



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

Case number: A305/2025

In the matter between:

JOHN VAN DEN HEEVER

First Applicant

BONTE VAN DEN HEEVER

Second Applicant

And

COLETTE ROOS

First Respondent

MINPROP PROPERTY (PTY) LTD

Second Respondent

JACOB JACOBUS BASSON

Third Respondent

Coram : Nziweni, J et Mgengwana, AJ (concurring)

Heard : 27 February 2026

Delivered : 11 March 2026 (electronically)

Summary – Civil Procedure- Non-compliance with the prescribed time periods in the Rules of Court- Courts are increasingly grappling with a frequent problem of missed deadlines- Such delays can no longer be tolerated without good cause – Condonation

- Absence of a complete record makes the application for condonation premature and substantively hollow.

Litigation - Litigants possess an independent duty to maintain active oversight of their cases - Legal representation does not absolve litigants of the responsibility to monitor proceedings - A "washing of hands" attitude, characterised by passive acceptance of protracted delays, is unacceptable and constitutes a failure of this duty – For the litigant to be absolved from the neglect, there should be a factual basis to reasonably infer that the litigant was blameless victim of his / or her attorney's neglect - Lien - Failure to state that payments were made constitutes an incomplete version to sustain the claim of right of lien.

ORDER

Application for condonation for late filing and prosecution of the appeal is dismissed. The appeal has lapsed and struck from the roll. No order as to costs.

JUDGMENT DELIVERED ELECTRONICALLY

Nziweni, J

Introduction

[1] This appeal finds its genesis in an eviction application that was brought in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, Act 19 of 1998 [commonly referred to as PIE], by the respondents before a Magistrate in Paarl. After hearing the matter, the Magistrate issued an order evicting the appellants from the premises in question.

[2] Primarily, in this appeal, the appellants, inter alia, seek to set aside the Magistrate's decision on the ground that the Magistrate erred in his decision to grant the eviction order.

[3] The relationship that existed between the first appellant and the second respondent could be described as one that involved an employer [second respondent] and employee [first appellant] relationship. This relationship led to the first and the second appellant occupying the property in question. The first respondent is the new owner of the property in question, and she had purchased the property from the second respondent.

[4] This appeal also concerns two overlapping interlocutory applications that are brought by both the appellants and the respondents. It is common ground that the journey to this hearing has been marked by significant procedural challenges. And this is so because of the appellants' failure to comply [that is not disputed] with the Magistrates' Rules of Court. The respondents challenged the appellants' noncompliance in bringing this appeal before this Court by bringing an interlocutory application for a declaratory relief.

[5] In the interlocutory application, the respondents [before indicating that they would abide by this Court's decision] they sought that this Court should declare that the present appeal had lapsed, alternatively, that it be struck from the roll. In response to the respondents' application, the appellants filed an application for condonation for the late filing of the security, and the failure to procure the Magistrate's reasons for his decision. Thus, this appeal is accompanied by an [appellants'] application for condonation of delay in filing the security and securing the Magistrate's reasons.

[6] At the outset of this hearing, the matters presented for adjudication before this Court comprised the main appeal, an application for condonation, and an application by the respondents for declaratory relief.

[7] During the commencement of these proceedings, however, the parties requested that the application for condonation be heard simultaneously with the merits of the appeal. The parties agreed that the appellants would proceed with their argument for condonation; should the Court decline to condone the common cause failures to comply with the Rules, it would mean that the appeal had lapsed.

[8] The direct corollary of this is that the parties further agreed that in such circumstances, it would be unnecessary for this Court to determine the respondents' application to declare that the appeal had lapsed, alternatively to strike the matter from the roll ("the application to strike"). The appellants also tendered the costs occasioned by the application to strike.

[9] This Court directed that, in the circumstances, it would be proper and prudent to adjudicate and determine the application for condonation prior to addressing the merits of the appeal. This was particularly necessary given that the appellants, in their condonation application, concede their failure to comply with the Magistrates' Court Rules, specifically Rule 51(1). The parties were amenable to the court's direction.

[10] This Court was further informed that, as far as the condonation application is concerned, the respondents have elected to abide by the decision of the Court. This is not to say, however, that this Court should grant the condonation. Consequently, the sole issue that is currently before this Court is the condonation application.

