

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 18544 / 2023

In the matter between:

**JULIAN VAN DER WESTHUIZEN AND
SIXTEEN (16) OTHERS**

Applicants

and

**LIFE HEALTHCARE HOLDINGS GROUP (PTY) LTD
LIFE VINCENT PALLOTTI HOSPITAL (PTY) LTD
LOUIS KATHAN
DR LOUIS KATHAN INC**

First Respondent
Second Respondent
Third Respondent
Fourth Respondent

Summary: Condonation Application - Failure to Comply with Practice Notes
- Decision to Ignore Practice Notes – Condonation granted in
the Interests of Justice - Punitive *De Bonis Propriis* Costs.

Coram: Wille, J

Heard: 17 October 2025

Delivered: 11 December 2025

JUDGMENT

WILLE, J:

Introduction

[1] This is an application in terms of which the first and second respondents (the hospital respondents) seek condonation for non-compliance with specific Practice Directives (PDs) of this court. This is in relation to an application for leave to appeal.¹

[2] At the outset, what is striking about the application on behalf of the hospital respondents is that no affidavit has been filed confirming the contents of the affidavit deposed to by their attorney of record (the hospital respondents' attorney) in support of their core argument regarding their application for condonation. Thus, the primary allegation made on behalf of the hospital respondents regrettably amounts to hearsay evidence. Therefore, very little, if any, probative weight can be attached to the key unsupported averments made by their attorney in this connection.²

[3] I say this because the attorney representing the hospital respondents confirms that he was aware of, and advised explicitly of, his obligations under PD 45B (2) by his correspondent attorney in Cape Town. Despite this, the attorney representing the hospital respondents failed to comply with the PDs because he was allegedly told that the requirements as set out in PD 45B (2) were not strictly enforced in the Western Cape High Court (WCHC). This makes the entire application by the hospital respondents challenging to adjudicate, as there is no affidavit in support of this allegation from the local correspondent attorney.³

¹ A specified procedure is set out in PD 45B (2).

² Despite this being raised by the applicants in their opposing affidavit.

³ There is no reason why this affidavit could not have been filed.

[4] And, there are no details on when this advice was given or who the *dramatis personae* were in connection with it. When this was raised during the hearing, I was advised that the attorney who gave this advice (whose identity remains a mystery) had since left the correspondent attorney's firm in Cape Town and could not be traced.⁴

[5] This notwithstanding, the attorney for the hospital respondents suggests that they should not be prejudiced by an error made by him and his firm. This is then the first issue I will address in connection with this condonation application.⁵

The hospital respondents should not be prejudiced!

[6] The submission suggests that it would be unfair to penalise the hospital respondents for the conduct of their legal representatives. It is contended that the hospital respondents always intended to appeal the orders I granted, as evidenced by their timely application for leave to appeal. It is worth noting that the application for leave to appeal was filed, but only one day before the statutory time limit was due to lapse.⁶

[7] Because there existed two separate applications in this matter, which were heard one after the other, the core submission by the hospital respondents is that the two applications for leave to appeal should be determined by the court simultaneously. This is challenging to follow as the hospital respondents initially strenuously argued that the two discrete applications should be heard and decided

⁴ The identity of this "mystery" attorney remains unknown.

⁵ The firm representing the hospital respondents says it is a firm with offices in 77 countries.

⁶ The application for leave to appeal was filed on 9 May 2025.

separately. With this, I agreed, and they were heard independently and individually of each other.⁷

[8] Now, because the hospital respondents have not followed the subject PDs of the WCHC, they say (presumably because it suits their case) that these applications should be heard together. Also, there was a delay between the delivery of the judgment in the application involving the hospital respondents and the judgment in the discrete application launched by the third and fourth respondents.⁸

[9] Thus, one crucial issue for me to decide is whether condonation should be granted where the lawyer's conduct is relied upon as the sole basis for condonation, and there is no evidence to support it (this negligent conduct). Put another way, there is no supporting affidavit from the hospital respondents that provides any additional explanation for the attorney's failure to perform in accordance with the PDs.⁹

[10] Additionally, it is unlikely that the hospital respondents intended for the simultaneous hearings of the applications for leave to appeal. I say this because when the application for leave to appeal was filed in this matter, no judgment had yet been delivered in the other discrete application (the third and fourth respondents' application). Moreover, no communication was made to the parties or to the court requesting that the applications be heard promptly and seeking directions to that effect within the prescribed period as set out in the PDs for both applications for leave to appeal. Thus, this really goes to the conduct of the attorney representing

⁷ The argument for the leave to appeal applications to be heard together is difficult to understand.

