “*tendered*”, but since they did not consider the amount sufficient, the process remained incomplete so to speak.

²³ Coincidentally it appears that a similar approach was adopted in *Breda N.O and Others v Naude* (“*Breda*”) (A85/2023) [2025] ZAGPPHC 157 (14 February 2025), at [42], where the court was faced with the significant issue and impact of striking the appeal from the roll. The appellant concerned was alleged to have failed to comply with a number of rules including Rule 49 (13). The court was not in a position to deliver an *ex tempore* judgment on the complexity of the situation and required time to reflect on the issues after argument. This led to judgment being reserved in the striking application and the appeal remaining in *limbo*. Ultimately the striking off order was not entertained, and the appeal had to be postponed *sine die*, since it had survived the respondent's attempts to strike it from the roll. *Quantibuild* is another example of a preliminary objection raised in heads of argument, that caused two rounds on appeal and a delayed judgment after the first round (refer footnote 11 above.)

The trust, contrariwise, suggested that the respondents had refused to engage with them about the amount of security required.

[22] There was an expectation that it was up to the court to determine whether the trust had as a fact complied with the provisions of the sub-rule by providing the requisite standard of security, each of the parties suggesting that the other should establish why security was adequate or inadequate as the case may be. On behalf of the respondents it was especially contended that this was a hurdle that the trust would have to overcome in establishing good cause for the condonation relief sought.²⁴

[23] It was also unclear what the status of the appeal was in the meantime as a result of the trust's supposed ongoing non-compliance with the sub-rule.

[24] Of course the primary significant question raised was whether the respondents were entitled to have requested that the appeal be struck from the roll without a formal application for such relief, concerning which procedure the courts have not been harmonious in their approach.

[25] There additionally remained the taint that the respondents were somehow not entitled to raise their objection so late, whereas they might, if they had reasonably applied their minds, have noticed the deficiency in the process earlier and or that they were perhaps being obstructive in not accepting the security tendered.²⁵ Both of these considerations would be answered by understanding principally which of the parties owed what obligation to give meaningful effect to the security measure provided for in Rule 49 (13) and

²⁴ This may well be so if one considers that the granting of condonation for want of compliance with a court rule depends for its success on the assumption that the non-compliance under consideration has in fact been cured.

²⁵ Also vaguely flirted with was the notion that the respondents had tacitly waived their entitlement to be furnished with security.

whether any duty is placed on a respondent to demand security or to take up with the Registrar any failure to agree on the sufficiency thereof.

[26] The question as to who should be liable for the wasted costs of the appeal, each blaming the other for the predicament at hand, was also foremost in everyone's mind, which scale the parties were at least agreed should be ordered on Scale C.

[27] The court was notably inconvenienced by virtue of the late filing of the interlocutory application and its various appendices (including the answering affidavit) that were handed up from the bar and were not contained in a bundle properly indexed and paginated. Supplementary heads of argument were also only brought to our attention during the hearing of the preliminary issues and additional cases were referred to as the matter progressed, none of which the court had had an opportunity to peruse beforehand.

[28] Moreover the court thought it appropriate that the parties be invited to file supplementary heads of argument to provide answers to some of the questions raised during argument which counsel themselves had noted were not immediately apparent.

The obligation to provide security and its relevance to the objection and application for condonation respectively:

[29] Rule 49 (13) puts a peremptory obligation on an appellant who has been granted leave to appeal to enter into good and sufficient security for the respondent's costs of appeal. An exception exists in circumstances where the respondent has either waived his/her right to security or the court in granting such leave, or subsequently on application to it, has released the appellant

wholly or partially from that obligation. Neither of these scenarios apply in this instance and more especially the trust was not asking to be relieved of its obligation to tender security beyond the amount provided for in the bond of security (which we accept as a fact was presented in such form to the respondents), but to be allowed to push pass this area of contention between the parties so as to be permitted to argue the appeal on its merits.

[30] As for timing of the obligation indicated by Rule 49 (13), the appellant is expected to attend to its provisioning *before* lodging copies of the record on appeal with the Registrar.

[31] The sub-rule is reproduced below for convenience:

“(13) (a) Unless the respondent waives his or her right to security or the court in granting leave to appeal or subsequently on application to it, has released the appellant wholly or partially from that obligation, the appellant shall, before lodging copies of the record on appeal with the registrar, enter into good and sufficient security for the respondent’s costs of appeal.

(b) In the event of failure by the parties to agree on the amount of security, the registrar shall fix the amount and the appellant shall enter into security in the amount so fixed or such percentage thereof as the court has determined, as the case may be.”