[11] It is significant to note in this matter, the appellants' non-compliance with the Magistrates' Court Rules is common cause. Hence, the application by the respondents to condone the non-compliance.

[12] This matter has a long history which, I unavoidably, need to recite briefly. The record reveals that the chronology of events which precipitated this appeal are as follows.

Chronology of events

- On 27 August 2025, the court a quo handed judgment.
- Notice of appeal was filed by the appellants on 25 September 2025.
- The magistrate ruling was filed on 16 October 2025.
- On 27 October 2025, respondents served via electronic mail a Rule 62 Notice demanding Security for Costs.
- In response to the Rule 62 notice, the appellants wrote a communique to the respondents pointing out that the demand for security is premature and irregular

as the Uniform Rules of Court were applicable. The appellants undertook to file the security when they were in a position to deliver the record.

- Once again, on 01 December 2025, the first respondents' attorney caused a letter to be written to the appellants' attorneys, complaining about the lack of bona fide, dilatory conduct and non-compliance with the Magistrates' Court Rules. This letter also served as a stark reminder that, inter alia, at the 40 days afforded to the appellants to prosecute their appeal had lapsed on 20 November 2025.
- According to the notice of this Division's registrar, on 04 December 2025, the appellants applied for a date with the registrar; (appellants at the time were already late because the application for the date ought to have been filed by 20 November 2025). In terms of the filed notice of application in the record, the appellants applied for the date on 28 November 2025.
- On 22 January 2026, the respondents filed a notice of an application to strike, seeking the following reliefs:
 - a) to declare that the appeal lapsed, alternatively striking the appeal from the roll;
 - b) to declare that the bond of security dated 28 November 2025 is invalid and be set aside; and
 - c) that the first and second appellants be liable for costs.

[13] The key question to determine is whether the condonation sought by the appellants reveals that the appellants had exercised due diligence in their endeavours to comply with the Rules and made reasonable enquiries to determine the existence of further reasons by the magistrate.

[14] Rule 51 of the Rules stipulates the following:

"51. Appeals in civil cases

(1) Upon a request in writing using the conventional method or the e-justice system in courts, where operational by any party within 10 days after judgment and before noting an appeal, the judicial officer shall within 15 days hand to the registrar or clerk of the court a judgment in writing which shall become part of the record showing—

(a) the facts he or she found to be proved; and

(b) his or her reasons for judgment

(2) The registrar or clerk of the court shall on receipt from the judicial officer of a judgment in writing supply to the party applying therefore a copy of such judgment and shall endorse on the original minutes of record the date on which the copy of such judgment was so supplied.

(3) An appeal may be noted by the delivery of notice within 20 days after the date of a judgment appealed against or within 20 days after the registrar or clerk of the court has supplied a copy of the judgment in writing to the party applying therefor.

(4) . . .

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 or clerk of the court, enter 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 or clerk of the court shall fix the amount and the appellant shall enter security in the amount so fixed or such percentage thereof as the court has determined, as the case may be:

Provided that no security shall be required from the State or, unless the court of appeal otherwise orders, from a person to whom legal aid is rendered by a statutorily established legal aid board.

(5) Money paid into court under sub-rule (4) and outstanding for more than three years, may be paid into the National Revenue Fund, after three months' notice of such intention in writing has been given to the parties concerned, whereafter the parties concerned may apply for a refund of the amount paid into the said Fund.

(6) . . .

(7) . . .

(8) (a) Upon the delivery of a notice of appeal the relevant judicial officer shall within 15 days thereafter hand to the registrar or clerk of the court a statement in writing showing (so far as may be necessary having regard to any judgment in writing already handed in by him or her)—

(i) the facts he or she found to at any finding of fact specified in the notice of appeal as appealed against; and

(iii) his or her reasons for any ruling of law or for the admission or rejection of any evidence so specified as appealed against.

(b) A statement referred to in paragraph (a) shall become part of the record”

[15] It is common cause that the appellants initially furnished security that reads as follows:

“the Appellants bind themselves, as security for the Respondents’ costs, to pay to the Respondents, or whom else it shall concern, the Respondents’ costs of appeal, as taxed or agreed upon, should the Appeal not be successful.”

[16] The respondents vehemently objected to the initial security that was furnished and maintained that what was required was an unconditional security within the prescribed period. The respondents further informed the appellants that the conditions that were attached to the initial security made it invalid.

