



In the matter between:

and

Respondent

Coram: Petersen ADJP; Maodi AJ

Date heard: 08 August 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for handing down the judgment are deemed to be 12h00 on 12 February 2026.

Summary: Application for reinstatement of lapsed appeal – condonation for late filing of record – explanation for 12-month delay deemed vague and unsatisfactory – negligence by appellant attorneys in prosecuting appeal – strict scrutiny of legal practitioners’ conduct – application of trite principles weighing poor explanation against prospects of success – strong prospects of success on appeal identified – court *a quo* irregularly admitted replying affidavit in summary judgment proceedings contrary to Magistrates’ Court Rule 14 – procedural irregularity constitutes potential gross injustice – interests of justice favour ventilation of dispute despite “slapdash” prosecution of the appeal – strong merits compensate for weak explanation – appeal reinstated – appellant ordered to pay costs of application and opposition due to dilatory conduct.

ORDER

On appeal from (Rustenburg Magistrates’ Court): (Magistrate P J Smith sitting as court *a quo*):

1. Condonation for the late filing of the record and the late prosecution of the appeal is granted.
2. The appeal under Case No. CIV APP MG 06/2022 is hereby reinstated.
3. The Appellant is directed to take all necessary steps to set the appeal down for hearing within 30 days of this order.
4. The Appellant is ordered to pay the costs of this application for reinstatement and condonation, including the costs of the Respondent’s opposition on Scale C, to be taxed.

JUDGMENT

PETERSEN ADJP

Introduction

[1] This is an application for the reinstatement of an appeal that has lapsed due to the failure of the appellant (applicant in this interlocutory application) to prosecute the appeal within the prescribed time limits. Accompanying this request is an application for condonation for the late filing of the record and the late filing of the application for reinstatement itself.

[2] The appellant, a firm of attorneys, seeks to overturn a summary judgment granted against it by the Rustenburg Magistrate's Court on 07 July 2021. The appeal is founded on alleged procedural irregularities committed by the court *a quo*, most notably the admission of a replying affidavit during summary judgment proceedings.

[3] The respondent, acting on behalf of her minor child, opposes the application for reinstatement. The respondent contends that the appellant has displayed a flagrant disregard for the Rules of Court, that the explanation for the delay is woefully inadequate, and that the application is merely a dilatory tactic to delay payment.

[4] The matter before this Court, therefore, concerns the classic tension between the need for finality in litigation and the interests of justice, which dictate that a party should not be barred from ventilating a genuine dispute due to procedural missteps, provided a reasonable explanation exists.

[5] In adjudicating this application, this Court is required to exercise a judicial discretion, weighing various factors including the degree of non-compliance, the explanation therefor, the prospects of success on appeal, the importance of the case, and the prejudice to the respective parties.

Factual background

[6] The genesis of this dispute lies in the Magistrate's Court for the District of Rustenburg under case number 3112/2020. The respondent instituted action against the appellant, which culminated in an application for summary judgment.

[7] The summary judgment application was argued, and judgment was delivered in favour of the respondent on 07 July 2021. The appellant, dissatisfied with this outcome, noted an appeal against the whole of the judgment shortly thereafter.

[8] In terms of Rule 50(1) of the Uniform Rules of Court, read with Rule 51 of the Magistrates' Court Rules, the appellant was required to prosecute the appeal by filing the record and applying for a date of hearing within strictly prescribed timeframes, sixty (60) days after noting the appeal or the certification of the record.

[9] It is common cause that the appellant failed to adhere to these timeframes. The record was not filed timeously, and no application for a hearing date was made within the prescribed period. Consequently, the appeal lapsed *ex lege* (by operation of law).

[10] The appellant remained supine for a considerable period. It was only in July 2022, approximately one year after the judgment *a quo* was delivered, that the appellant launched the current application to revive the appeal.

The explanation for the delay

[11] The appellant bears the onus to satisfy this Court that sufficient cause exists to condone the non-compliance. This requirement is not a mere formality. The explanation proffered must be reasonable, *bona fide*, and cover the entire period of the delay.

[12] In the founding affidavit filed in support of reinstatement, the appellant attributes the delay to a confluence of administrative challenges and external factors. The primary reason advanced is the difficulty experienced in obtaining the transcribed record from the service providers and the Clerk of the Court.

[13] The appellant further submits that the restrictions imposed by the COVID-19 pandemic, which persisted during the relevant period, hampered the normal flow of court administration and the reconstruction of the record.

[14] Reference is made to various attempts to communicate with the transcribers and the court *a quo* to secure the complete record. The appellant contends that the file went missing at the Magistrate's Court at one stage, necessitating a reconstruction process which consumed significant time.