[32] It is trite that the purpose of the rule is to protect a respondent in an appeal from an impecunious appellant from the date of lodging the record and prosecuting the appeal until its conclusion.²⁶ Indeed the court in *LG*, referencing *Strouthos*, emphasized that whatever the penalty that non-compliance with the sub-rule attracts, including a strike off, this does release an appellant from his obligation to furnish security. Evidently the respondent’s right to security for costs of the appeal remains inviolable unless her/she is

²⁶ *Shepherd v O’Neill* 2000 (“*Shepherd*”) (2) SA 1066 (N) at 1073 C. See also *Carpe Diem, Supra*, at [12].

prepared to waive his/her entitlement to the protective measure, or the court granting leave to appeal gives the appellant a pass in this respect.

[33] The court in *Jeanru Konstruksie (Pty) Ltd v Jaco Stefan Botes* (“*Jeanru Konstruksie*”)²⁷ reiterates the very valid reason why security for costs in appeals is a necessary “*default protective measure*”²⁸ as follows:

“[26] In *Boost* the Supreme Court of Appeal had found that, in the case where security for costs is ordered against a plaintiff it should only do so in instances where the litigation is vexatious or reckless or otherwise amounts to an abuse. That is of course the position in the context of when a litigant approaches a court for the first time, thereby exercising his Constitutional rights. The approach is understandably different in instances where a court has already found against a party who wishes to proceed as an appellant. Such an appellant has nothing to lose in taking an adverse finding on appeal and might do so opportunistically or frivolously, even though not necessary vexatiously or recklessly. Recent experience in our courts has shown that this happens with increasing frequency. In addition to the powers to regulate its own processes, High Courts also, again with reference to section 173 of the Constitution, have the power to protect itself (and other litigants, such as respondents in appeals) from abuse of its processes. The High Courts have, as a default position consistently applied the protective measure of requiring security for costs on appeal for more than 50 years. These powers are separate from the hurdle of having to obtain leave to appeal and deals with safeguards on a more practical and again, procedural level.”

[34] An appellant who has not filed good and sufficient security for the protected party’s costs of the appeal would therefore come up short firstly for the omission in breach of the respondent’s right and entitlement to be protected

²⁷ [2023] ZAGPPHC 421; 2023 (6) SA 305 (GP) (30 May 2023) (footnotes omitted).

²⁸ At paragraph [27].

by the default procedural measure,²⁹ but also because that party would have taken a step in the proceedings constituting an irregularity by filing the record on appeal and prosecuting the appeal *before* security has been entered into.³⁰

[35] The trust fell short in both respects and came to the hearing, now aware of its default, but believing that it had done and said enough to be condoned and to be entitled to be heard on the merits. As for the issue of the adequacy of the bond of security it persisted that the irregularity had been “*cured*” even if the quantum remained unresolved and/or that that the mere “*issue*” (of the quantum being unresolved) could not defeat an application for condonation. Thus the trust urged upon the court to grant condonation, arguing that it would be against the interests of justice to defer the matter whereas the appeal was otherwise ready to be heard, and because the costs “*had already been incurred*”. (Sic)³¹ It sought to impress upon the court its wide discretion to grant condonation on good cause shown.³²

[36] There is no question that the trust had otherwise complied with the multi-layered obligations on it to have initiated and prosecuted its appeal in terms of Rule 49 of the Uniform Rules of Court save for the irregularity contended for.

²⁹ The court in *Shepherd* refers to this as a requirement of substance (at 1073 A). In *LG* (at [7] and [24]) it is recognized as a “*right to security*” that is specifically created by Rule 49 (13).

³⁰ *LG Supra* at 25. In *Freedom Stationary (Pty) Ltd v Palm Stationary Manufacturers (Pty) Ltd and Mveli Data Matrix Solutions (Pty) Ltd (Joint Venture) and Others (“Freedom Stationary”)* (1023/2021) [2021] ZAMPMBHC 42 (15 September 2021) the appeal panel *mero motu* raised the issue of the appellant’s non-compliance with the sub-rule in a directive ahead of the appeal pointing out that the appellant had not filed security and that for this reason the appeal was not properly enrolled before it. It “*strongly recommended*” that the appeal be removed from the roll “*so that the parties can attend to the hearing on another date in the future*”. Even though the respondent indicated that it had waived security, the panel expressed the view that the failure to have done so before the record upon appeal had been filed was “*fatal*” and proceeded to strike the appeal.

³¹ It is unclear how such a submission can be correct. The very purpose of the security is to meet the costs already incurred in the event of an adverse outcome should the appeal fail.