[17] According to the respondents, another problem that was associated with the initial security that was given by the appellants was that the bond of security does not contemplate, nor action, any money paid into the court a quo as is contemplated by the Magistrates’ Court Rules. Another problem recognised by the respondents with the initial security was that it did not differentiate between the two respondents who will invariably share the costs. According to the respondents, the initial security bond warranted to be set aside.

[18] More significantly, pursuant to the respondents’ demand for a valid security, the appellants attorney responded as follows:

“It is our intention, as required by the Rules, to provide the necessary security for costs. This however is only due simultaneously with the filing of the record and on application for a Court date (which is also when a case number is assigned by the Registrar) ...

Your demand for security is premature and, in *sic* event, the Request in terms of Rule 62 is irregular as the uniform Rules apply. We will file our security bond once we are in a position to deliver the record.” Emphasis added.

[19] It is, of course, true that following the response from the appellants, the attorneys of the first respondent then wrote a letter to the appellants attorney. I consider it important to recite the contents of the letter. The letter partly reads as follows:

1. "Your letter dated 28 November 2025 refers. . .
2. At the outset, we record the following:
 - 2.1 the lack of *bona fide* and dilatory conduct that has marked your clients' approach to date; and
 - 2.2 the clearly apparent continuation of that approach:
 - 2.2.1 in your intentional failure to deal with our correspondence; and
 - 2.2.2 in the grounds of appeal advanced notwithstanding now indisputable concessions made before the court *a quo*.
3. On 18 November 2025 our office caused a letter to be sent to you reminding your clients of their ongoing failure to comply with the provisions of Rule 51 (4) (a) - which requires the furnishing of security – as well as a formal demand made for that security. It was due to be filed on 25 September 2025.
4. Further to the above, you, as the Appellants, bear the responsibility to have applied in writing to the Registrar, with notice to all other parties, within forty (40) days after noting the appeal, for allocation of a date of hearing. You have not done so.
5. To date hereof, your office has failed and/or neglected to respond to the aforementioned correspondence and/or comply with our client's demand for security and /or file your notice for the allocation of a hearing date, as the aforementioned forty (40) days lapsed on the 20th day of November 2025.
6. The non-compliance has not been explained by your client, let alone justified. Such a flagrant or gross no observance of the Rules renders the appeal irregular and liable to being struck from the roll . . .
7. While we again demand that security be furnished immediately, we reserve our clients' rights to take issue with the extreme delay in its filing, together with the delay in prosecuting the appeal..."

The appellants' assertions

[20] As mentioned previously, the appellants submit that they seek condonation for the belatedly filed security bond, the failure to procure the Magistrate's reasons for his decision and requesting this Court to proceed without them [the Magistrate's reasons] and late prosecution of the appeal.

[21] The appellants further submit that the failure to file the requisite security bond and the failure to have the record complete within the prescribed period, resulted in a failure to prosecute the appeal timeously.

[22] Regarding the failures to comply with the Rules of Court, the appellants' attorney conceded that he had previously misinterpreted the Rules. He only arrived at this realisation upon receipt of the respondents' heads of argument. This explains the shift from his initial resistance toward compliance, despite having been urged by the respondents to adhere to the Rules.

[23] Mr. May, on behalf of the appellants, submitted that his clients should not be prejudiced by the errors of their legal representative.

Analysis

Is there a satisfactory justification for the late filing of the security?

[24] In *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) Holmes JA stated the following at para 532C-F:

"In deciding whether a sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus, a slight delay and a good explanation may help to compensate for the prospects of success which are not strong. Or the importance of the issue and the strong prospects of success may tend to compensate for the long delay. And the Respondent's interest in finality may not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavit. I think that all the foregoing clearly emerge from decisions of this Court, and therefore I need not add to the ever-growing burden of annotation by citing cases."

[25] In the matter of *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*

[2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC), the Constitutional Court held that an application for condonation must be evaluated based on the interests of justice. In this instance, the Constitutional Court refused the application due to the applicant's failure to act with the requisite diligence. Applying this standard, the Constitutional Court found the applicant's history of delays, spanning from 1993 to

1999, to be inordinate and inadequately explained. As these delays were attributable solely to the applicant rather than the opposing party, the Constitutional Court concluded that granting condonation would be unjust and would undermine the administration of justice.