⁸ The latter judgment was delivered only on 14 May 2025.

⁹ Louw v Louw 1965 (3) SA 750 (ECD).

the hospital respondents. It is this conduct (or lack thereof) that bears scrutiny. This is then the real issue which I need to consider in this condonation application.¹⁰

[11] The Supreme Court of Appeal has decisively ruled on this type of conduct by a lawyer. I accept the law to be the following on the conduct failure by an attorney:

*'...I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence, or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations ad misericordiam should not be allowed to become an invitation to laxity. In fact, this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are...'*¹¹

[12] As a matter of pure logic, this must be so, and even more so the case when: (a) the litigant concerned does not depose to any affidavit supporting and attributing the blame or misunderstanding to the attorney; (b) the attorney's explanation for non-compliance is wholly unsatisfactory and completely unsupported and, (c) the

¹⁰ The judgment in the case involving the third and fourth respondents was delivered on 14 May 2025.

¹¹ Salojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A) at 141 B-E.

prospects of success in the application for leave to appeal cannot be determined because the application for leave to appeal is wanting. I now turn to this issue.¹²

The irregular application for leave to appeal!

[13] The prospects of success at this juncture are difficult, if not impossible, to assess because of the defects in the application for leave to appeal. I say this because the notice of the ‘application for leave to appeal’ is longer than the judgment that I delivered (not that this is decisive of anything). As currently formulated, it lists alleged and purported errors in the judgment (instead of explaining why the orders were incorrect) in general terms, with little or no regard for the pleadings. The application for leave to appeal consists of a random list of 63 alleged errors made in the judgment. Thus, the application for leave to appeal as currently formulated is of little or no assistance in defining the legal or factual grounds of the intended appeal.¹³

[14] Put another way, should this court grant leave to appeal to the Supreme Court of Appeal (based on the application for leave to appeal as currently formulated) it would make it difficult, if not impossible, for the learned judges in the Supreme Court of Appeal to determine and decide upon the grounds upon which the appeal is being sought. In addition, I would not be able to write a judgment on the application for leave to appeal because I am left in complete darkness as to the actual grounds of appeal advanced by the hospital respondents.¹⁴

¹² The application for leave to appeal is defective and irregular in law.

¹³ *Hing and Others v Road Accident Fund 2014 (3) SA 350 (WCC)*.

¹⁴ The applicants in the main application are also left in the dark.

[15] The unfortunate nature of the application for leave to appeal also makes it difficult, if not impossible, to apply the test under s17 (1) (a) (i) and (ii) of the Superior Courts Act, 10 of 2013, due to the 63 randomly formulated errors in the judgment.¹⁵

[16] The application for leave to appeal is no more than a regrettable attempt at obfuscation, if not intimidation. Our jurisprudence dictates that applications formulated in this manner are defective and fall to be dismissed for this reason alone. Put another way, the grounds of appeal must be clearly defined and set out in unambiguous terms. As a matter of pure logic, this must be so to enable the parties and the court to be fully informed of the case which the applicant in an application for leave to appeal seeks to make out and which the respondent thereto is to meet. The application for leave to appeal, as currently formulated, has very little value (if any).¹⁶

Constitutional issues?

[17] The hospital respondents argue that leave to appeal should be granted due to the constitutional importance to the private healthcare industry. Again, as a matter of pure logic, this subjective interpretation of ‘importance’ does not commend itself to whether leave to appeal should be granted or not.¹⁷

[18] Most importantly, it is challenging to understand the broad implications of my judgment for the private healthcare industry. I held that the termination decision was made in accordance with administrative procedures, primarily because of an interpretation of the hospital respondents’ conduct policies. My judgment never addressed the proposition that all decisions of private hospitals constitute

¹⁵ These “complaints” seem to be no more than a regurgitation of the arguments made at the hearing.

¹⁶ *Songono v Minister of Law-and-Order* 1996 (4) SA 384 (ECD) at 385E.