³² As for the prospects of success on the merits these were not addressed before us with any intensity. The respondents suggested in passing that they were poor and the trust, conversely, that they were good. In fact the high watermark of Mr. Dyke’s submission in this respect is that the court *a quo* considered that there were prospects of success in the appeal in the act of having acceded to the trust’s request to grant it leave to appeal.

The supplementary considerations:

[37] The following principles can be distilled on the subject of the impact of an appellant's failure to provide security for a respondent's cost of appeal, most of which do already appear from the *dictum* in *LG* referenced in paragraph 4 above:

37.1 First and foremost, it is harmoniously accepted by the courts that Rule 49 (13) is a peremptory rule.³³

37.2 It would therefore be fair to observe that a respondent should not be looked at askance for insisting that the sub-rule in his/her favour be complied with. It is a provision that must be met as a matter of course, without proof that it is required, unless there is a waiver or a release by a respondent from such an obligation.³⁴ The Rule gives a respondent a "*right to security*" and "*obliges*" an appellant to provide security.³⁵

37.3 It is a procedural rule,³⁶ and serves a valid purpose which is to provide adequate cover for the costs that the respondent is likely to incur in a failed appeal by the appellant. It covers the eventuality that the appellant may not have the resources to meet an adverse costs order at the end of the appeal.³⁷

³³ *Kama and Others v Kama and Another* (1357/2005) [2007] ZAEGHC 115 (6 September 2007) at [4]; *Shepherd Supra* at 1073 (C); *TR Eagle Air (Pty) Ltd v Thompson* [2020] ZAGPPHC 801 (13 November 2020) at [18]; *LG, Supra* at [23] – [27].

³⁴ *LG, Supra* at [23] – [27]. *Jyoti Structures Africa (Pty) Ltd v KRB Electrical Engineers ("Jyoti")* 2011 (3) SA 231 (GSJ) at [7] and *TR Eagle Air (Pty) Ltd v Thompson* ("*TR Eagle Air*") [2020] ZAGPPHC 801 at [18].

³⁵ *LG, Supra* at [24].

³⁶ *Jeanru Konstruksie, Supra* at [21] – [29].

³⁷ See paragraphs 32 – 33 above and the corresponding footnotes referenced there.

37.4 The obligation resting on the appellant to provide good and sufficient security in terms of the sub-rule components (13 (a) and (b)), has been held to entail a constitutionally compliant regime.³⁸

37.5 It is for the appellant to apply to the court that granted leave to appeal in order to obtain release from the obligation to provide security for costs of that appeal.³⁹

37.6 Until such time as such an order is obtained, the respondent is *obligated* to provide security and this must be done *before* lodging copies of the record on appeal with the Registrar. (The rule is therefore peremptory in both respects.)⁴⁰

37.7 A waiver by the respondent of his costs of the appeal is his/her prerogative, and must be clear.⁴¹

³⁸ *Erasmus Superior Court Practice*, 2nd Ed at RS 25, 2004, D1 Rule 49 -26 including the authorities cited in support of the contention that in its amended form, the sub-rule has not been found to be unconstitutional or *ultra vires* the statutory powers of the Rules Board for Courts of Law.

³⁹ *Strouthos Supra* at 150 H – J and 141 F.

⁴⁰ See *Erasmus* at 31 of the corresponding cases referenced there (footnote 198). The court in *Breda* observed that the rule has “two requirements which may, if needs be, interdependent and sequential” and helpfully reflects upon their relationship in [38] as follows:

“[38] But, the provisions of Rule 49(13) are clear. The rule has two requirements which may, if needs be, interdependent and sequential.

[38.1] The first requirement is that an ‘appellant shall ... enter into good and sufficient security for the respondent’s costs of appeal’.⁴⁰ The provision prescribes the timing for the first requirement (i.e. ‘before lodging copies of the record on appeal with the registrar’).⁴⁰ Also, it allows the respondent in the appeal (through waiver of the right to security) or the Court (granting partial or whole release from the obligation) to dispense the appellant from the requirement.⁴⁰ ... The nature and extent of the security is not mentioned in the rule, save for the appellation ‘good and sufficient’ security. The rule appears to grant an appellant the prerogative of determining the form and amount of security. But, whilst the prerogative is not unconstrained, in terms of the rule it appears only the respondent could enforce the granting of ‘good and sufficient’ security by triggering the second requirement of Rule 49(13).