[15] The appellant argues that the delay was not wilful or intended to frustrate the respondent, but rather the result of systemic inefficiencies beyond its control.

Applicable legal principles

[16] The principles governing condonation are well-entrenched in our law. In *Melane v Santam Insurance Co Ltd*¹ the Appellate Division held that “sufficient cause” includes the assessment of the degree of lateness, the explanation for it, the prospects of success, and the importance of the case.

[17] However, more recent jurisprudence has refined the application of these principles, particularly regarding the standard of conduct expected from litigants and their legal representatives.

[18] We must have specific regard in *Harry's Tyres (Pty) Limited v Symes and Others*², where the Full Court of this Division emphasized that the factors relevant to condonation are not individually decisive but must be weighed against one another.

[19] *Harry's Tyres* establishes that even if the explanation for the delay is weak, strong prospects of success may compensate for it. Conversely, where the delay is egregious and the explanation unsatisfactory, even good prospects of success may not be sufficient to save the application. The paramount consideration remains the interests of justice.

¹ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A).

² *Harrys Tyres (Pty) Limited v Symes and Others* (CIV APP FB10/2023) [2024] ZANWHC 75 (13 March 2024).

[20] Furthermore, the quality of the explanation must be scrutinized strictly. In *Ngaka Modiri Molema District Municipality v Quantibuild (Proprietary) Limited*³ the Full Court of this Division articulated the standard as follows:

‘A party seeking condonation must give a full explanation for the non-compliance with the rules of court. The explanation must be reasonable and must cover the entire period of the delay.’

[21] The dictum in *Quantibuild* places a heavy burden on the applicant to account for every significant gap in the timeline. A fragmented or sketchy explanation that leaves months unaccounted for is insufficient.

[22] Finally, in *Member of the Executive Council, North West Department of Health v L.S.M obo O.M*⁴ the Full Court of this Division encapsulated all the aforesaid principles, relevant to the conduct of legal practitioners, with reference to recent authorities of the SCA and the aforesaid authorities. It stated, amongst others:

‘[8] The approach to an application for condonation accompanied by an application for reinstatement of an appeal, in the context of Uniform Rule 49, was reaffirmed by the Supreme Court of Appeal (SCA) in *MEC for Health Eastern Cape v A.S obo S.S*⁵. The SCA made the point, which is equally apposite in the present matter, that *‘Medical negligence claims linked to cerebral palsy in newborns are increasingly prolific in our courts. They often involve*

³ *Ngaka Modiri Molema District Municipality v Quantibuild (Proprietary) Limited* (CIV APP FB12/2022; 3352/2019) [2024] ZANWHC 101 (12 April 2024).

⁴ *Member of the Executive Council North West Department of Health v L.S.M obo O.M* (Appeal) (FC06/2024 ; 1362/2019) [2025] ZANWHC 203 (16 October 2025).

⁵ *MEC for Health Eastern Cape v A.S obo S.S* (842/2023) [2025] ZASCA (15 January 2025).

complex questions around negligence and, in particular, causation. The present case is no exception.’

[9] As in *MEC for Health Eastern Cape v A.S obo S.S*, the issue that complicates the present matter is the multiple failings on the part of the attorneys for the MEC to comply with the relevant Uniform Rules of Court (the rules) regulating appeals from the trial court to the full court. It is incumbent on this Court to carefully consider these failings and whether or not they can be condoned.

[10] The SCA underscored that ‘*the two aspects of the appeal are linked. Condonation of a failure to comply with the rules almost inevitably involves weighing the prospects of success on the merits of the appeal as a key factor*’. We are reminded that, as in the present case where the condonation is opposed, this Court *must give proper consideration to the question of whether the defaulting party has made out a case for that relief.*’

[11] On the contrary argument, also postulated by the SCA, it is trite that prospects of success are by no means a decisive factor. Our law is replete with authority that, in the case of gross negligence, even strong prospects of success will not justify condonation. The question of prospects of success ordinarily warrants a consideration of the merits of the matter, and more so, the reasons advanced by the appellant why the prospects of success should sway the pendulum in favour of the MEC. This, however, is not a hard-and-fast rule. In *The Member of the Executive Council for Health, Eastern Cape Province v Y N obo E N*, with reference to *Melane v Santam Insurance Co Ltd*⁶; and *Commissioner: South African Revenue Service, Gauteng West v Levue Investments (Pty) Ltd*⁷, the SCA pointed out that:

‘[14] Although the prospects of success on appeal are generally an important consideration in relation to the reinstatement of an appeal, it is not decisive. Where the degree of non-compliance is flagrant and substantial, condonation may be refused irrespective of the prospects of success. If the explanation for such flagrant and substantial non-compliance is manifestly inadequate or there is no explanation at all, the prospects of success need not be considered.