[26] In *Van Wyk v Unitas Hospital and Another* (CCT 12/07) [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) (6 December 2007), the Constitutional Court echoed that the standard for condonation is the interests of justice, an inquiry determined by the specific facts and circumstances of each case. Central to this requirement is a reasonable and comprehensive explanation covering the entire duration of the delay. In this instance, the applicant's eleven-month delay was deemed unjustified and superficial, appearing to be a tactical reaction to a threat of execution rather than a genuine intent to appeal. Ultimately, granting condonation in the absence of a satisfactory explanation would undermine the principle of finality and frustrate the administration of justice.

[27] The unifying principle emerging from *Melane*, *Brummer*, and *Van Wyk* is that the granting of condonation hinges on the interests of justice, determined through a flexible yet rigorous balancing of all relevant factors. This inquiry moves beyond a 'rule of thumb' approach, requiring that any delay be met with a comprehensive and reasonable explanation for its entire duration. Ultimately, the court must weigh the applicant's prospects of success against the systemic need for procedural diligence and the principle of finality, ensuring that an indulgence is only granted where it is fair to both parties and does not frustrate the administration of justice.

[28] Applying the unifying principles of *Melane*, *Brummer*, and *Van Wyk* to the present matter, it is evident that the application for condonation fails to meet the interests of justice standard.

[29] First and foremost, regarding the burden of accountability established in *Van Wyk*, the appellants have failed to provide a comprehensive and reasonable explanation covering the entire duration of the delay. Instead of addressing the deficiencies once alerted by the first respondent, the appellants' representative persisted in justifying his conduct, only ostensibly recognising the non-compliance on the eve of the hearing.

Such a superficial approach to the Rules is precisely what the Constitutional Court cautioned against.

[30] For instance, it is common cause that the appellants initially furnished security that reads as follows:

"the Appellants bind themselves, as security for the Respondents' costs, to pay to the respondents, or whom else it shall concern, the Respondents' costs of appeal, as taxed or agreed upon, should the Appeal not be successful"

[31] It appears from the record and papers that the respondents vehemently objected to the initial security that was furnished and maintained that what was required was an unconditional security within the prescribed period. The respondents further informed the appellants that the conditions that were attached to the initial security made it invalid. According to the respondents, another problem that was associated with the initial security that was given by the appellants was that the bond of security does not contemplate, nor action, any money paid into the Court a quo as is contemplated by the Magistrates' Court Rules.

[32] Furthermore, another problem recognised by the respondents with the initial security was that it did not differentiate between the two respondents who will invariably share the costs. According to the respondents, the initial security bond warranted to be set aside.

[33] I deem it necessary at this juncture to repeat the response [from the appellants] to the respondents' demand for a valid security. It provided, so far as is material, as follows:

"It is our intention, as required by the Rules, to provide the necessary security for costs. This however is only due simultaneously with the filing of the record and on application for a Court date (which is also when a case number is assigned by the Registrar) ...

Your demand for security is premature and, in *sic* event, the Request in terms of Rule 62 is irregular as the uniform Rules apply. We will file our security bond once we are in a position to deliver the record." **Emphasis added.**

[34] I emphasise the last phrase of that passage ("we are in a position to deliver the record") because it is an important reminder that at that juncture, the appellants were still unable to deliver the record or the security. On the face of it, the above extract reveals that the appellants' attorney did not seriously argue that there was a compliance with the furnishing of a complete record.

[35] Equally, it is as well to remind oneself at this stage that on this, as on many other aspects of this case, the evidence remains unclear as to what attempts the appellants' attorney ever made to do due diligence. The history of procedural non-compliance in this matter is well-documented and warrants reiteration. Most notable was the appellants' legal representative's persistent attempts to justify his conduct rather than timeously prosecuting the appeal. The appellants cannot claim to be surprised; the first respondent's representative specifically alerted them to the deficiencies in their papers well in advance.

[36] Despite these warnings, the appellants failed to heed the need to comply with the Rules. Consequently, no effective corrective action was taken until the respondents served their heads of argument on 13 February 2026, upon the appellants. It was only on the eve of the hearing that the appellants' representative ostensibly recognised their failure to comply with the Rules. Additionally, when this application for condonation was heard, it was common cause that the reasons of the magistrate were never requested by the appellants.