[38.2] The second requirement of Rule 49(13) is overseen by the registrar. The registrar’s involvement would be triggered or sought when there is ‘failure by the parties to agree on the amount of security’.⁴⁰ The rule does not prescribe who, between the appellant and the respondent, is to approach the registrar and, thus, it is reasonable to think that either of the parties or both of them may approach the registrar for intervention. But, the registrar is clearly empowered to ‘fix the amount’ which the appellant ‘shall enter into security in the amount’ or percentage of amount determined by the court.⁴⁰ The learned author of *Erasmus: Superior Court Practice*⁴⁰ explains that the latter reference to ‘the court’ is to ‘the court that granted leave to appeal as contemplated in paragraph (a) of this subrule’.⁴⁰ I do not think that the registrar would be reasonably discharging her or his duties if he or she goes about all these without consideration of the views or representations of the contending parties. Therefore, assertions that a security bond filed is ‘meaningless and provides no security’ should be advanced before the registrar.”

⁴¹ See *LG, Supra* generally.

37.8 A failure to tender security at the requisite time does not visit the appeal with nullity, but it attracts the “*fatal consequence*” that the appeal may be struck off the roll.⁴² The recognition of the omission, especially in consequence of a finding of an irregular step having been taken by the appellant would result therein that the appeal would have to be removed from the roll - this appears to be the most practical solution, or run the risk of being struck off.⁴³

37.9 A non-compliance with the sub-rule does not automatically result in a lapsing of the appeal.⁴⁴ Indeed Rule 49 (13) does not provide so in terms.

37.10 An appeal will “*lapse*” though as an inherent consequence of a striking off and require to be reinstated in due course should the appellant wish to revive it.⁴⁵ This is however self-evidently not the kind of lapsing contemplated in Rule 49 (6)(a) and (7) (d). If a respondent wishes to declare that an appeal has lapsed, this relief should be pertinently requested on notice of motion, no doubt because of the serious consequences of such a lapsing.⁴⁶

37.11 Unless an appeal lacking in compliance with the provisions of Rule 49 (13) is removed when the omission is observed, a striking off is inevitable or this is what will invariably happen in the absence of condonation being granted to the appellant.⁴⁷

⁴² *Strouthos*, *Supra* at 140 H.

⁴³ *Stouthos*, *Supra* at 140 H; *Jeanru Konstruksie*, *Supra* at [10]; *TR Eagle*, *Supra* at [19]; *Jyoti*, *Supra* at [9].

⁴⁴ *Janse van Rensburg v Obiang and Another* (“*Van Rensburg*”) (A338/2018, 22470/2015) [2019] ZAWCHC 53 (10 May 2019) at [33]. It would also be illogical to wish away the fact that a Registrar has accepted a timeously lodged application for the appeal to be set down and has allocated a date for its hearing on the assumption that the provision of security is not wanting. The very act of seeking to strike such an appeal from the roll assumes its vitality in the first place. *Jyoti*, *Supra* at [14] – [15].

⁴⁵ See *Jojwana v Regional Court Magistrate and Another* (5435/17) [2018] ZAECHC 54; 2019 (6) SA 524 (ECM) 11 September 2018) at [10] – [11] regarding the effect of a striking off order. This is by no means a termination of the proceedings. It merely has the effect of “*discontinuing it*”.

⁴⁶ *Rand Water Board and Another v Kariki Pipeline and Water Project (Pty) Ltd* (A2023/080029 & 2017/2774) [2024] ZAGPJHC 418 (22 April 2024) at [23]. See also *Jyoti*, *Supra* at [15].

⁴⁷ *Erasmus* at 31 and the corresponding cases referenced in footnote 199.

37.12 It is logical that before, or contemporaneously with the seeking of condonation, an appellant will remedy his shortcoming or cure the irregularity by in fact entering into good and sufficient security for the respondent's cost of the appeal.⁴⁸

37.13 An appellant's non-compliance with the sub-rule constitutes an irregular step in the sense that the record was lodged and the appeal prosecuted without the necessary requirement of security having been entered into at that juncture.⁴⁹ In order to remedy the bar to a re-enrolment of the appeal, it follows that the solution to the problem is the entering of good and sufficient security in terms of Rule 49 (13).

37.14 Although Rule 49 (13) is stated in peremptory terms, the sub-rule does not provide for a procedure to compel an appellant to provide security when he or she fails to meet this necessary requirement.⁵⁰

37.15 A respondent may however (but is not obliged to) invoke Rule 30 (following a complaint that the omission constitutes an irregular step) for want of compliance with the obligation created under the provisions of Rule 49 (13).⁵¹

⁴⁸ In *Kama* this was unnecessary because counsel stood the matter down to discuss the bump in the road, which was resolved by the respondents agreeing, in the interests of the matter proceeding, to waive their right to security. In *Boland* the appellant's counsel was hopeful that the provision of a cheque offered last minute would remedy its non-compliance, but the matter was struck off the roll by reason of the record's unacceptable state and because the appellant had in any event not appropriately dealt with its non-compliance on affidavit, or pertinently sought condonation in this regard. (See footnote 7). See *Shepherd*, at 1072 F – G where the court noted the unique situation in *Boland* that a cheque for security was ultimately tendered so this would not have amounted to exempting the appellant from compliance with the relevant sub-rule (Rule 42 (12) at the time.).