¹⁷ *Minister of Justice and Constitutional Development v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA) para 24.

administrative action. Self-evidently, this case was fact-specific and dealt with the facts before the court. Nothing more and nothing less.¹⁸

[19] I indicated on numerous occasions that the facts of the case that were presented before me were specific and peculiar by nature. Each case going forward will require an evaluation of the specific policies and facts concerning each hospital.¹⁹

[20] In addition, for want of a better description, I have a judicial duty of care concerning any potential appeal process in the future. Put another way, no practical purpose would be served by granting leave to appeal on the papers as currently formulated because I have already concluded that the cancellation of the third and fourth respondents' practising privileges by the hospital respondents was of no force and effect. This is in the related application.²⁰

The delay

[21] The hospital respondents assert that their non-compliance with Practice Directive 45 B (2) was not intentional nor wilful. As I have said, there is no affidavit from the correspondent attorney to support the allegation that the PDs in the WCHC are not strictly enforced. The attorney for the hospital respondents unilaterally judged the prospects for implementing the PDs as low. Self-evidently, it is challenging to read into this application that a reasonable explanation for non-compliance has been provided or (indeed) even exists. Also, as a matter of pure logic, it cannot be that the hospital respondents would have the right to unilaterally

¹⁸ This challenge is difficult to understand.

¹⁹ This application was case and fact specific.

²⁰ Under Case Number: 9940 / 2023.

determine that there should be a simultaneous hearing of the applications for leave to appeal when they sought leave in this case. This is when they initially sought discrete hearings.²¹

[22] This is because the judgment in the third and fourth respondents' separate case had not been delivered at the stage when they were required to comply with the PDs. Instead, the likely position was that the hospital respondents may have been advised of their obligations under the practice directives but chose to ignore them and not comply, having erroneously accepted that they are not strictly enforced in the WCHC.²²

[23] If this were the case (the most probable version), it would have been more appropriate to seek condonation based on these facts. That may have been the proper course of action and in the interests of justice.²³

Consideration

[24] Regrettably, the hospital respondents' approach is to shift the blame for their non-compliance with the PDs. They must have been aware of the obligation to consult with the applicants' legal representatives and with the court to arrange a suitable date for the hearing of their application for leave to appeal. This they did not do.²⁴

[25] Simply put, the hospital respondents chose a path of non-compliance because they judged the risk of court enforcement to be low. When the applicants

²¹ Because of their failure to comply with the PDs they want the applications to be heard together.

²² This is the most probable version.

²³ I expected more the hospital respondents' attorneys.

²⁴ They simply refuse to accept responsibility for their inaction.

pointed out in their answering affidavit that the hospital respondents had (in their view) wilfully defied this court's PDs, they sought, in reply and (regrettably in heads of argument) to obfuscate and shift the blame by alleging the following:

- (a) That the PDs are not court rules and must be treated differently.
- (b) By attempting to blame my registrar by contending that she had an obligation to set the application for leave to appeal down for hearing.
- (c) By contending that there is a conflict between this court's PDs and the Uniform Rules of Court.
- (d) By blaming the court for trying to make out a case that the setting down of the application must be regulated in conjunction with the court.
- (e) By attempting to blame the applicant's attorney by contending that he should have approached the court to arrange a date and time for the hearing of the application for leave to appeal.²⁵

[26] In my view, it is now settled law that this court's PDs have the same force as the Uniform Rules of Court, and there is no conflict between the PDs and the Uniform Rules of Court in this instance.²⁶

[27] The way the hospital respondents' attorneys treated their colleagues (and the court) is deplorable. They ignored emails. They requested that the application be heard after hours on the exact dates proposed by the applicants and the court. They requested that the application be determined during the court recess. They asked

²⁵ They say that the applicant's attorney took no steps to advance the application for leave to appeal.

²⁶ Phillips v Bradbury (A 200/2024) [2025] ZAWCHC 430 (17 September 2025) at para [18].

me to come into court during my long leave to hear the application for leave to appeal. All these wholly inappropriate and regrettable allegations were made, despite their colleagues' and the court's attempts to accommodate them while the court was on circuit in Knysna.²⁷

[28] Condonation is an indulgence. Therefore, the party seeking indulgence must provide a complete and satisfactory explanation of the non-compliance. The answer must also be reasonable enough to excuse the default. The court also has a discretion to dismiss the default and, nevertheless, grant condonation. The real test for condonation is whether it is in the interest of justice to excuse the default. There are no fixed requirements for condonation when applying this judicial test.²⁸

[29] A court will generally consider the period and explanation for the delay; the prejudice to the court and other litigants, and the prospects of success in the main proceedings. In this case, the application for leave to appeal.²⁹

Is the explanation satisfactory?