⁶ *Member of the Executive Council for Health, Eastern Cape v Y N obo E N* (056/2021) [2023] ZASCA 32 (30 March 2023).

⁷ *Commissioner: South African Revenue Service, Gauteng West v Levue Investments (Pty) Ltd* [2007] 3 All SA 109 (SCA) para 11.

[12] The seminal decision in *Ferreira v Ntshingila*⁸ regarding attorneys being fully acquainted with the rules of the appeal court, has found expression in many SCA judgments since. In *S v Sayed and others*⁹ with reference to *Ferreira v Ntshingila* at 281F–G, the SCA reiterated that: ‘An attorney instructed to note an appeal is required to acquaint himself with the rules of the court in which the appeal is to be prosecuted...’ (emphasis added).

[23] This Court, guided by *Member of the Executive Council for Health, Eastern Cape v Y N obo E N*, where the SCA deprecated the “slapdash” approach to litigation often adopted by attorneys, cannot overlook the conduct of the appellant *in casu*.

[24] In *MEC for Health v Y N*, the SCA warned that where there is gross negligence or a flagrant disregard for the rules, the Court is entitled to refuse condonation to protect the integrity of the judicial process, irrespective of the merits. This is particularly relevant *in casu*, where the appellant is itself a firm of attorneys.

Evaluation of the delay

[25] Applying the *MEC for Health v Y N* standard to the facts at hand, the appellant’s explanation leaves much to be desired. The approximately 12 (twelve) month delay is substantial and inordinate.

⁸ *Ferreira v Ntshingila* 1990 (4) SA 271 (A) ([1989] ZASCA 149) at 281F – G.

⁹ *S v Sayed and others* 2018 (1) SACR 185 (SCA) at para 19.

[26] While this Court takes judicial notice of the disruptions caused by the COVID-19 pandemic, a general reliance on “pandemic restrictions” without specific dates and details regarding how those restrictions prevented compliance during specific weeks or months is inadequate.

[27] The explanation regarding the missing file and the transcription delays is similarly vague in parts. There are significant periods of inactivity during which the appellant appears to have sat back and waited for developments rather than proactively driving the process.

[28] As a firm of attorneys, the appellant is expected to know the Rules of Court intimately. The failure to apply for an extension of time or to bring the application for reinstatement sooner points to a degree of negligence. In *Member of the Executive Council North West Department of Health v L.S.M obo O.M*, the Full Court of this Division emphasized what was said by the SCA in *The Member of the Executive Council for Health, Eastern Cape Province v Y N obo E N*, that:

‘[54] The circumstances prevailing in the present matter are on all fours analogous to those in *The Member of the Executive Council for Health, Eastern Cape Province v Y N obo E N*. The sentiments expressed at paragraphs 15 and 16 are apposite:

‘[15] The effect of the delay in the filing of the record upon the administration of justice and upon the interests of the respondent is self-evident. At issue in this case is liability for harm caused to a child, who is permanently disabled, and whose interests are paramount.[\[19\]](#) She was born on 1 January 2010. Liability was determined by the trial court on 30 October 2018 and confirmed on appeal on 23 July 2020. The interests of the respondent and the minor child cannot be ignored.

The quantum of the loss suffered by them has yet to be determined, and they have not yet received compensation in accordance with the loss.

[16] ... Finally, it must be said that the way in which the State Attorney, Mthatha, dealt with this matter is to be strongly deprecated. There was a flagrant disregard of the SCA rules. This Court, on more than one occasion, has stated that in such cases, punitive personal costs orders may be appropriate.’

[29] If this Court were to decide the matter solely based on the explanation for the delay, the application would likely fail. The explanation does not fully meet the “full and satisfactory” threshold espoused in *Quantibuild*.

Prospects of Success

[30] As established by the Supreme Court of Appeal in *MEC for Health Eastern Cape v A.S obo S.S*, condonation for a failure to comply with court rules almost inevitably involves weighing the prospects of success on the merits as a key factor against the poor explanation for the delay. This Court is acutely aware that evaluating these two linked aspects requires careful balancing.

[31] In conducting this balancing act, we must be guided by the stern cautions set out in *Member of the Executive Council for Health, Eastern Cape v Y N obo E N*. The SCA was clear that the prospects of success are not always decisive. Where a litigant’s non-compliance is flagrant and substantial, a court retains the discretion to refuse condonation irrespective of how strong the prospects of success might be. Given the appellant’s standing as a firm of attorneys, their failure to adhere to the prescribed timeframes and their vague explanation skirt dangerously close to this threshold of flagrant non-compliance.