⁴⁹ *Erasmus Supra* at 31 and the corresponding cases referenced at footnote 197. See also *Quantibuild* at [6] in which it is recorded that the appellant filed security after the respondent issued an application to declare that the appeal had lapsed but before the appeal was re-enrolled again together with a supplementary record and an application for condonation and conditional reinstatement of the appeal, if the Full Court were to find that the appeal had lapsed.

⁵⁰ *LG, Supra* at [26].

⁵¹ *LG, Supra*, at [23] and [25] (although the court perhaps meant to refer to Rule 30A); *Strouthos, Supra* at 140 H. However see *Jyoti, Supra* at [12] where the court held that the respondent's remedy did not lie in proceeding with a rule 30 application.

35.1 Equally so it appears that the provisions of rule 30 A may be invoked by a respondent to enforce compliance with the mandatory provisions of Rule 49 (13).⁵²

35.2 A respondent can raise the issue of the appellant's non-compliance with the sub-rule at any point, unless it has become obviously moot.⁵³ He does not forego the right to insist on the provisioning of security unless he has clearly waived his entitlement thereto.

35.3 Logically as to when a respondent might draw attention to the appellant's non-compliance, he/she/it should do so as soon as he/she/it becomes aware of the absence of the default measure being in place for his/her protection.⁵⁴

35.4 Although it appears desirable for a respondent to seek by way of a substantive application to strike the matter from the roll,⁵⁵ he/she is not precluded from raising an objection *in limine* in heads of argument.⁵⁶

35.5 An appellant who has failed to comply with the sub-rule ought to seek condonation from the court hearing the appeal on affidavit explaining why he/she has not complied with the rule.⁵⁷ Assuming that the defect has by then been cured, condonation may well be granted in the discretion of the court.

35.6 Any contention as to the form and extent of the security, ought to be resolved by the Registrar whose function it is when there is

⁵² See footnote 52. This is probably what the court in *LG* meant. In any event a court can, in regulating its own proceedings, fashion a remedy to ensure the efficient administration of the court's judicial functions.

⁵³ This would unlikely be before judgement is delivered in the appeal because the respondent is entitled to security as of right. It may become moot though if the respondent has unconditionally waived his entitlement to security or security has in fact been provided.

⁵⁴ In *Jyoti*, the court did not find that there was a tacit waiver. To the contrary it was recorded (at [4]) that it was common cause that the right to security had not been waived. The application under consideration before it was however uniquely one in terms of Rule 30.

⁵⁵ See *Pilane* and *Boland* where substantive applications were indicated.

⁵⁶ This approach was permitted in *TR Eagle Air*. In *Freedom Stationary* it is apparent that the appeal panel raised the issue *mero motu*.

⁵⁷ *Pilane*, *Supra* at 619 E – H and 622 G – H.

contention in this respect, and until such time as it has been fixed and the amount settled upon, the appeal will remain irregular because of the two “*interdependent and sequential*” requirements referred to in *Breda*.⁵⁸

35.7 Either party would be entitled to approach the Registrar to fix the amount of the security. Rule 49 (13) does not say who is obliged to do so. The appellant would principally bear the duty to approach the Registrar however because he is the party obliged to enter into “*good and sufficient*” security and who is in effect under bar until he does so. The trigger for the invocation of the sub-rule 13 (b) would however essentially arise from a *respondent’s* disagreement that the security offered is either good or sufficient.⁵⁹ This is because the Rule envisages that the respondent shall be satisfied that good and sufficient security is given that his costs will be paid in the event of the appeal not succeeding. The respondent is also the party with whom the prerogative lays to waive security for his costs.⁶⁰

35.8 Where there is a lag in the Registrar being approached, a respondent may proceed in terms of Rule 30A or seek a *mandamus* directing the appellant to approach the Registrar.⁶¹

35.9 An appeal struck from the roll for want of compliance of having filed security for the respondent’s costs of appeal will also require an application to be made for its reinstatement on the appeal roll after the recognized shortcoming has been duly rectified.⁶²

⁵⁸ *Breda, Supra* at [38].

⁵⁹ *Jyoti, Supra* at [10] – [11].