[30] In their papers, the hospital respondents say that it was impossible to comply with PD 45B (2) because:

(a) I was in Knysna on Circuit Duty.

(b) They unilaterally adopted the view that the application for leave to appeal should be heard together with the application for leave to appeal in the case involving the third and fourth respondents.

²⁷ Their conduct is regrettable and wanting.

²⁸ Grootboom v National Prosecuting Authority 2014 (2) SA 68 (CC) paras 23 and 24.

²⁹ Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC) para 20.

(c) They were advised by their correspondent attorneys that the PDs are not strictly enforced in the WCHC.³⁰

[31] These reasons are mutually destructive of each other. The hospital respondents did not comply with the PDs because they believed they were not strictly enforced. Thus, reliance on the different grounds is illogical. Also, they concede that I said I had all the papers with me in electronic form and that I would be available and at the party's disposal while I was in Knysna.³¹

[32] In one last attempt at explaining their delays, the hospital respondents aver that the applications for leave to appeal in this case and the third and fourth respondents' cases are to be heard together. The application for leave to appeal was filed before the judgment in the third and fourth respondents' discrete matter was delivered. Judgment in this latter case was handed down on 3 June 2025. Thus, the hospital respondents had more than sufficient time to comply with the PDs in this case, as the deadline was 23 May 2025.³²

[33] In addition, there was no timeous written communication requesting that the applications be heard together. What is even more significant is that the hospital respondents also did not comply with the time periods set out in the PDs in connection with the third and fourth respondents' separate cases. The hospital respondents failed to comply with the PDs in both cases, despite being aware of the provisions therein. The hospital respondents admit that their attorneys were mindful of the PDs because their correspondent attorneys advised them of their content.

³⁰ This is their excuse made in a hearsay vacuum.

³¹ During the meeting on 17 April 2025.

³² No explanation is given in this connection.

They made an election and took the view that they need not comply with the PDs because they were informed that they were not strictly enforced.³³

[34] Thus, they made a conscious decision that compliance depended on the possibility of enforcement. Nothing more and nothing less.³⁴

[35] Self-evidently, the conduct of the attorneys representing the hospital respondents was deliberate. Put another way, they ignored the PDs because they believed they would not be applied, despite their application to all other litigants.³⁵

[36] Instead of accepting responsibility, the hospital respondents' attorneys seek to divert the focus from their unsatisfactory conduct by contending that:

- (a) Their clients should not be blamed for their conduct.
- (b) My registrar had to enrol the application for leave to appeal.
- (c) The court itself failed because the PDs recognise that the set down is to be regulated in conjunction with the Judge.
- (d) The applicants are to blame because they did not seek a set down after the ten-day period had lapsed.³⁶

[37] It is no excuse for a litigant to blame their attorneys for non-compliance with the rules. This has been eloquently expressed in the following terms:

³³ This is what they aver on a hearsay basis and in a vacuum.

³⁴ It would have been appropriate to merely "come clean" and accept responsibility for their inaction.

³⁵ The decision they made was not only wrong, but it was also dead wrong.

³⁶ As provided for in PD 45B (3).

‘...in cases of flagrant breaches of the Rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused, whatever the merits of the appeal are and that this applies even where the blame lies solely with the attorney...’³⁷

[38] The attorneys representing the hospital respondents allege that they are sophisticated and well-resourced, with offices worldwide. Thus, it makes their non-compliance even worse. Also, the allegation that my registrar is to blame falls to be deprecated.³⁸

[39] In a further exercise in legal gymnastics, the hospital respondents attempt to create a conflict between the Uniform Rules and the PDs. They aver that there is a difference between non-compliance with the Rules and the PDs. I say there is no legal difference between the two when it comes to compliance.³⁹

[40] The purpose of the PDs is to aid the speedy determination of an application for leave to appeal by establishing mutually beneficial dates for all parties. There is no obligation on the applicants or their legal representatives to seek a set down of the hospital respondents’ application for leave to appeal. This obligation rested solely on the hospital respondents and is mandatory. It states that an applicant for leave to appeal shall approach the judge for a date after consulting with the parties. Regarding the PDs, the hospital respondents were obliged to arrange a convenient date and time for the hearing of the application for leave to appeal after consulting with the legal representatives of the other parties, after the application for leave to

³⁷ SA Express v Bagport (Pty) Ltd 2020 (5) SA 404 (SCA) para 18.