[32] However, despite the “slapdash” prosecution of this appeal by the appellant, this Court cannot disregard the compelling merits of the case. The appellant’s central grievance is that the court *a quo* irregularly admitted a replying affidavit during the summary judgment proceedings.

[33] The admission of a replying affidavit in summary judgment proceedings is strictly contrary to Magistrates’ Court Rule 14. Rule 14, which governs summary judgment, permits only two sets of affidavits: the plaintiff’s verifying affidavit and the defendant’s opposing affidavit. The Rule does not make provision for a replying affidavit. The filing of a replying affidavit in summary judgment proceedings is widely regarded as an irregular step. If the Magistrate relied on the new matter or evidence raised in this impermissible affidavit to grant summary judgment, it constitutes a material misdirection. The appellant, in fact, contends that the summary judgment was granted largely on the strength of this irregular replying affidavit, which effectively closed the door of the appellant’s defence without a trial. This is not a mere technical oversight. It constitutes a potential gross injustice.

[34] On the papers before us, this ground of appeal appears to have strong prospects of success on appeal. Summary judgment is a drastic remedy that closes the court’s doors to a defendant. Strict compliance with Rule 14 is therefore required, to avoid the tenets of s 34 of the Constitution of the Republic of South Africa, 1996 being impinged.

[35] Refusing reinstatement would allow a potentially legally defective judgment to stand. It would impose liability on the appellant without affording the appellant a fair opportunity to defend the matter at trial, solely because of procedural noncompliance in the appeal process.

[36] Conversely, the respondent is prejudiced by the delay in finalising the matter and obtaining the judgment debt. However, prejudice to the respondent can, to a large extent, be cured by an appropriate costs order.

[37] While the appellant's conduct borders on the "slapdash" behaviour criticised in *MEC for Health v Y N*, we are not persuaded that it reaches the level of gross negligence that warrants closing the door on a meritorious appeal entirely.

[38] The constitutional right of access to courts and the right to a fair hearing weigh heavily in favour of granting the indulgence, despite the appellant's dilatory conduct.

[39] Ultimately, these strong merits outweigh the weak explanation for the twelve (12) month delay. Taking all these factors into consideration and heavily influenced by the principles distilled in *Member of the Executive Council, North West Department of Health v L.S.M obo O.M* regarding the ultimate interests of justice, this Court finds that the interests of justice strongly favour the ventilation of this dispute. To shut the courtroom doors on the appellant when a clear procedural irregularity occurred *a quo* would compound the injustice. Consequently, the appeal must be reinstated.

Costs

[40] The granting of condonation and reinstatement is an indulgence. The appellant is asking the Court to excuse its non-compliance.

[41] The respondent was fully entitled to oppose this application, given the length of the delay and the gaps in the appellant's explanation. The opposition was not unreasonable.

[42] In light of the principles in *MEC for Health v Y N*, the Court must mark its displeasure at the appellant's lax prosecution of the appeal. The appellant should not be allowed to escape the financial consequences of its delay.

[43] Accordingly, it is only fair and proper that the appellant be ordered to pay the costs of this application, including the costs incurred by the respondent's opposition.

[44] The respondent prayed for a punitive costs order. While the appellant's conduct was negligent, we are of the view that it was not malicious or vexatious to the extent that it warrants attorney and client costs at this stage. Party and party costs will suffice to address the prejudice on the highest scale.

Conclusion

[45] In summary, while the appellant's explanation for the delay is weak and subject to criticism under the authorities cited above, the strong prospects of success regarding the irregularity of the replying affidavit compel this Court to grant the relief sought in the interests of justice.

[46] The appeal is therefore reinstated, but the appellant must pay for the delay and the opposition thereto.

[47] Finally, the judgment in this appeal was assigned to Judge Maodi to scribe. Upon receipt of correspondence from *T T Hlapolosa Inc Attorneys*, enquiring about the delay in handing down the judgment, I took it upon myself to pen the judgment in this appeal. The delay is regretted, particularly in light of the high standard expected by our Courts from practitioners, as espoused in this judgment.

Order

[48] In the result, the following order is made:

1. Condonation for the late filing of the record and the late prosecution of the appeal is granted.
2. The appeal under Case No. CIV APP MG 06/2022 is hereby reinstated.
3. The Appellant is directed to take all necessary steps to set the appeal down for hearing within 30 days of this order.
4. The Appellant is ordered to pay the costs of this application for reinstatement and condonation, including the costs of the Respondent's opposition, on Scale C, to be taxed.



A H PETERSEN

**ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG**

I agree.



T J MAODI

**ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG**

Appearances

For the appellant: Mr T T Hlapolosa
Instructed by: T T Hlapolosa Attorneys Inc
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For the respondent: Adv R C Marakalla
Instructed by: Makgale Ngwasheng Attorneys
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