⁶⁰ *TR Eagle Air, Supra* at [18]. See also *Breda, Supra* at [39].

⁶¹ *Jyoti, Supra* at [12].

⁶² It is noted that the court in *Collatz and another v Alexander Forbes Financial Services (Pty) Ltd and others*⁶² suggests that an appeal that is struck under these circumstances would result in the operation of the order appeal against no longer being suspended. We form no view in this respect, but in the light of the contrary authorities that require an application on notice of motion to declare an appeal lapsed we suggest that this statement may not be correct.

The application of the principles to the present scenario:

[38] In this instance there is no contention by the trust that it was obliged, when it lodged the record and purported at the same juncture, under the assumption that everything was in order, to have prosecuted the appeal, to have filed security. It is also not in issue that this constituted an irregularity and put the appeal at risk of not being heard on its merits once the eventuality dawned on it that there was a non-observance of the sub-rule.

[39] It is further manifestly apparent, whatever its misgivings that the quantum of the security could lag behind, that the appellants wholeheartedly endeavoured to comply with the provisions of Rule 49 (13) since being made aware of their shortcoming in this respect. By everyone's account it can further reasonably be inferred that neither party noticed the glitch at all before the respondents' counsel drew attention thereto in the heads of argument filed on their behalf.

[40] First and foremost, the reconsidered view of the trust was that although the better approach would be the delivery of a substantive application to strike out the appeal, this is not a fixed rule. It was accepted that in appropriate circumstances the application may be brought from the Bar or that the court itself may strike the matter off the roll. The respondents' request is therefore properly before this court.

[41] Also conceded is the reality that the failure to have timeously furnished security constituted an irregularity and also put the trust's appeal at the risk of being struck off the roll which is the invariable outcome unless condonation is granted. It was not contended by either party that the appeal had automatically lapsed.

[42] Where the trust parted ways with the respondents however is in its insistence that the cause of the complaint thrown at it by the last minute objection had in fact been cured by the furnishing of security in the form of the bond tendered. Even if the respondents were dissatisfied with its adequacy, so the contention went, it was enough to get it over the hill of the first requirement stipulated in Rule 49 (13) (a).

[43] Whereas the trust acknowledged that it was not for the court but the Registrar to resolve the issue of the quantum of the security, it yet persisted that the court should find that it had done what it needed to in compliance with the sub-rule, but that it was the failure on the part of the respondents to meaningfully engage about the issue of the security's adequacy that was the obstacle which could be obviated by not striking the appeal off the roll at their behest. This supposed equivocation of their part was their own ruin, so the contention went.

[44] The trust also imagined that it could for this reason, unresolved quantum notwithstanding, appeal to the court in its wide discretion to grant condonation especially on the basis of its mere oversight, the fact that it had acted as promptly as possible to rectify the irregularity, the "*constellation of lodestars*" in the appeal, being "*the interests of justice, fairness and finality*",⁶³ the supposed ambivalent and obtuse stance adopted by the respondents (the latter in their rejection of its substantial security bond), the claimed absence of any prejudice to the respondents, the court a quo's endorsement of the "*self-evident*" prospects of success upon appeal by its order granting leave to appeal, the claimed "*significant public importance*" of the matter⁶⁴ and of course the convenience of a full court, seized of the matter, having perused the record and

⁶³ Collatz, *Supra* at [20].

⁶⁴ The appeal deals with the interpretation of subordinate legislation in regard to the liability for an electrical connection to premises in circumstances where the connection has been vandalized or stolen.

the heads of argument of both parties, ready to entertain an argument on the merits.

[45] Mr. Dyke sought to persuade us that it was in order to excuse the trust's non-compliance because it had as a fact put forward the bond of security even if the amount was contested, this based upon a view adopted by the court in *Breda* that “*the ‘Security Bond’ filed by the appellants – warts and all – is still security.*”⁶⁵ This finding must however be understood in the peculiar context of that matter. The appellants in that instance, in a quest to comply with Rule 49(13)(a), had about two months after prosecuting the appeal delivered, with service on the respondent and filing with the court, a document labelled ‘*Bond of Security*’ which stated the following in the material part:

“**BE PLEASED THAT THE APPELLANTS** are held liable and firmly bound for the costs in the abovementioned appeal to the full bench of the Honourable Court in the amount of R1 000.00 in the event that the Honourable Court may award costs to the Respondent.”

[46] It appears that the respondent in that instance had not reacted to the bond of security until he launched the application to strike the appeal from the roll a month before its enrolment. The court reasoned, in response to the respondent's contention that this security filed was “*meaningless*”, that it was instead the beginning of compliance by the appellant as one of the first legs of the “*interdependent and sequential*” requirements making up the obligation to file security in Rule 49 (13), but that where it had fallen short of the second requirement, this was a function of the Registrar to determine. The court found that those assertions, namely that a security bond filed is ‘*meaningless and provides no security*’ ought instead to have been advanced before the Registrar.