³⁸ This was totally unacceptable conduct.

³⁹ Rossiter and Others v Nedbank (96/2014) [2015] ZASCA 196 (1 December 2015) para 15.

appeal was filed. This they did not do, and no reasonable explanation was provided.⁴⁰

The interests of justice

[41] Further, as explained earlier in this judgment, the application for leave to appeal (as currently formulated) is defective for want of specificity, and it would be impermissible and unjudicial for me to grant leave to appeal on the strength of this application (even if I were inclined to do so). It puts the applicants and any appeal court in a difficult, if not impossible, position to deal with the appeal in a meaningful manner.⁴¹

[42] This notwithstanding, this application concerns condonation and, essentially, potential and actual prejudice to the hospital respondents. Put another way, the hospital respondents say that the applicants will not suffer any prejudice if the condonation is granted. This is the only submission made on behalf of the hospital respondents that I agree with.⁴²

[43] In addition, counsel for the hospital respondents (during argument) wisely saw the wood for the trees and advanced no excuses for the conduct of the attorney representing the hospital respondents. This, at the end of the day, weighed heavily with me. Had it not been for this wise change of course into the wind by the counsel for the hospital respondents, the result would have likely been a shipwreck for the hospital respondents. In summary, despite all the omissions and failures by the hospital respondents' legal representatives, it will be in the interests of justice that

⁴⁰ They were also 17 days out of time.

⁴¹ Counsel for the hospital respondents has indicated that the

⁴² I agree with this submission wisely made by counsel for the hospital respondents.

condonation be granted to the hospital respondents. It goes without saying that this indulgence must entail severe cost implications.⁴³

Costs

[44] The hospital respondents say they will not charge their clients for this application. The fee arrangement between the hospital respondents and their clients is beyond the remit of this court.⁴⁴

[45] The applicants and the third and fourth respondents must be compensated for the failures and omissions by the hospital respondents' legal representatives.⁴⁵

[46] The third and fourth respondents did participate in the hearing concerning the opposition to the condonation application. Thus, they are also entitled to recover the costs that they incurred as a result. Undoubtedly, because of the omissions and failures by the hospital respondents' legal representatives, these costs fall to be taxed on an attorney-client basis. Also, in the circumstances, all these costs fall to be paid personally by the attorney who deposed to the affidavit in support of the condonation application.⁴⁶

Order

[47] Thus, the following order is granted:

1. The condonation application is granted.

⁴³ There must be some accountability for the conduct by the attorneys for the hospital respondents.

⁴⁴ This fee arrangement is between the hospital respondents and their attorneys.

⁴⁵ The submissions made by them were of assistance to the court.

⁴⁶ There is simply no excuse for his conduct and inaction.

2. The first and second respondents are given leave to re-enrol their application for leave to appeal.
3. The first and second respondents' attorney who deposed to the affidavit in support of the condonation application shall be liable for the costs of the application on the attorney and client scale *de bonis propriis*.
4. This costs order shall also apply to any costs incurred by the third and fourth respondents.
5. The costs shall include the costs of two counsel and shall be on scale C.

E.D. WILLE
(Cape Town)

LIST OF APPEARANCES

FOR THE APPLICANTS

ANTON KATZ SC

KESSLER PERUMALSAMY

INSTRUCTED BY CARLO TIMOTHY

TIMOTHY AND TIMOTHY ATTORNEYS

FOR THE FIRST AND SECOND RESPONDENTS

ANDREW REDDING SC

DANIEL SIVE

INSTRUCTED BY BAKER & MCKENZIE

FOR THE THIRD AND FOURTH RESPONDENTS

STEVE KIRK-COHEN SC

MARTINUS VAN DEN BERG

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MCACISO STANSFIELD INC