⁶⁵ *Supra*, at [40].

It sanctioned the respondent for his gumption in applying to strike the appeal from the roll well knowing that a different remedy had remained at his disposal, namely to refer his disagreement to the Registrar to resolve. The reasoning of the court appears below:

“[40] The authorities appear to allow the Court to be involved including by way of striking an appeal from the roll, where no security has been filed. I do not include in the latter category an instance, such as the one propositioned by the respondent of labelling the security filed by the appellants in this matter ‘meaningless’. The ‘Security Bond’ filed by the appellants – warts and all – is still security. In case it falls short of the requirements in the rule it is for the registrar to determine. To treat this otherwise would amount to an overreach of the registrar’s jurisdiction. It is also noteworthy that the respondent appears to have suggested an amount of R356 725.40, but this appears to have been rejected by the appellants. But, the respondent as with the appellants, ought to have approached the registrar for intervention in terms of Rule 49(13)(b), as stated above. The fact that this was not done, doesn’t redound in either of the parties’ favour. Therefore, this ground for the striking is also dismissed.”

[47] This is by no means akin to stating that the mere filing of a bond of security, as a fact, renders an appellant compliant with both requirements where the amount is contested. As is clear from the provisions of sub-rule (13) (b), the Registrar’s involvement is triggered when the parties are unable to agree on the amount of the security.⁶⁶ Whilst the court in *Breda* was astute to observe that in the event of the “warts and all” security falling short of the requirements in the rule, and that it was for the Registrar to determine, we are not in agreement with the reasoning in the judgment inasmuch as it gives the impression that the appeal should not have been struck because the respondents were somehow complicit in the issue of the extent of the security remaining unresolved.

⁶⁶ *Breda, Supra* at [38] – [39].

[48] The essence of the matter is that good security, as contemplated by the “*independent and sequential*” requirements stipulated in the sub-rules’ components, was not furnished.

[49] Whilst that should have triggered prompt attention to either negotiate security and apply for condonation, or alternatively to have the matter removed and to tender wasted costs in order for the appellant to attend to compliance and condonation, we align ourselves instead with the concluding remarks in *T R Eagle Air*⁶⁷ that it is “*proper*” to strike such an appeal off the roll on the basis that non-compliance (especially ongoing in our view) should not be condoned and counsel should not be permitted to argue on the merits.

[50] Concerning the issue of where the costs should lie the facts of the present matter are further distinguishable from those in *Breda*. The fact of the disagreement between the parties *in casu* was unfortunately had at the doors of the court and under the hurried circumstances that unbundled themselves just before the Easter weekend. There would not have been time for a referral to the Registrar to resolve the disagreement.

[51] Once the amount of the security tendered was contested, it did not behove either party to suggest that the court should resolve the issue of the bond’s adequacy, and indeed we decline to do so.

[52] Indeed, apart from any overreach of the Registrar’s function, deciding the issue of what amount would be enough, and going on to excuse the appellant’s failure to have complied with sub-rule 49 (13)(b), would further amount to a deprivation of the respondent’s right to “*good and sufficient*” security that must be assessed by the Registrar who is the expert in taxations.

⁶⁷ *Supra*, at [19].

[53] Although in *Collatz*⁶⁸ and *Breda*⁶⁹ the courts thought it appropriate to condone and get on with the hearing of the respective appeals on the pretext that the respondents had already incurred the costs of the appeal, this approach appears to us to have missed the import of the provisions of sub-rule 49 (13)(b) and to have ridden roughshod over the respondents' right to the protective measure and procedure that is mandated by the sub-rule in their interests.⁷⁰

[54] Self-evidently the respondents have not waived their entitlement to the full enjoyment of the default protective measure, given the parties' mutual surprise before the Easter weekend when it dawned on them both that no security had been given at the time the appeal was prosecuted. There is no room for a tacit waiver in such circumstances.

[55] In our regard of the matter it is more correct to declare that the issue of security remains unresolved, and falls to be dealt with in terms of Rule 49 (13)(b) which puts the obligation on the Registrar to determine the amount given, the eventuality that has arisen that the parties are unable to agree on the amount of security, within the contemplation of that sub-rule.

[56] The appeal is accordingly struck from the roll, not for want of the condonation application having failed on its merits (an issue we decline to decide for now), but to enable the trust to give good and sufficient security, under the expert guidance of the Registrar. The appeal remains in *limbo* and is further postponed *sine die*, pending such process.

⁶⁸ *Supra*

⁶⁹ *Supra*

⁷⁰ Mr. Dyke noted that the decision in *Collatz* had been followed in *Quantibuild* but this submission overlooks the fact that by the time the appellants brought the application for reinstatement of the appeal in that matter, the security had in the meantime been given.

[57] In conclusion on the question whether the respondents were entitled to raise the objection that good and sufficient security had not been filed at the appropriate time as a preliminary objection in their heads of argument, whilst it was risky to have done so on the basis that the court might not have condoned their late filing, we find no reason to criticize them for drawing attention to the trust's conceded failure on this basis and without having filed a formal application. In our view, even if the heads of argument had been rejected for being filed late, the defect and irregularity in the process (which cannot be wished away and operates as a continuing bar to the appeal being prosecuted until the defect has been cured)⁷¹ could just as easily have been raised from the Bar on the day of the hearing and the court could not have ignored it.

[58] Mr. Dyke had referred the court to *Pilane*⁷² in this regard, in which the court held that an objection concerning the noting of an appeal by the absence of security could only be taken on notice of motion with supporting affidavits. Van Rhyn J, who wrote an adjunct to the judgment explained the reason why an objection taken to the failure of furnishing security in noting an appeal (from the magistrate's court in that instance) ought to be taken on notice of motion. It is, as Van Rhyn J pointed out, to "*bring such failure properly before the court*" because "*there is nothing which forms part of the record upon an appeal before the Supreme Court which could reflect the true position as to whether security has been furnished (timeously) in the magistrate's court or not*". That situation is however not the same as the present one. In this instance there is no mystery that security was not given and that there was a misstep in the process.

⁷¹ *Giddey NO v JC Barnard & Partners* 2007 (5) SA 525 (CC) at [16].

⁷² *Supra* at 622 F – G.

[59] The appellants' true issue with the respondents' objection is their timing, but it appears to have been accepted (albeit with a hint of suspicion that its raising was opportunistic) that the objection was well taken.

Costs:

[60] Despite the false optimism the trust entertained that it could persuade the court to hear the appeal on the merits without good *and* sufficient security having been filed, this should not excuse it from the burden of the wasted costs of the appeal's doomed enrolment. The appeal should not have been prosecuted and enrolled before this step had been taken. We share the reconsidered view of Ms Ntsepe that the trust ought to have resorted to the practical step of removing the appeal and tendering the respondents' costs in all the circumstances. Leave aside the trust's belief that all it had to do was file its "*warts and all security*" to be compliant, not only did it seek to put the blame at the respondents' door, but even in its putative application for condonation, it appeared to miss the respondents' sting that it imagined that obtaining condonation was a mere formality. It also insisted on the right to contend that the appeal should be argued on its merits.

[61] We are satisfied that the respondents were not unreasonable in their opposition of the trust's application for condonation.

[62] Ms. Ntsepe suggested that the wasted costs of the appeal should be extended to the costs of the application for leave to appeal, but that would suppose a proper lapsing of the appeal. There was however no application made for that. The appeal is merely "*discontinued*" by our present order.

The order:

[63] The following order is made:

1. The respondents' preliminary objection is upheld.
2. The appeal is struck from the roll to enable the parties to negotiate and settle upon good and sufficient security or to invoke the provisions of Rule 49 (13)(b) in the event that they remain in failure to agree on the amount of security, and thereupon to seek the reinstatement of the appeal, if so advised, upon good cause shown after the requisite standard of security has been entered.
3. The appellant shall be entitled to seek the reinstatement of the appeal on the present condonation papers, duly amplified.
4. The appellants are liable for the respondents' costs of opposing the application for condonation, and for the wasted costs of the appeal by the failed enrolment.
5. Such costs are payable on Scale C.

B HARTLE
JUDGE OF THE HIGH COURT

I AGREE,

M LOWE
JUDGE OF THE HIGH COURT

I AGREE,

V SANGONI
ACTING JUDGE OF THE HIGH COURT

DATE OF APPEAL : 22 April 2025

ADDITIONAL HEADS OF

ARGUMENT DELIVERED ON: 30 April 2025

DATE OF JUDGMENT : 26 September 2025

Appearances:

For the Appellant: Mr. B Dyke SC instructed by BNI Attorneys Inc., c/o Joko & Co Inc., Makhandia (Mr. S Joko).

For the Respondents: Ms. L Ntsepe instructed by Smith Tabata Buchanan Boyes c/o Carinus Jagga, Makanda (ref. Jaunita Jagga).