[37] It is important to recognise that even after the appellants attorney eventually came to a realisation [through the respondents' heads of arguments] and accepted that he did not comply with the Rules, he did not immediately seek condonation. Given the fact that the application for condonation was drafted by the appellants attorney himself, and the affidavit merely contains eight and a half pages, there was no excuse for the application for condonation being launched 10 days after receipt of the respondents' heads of argument. For that matter, there is no excuse proffered for the delay in launching the condonation application.

[38] Another striking feature of this case is that the 10 days of inaction in filing the condonation application, despite the existence of prior delays, demonstrates a

persistent lack of urgency. Similarly, the discovery of the non-compliance with the Rules was discovered at the convenient leisure of the appellants attorney. What is more, during the hearing of the condonation application, the appellants requested that this Court should even condone the incomplete record. The fact that, at this point, the appellants did nothing to request reasons from the magistrate is baffling.

[39] Moreover, in the circumstances, to grant condonation would be to allow procedural laxity to be shielded by the attorney-client relationship. Surely, if the courts are heard to be saying that the circumstances as postulated in this condonation application, create an excusable neglect to justify condonation, then the courts would be in trouble.

[40] Litigation would spiral out of control and screech to a grinding halt, if operated under the circumstances presented by the facts of this matter. Similarly, if the courts say that such conduct by an attorney ought to be condoned, we might as well throw out the Rules of civil procedure and the Rules of courts. Without doubt, if such conduct is condoned and the courts' business is conducted under such circumstances, we might as well close the courts.

[41] I believe that it is important to keep in mind two significant facts: The first one is that the security bond ought to be given within the period prescribed for the noting of an appeal. The second one is that failure to comply with Rule 51 (4) implies that the appeal was not properly noted. This is so because the giving of security is part of noting an appeal. Furthermore, in terms of Rule 51 (1) the failure to ask for reasons makes the record incomplete.

[42] In this matter, security was due to be filed alongside the notice of appeal on 25 September 2025; however, it was only filed on 28 November 2025. It is common cause that this resulted in a 63-day delay. While the appellant was required to prosecute the appeal by 20 November 2025, the late filing of security meant the deadline was missed by eight days. Consequently, the appeal was prosecuted outside the prescribed timeframe.

The degree of lateness

[43] It is trite, though worth repeating, that the extent of non-compliance with the prescribed time periods in the Rules of Court has long been a question of great significance requiring judicial intervention. This evinces that the courts are increasingly grappling with a frequent problem of missed deadlines. Consequently, such delays have become a pressing concern that can no longer be tolerated. It is also settled that litigants are not permitted to deviate from the established course of litigation without showing good cause.

[44] Insofar as the degree of lateness, the appellants' attorney focussed mainly on the eight days delay. In my mind, the degree of lateness inevitably involves a degree of judgment. But it is also important to recognise the reason for the delay. And the delay needs to be evaluated in the context of a full understanding of what was expected from the litigant.

[45] It is so that the appeal court can extend the period for furnishing of the security. The court of appeal can only do so on good cause shown unless it is satisfied that the failure to give security within the prescribed time was due to gross ignorance of the Rules or a disregard thereof amounting almost to wilful neglect. See *Pick v Mtyali* 1930 TPD 712 where the court found that, notwithstanding the fact that the case was a borderline case, [the court] extended the period. In *Mtyali* at page 714, the Court stated the following:

"It is true applicant's attorney should then have gone or sent to Volksrust to comply with the rule, but evidently, he considered he could comply with the rule by getting into telephonic communication with the respondent's attorney, and making arrangements with him with regard to security. In that course, he erred. It was clearly his duty to see that proper security was duly lodged with the clerk of the court at Volksrust, where the case had been tried. The case is certainly on the border-line."

[46] I find *Mtyali* case readily distinguishable from this case. This is so because, in *Mtyali* there was some confusion between attorneys as to who should lodge, and whether security should be lodged by guarantee. The court then said that before the relief asked for is refused, a court should be satisfied that there was either gross ignorance of the rules or a disregard of the rules amounting almost to wilful neglect.

[47] Indeed, the question to be answered is whether the appellants have established good cause for this Court to exercise its discretion in favour of condonation. Of special importance in this case is the fact that the appellants concede that they did not comply with the Rules, as such this appeal was not timeously prosecuted.

[48] In this matter, as previously mentioned, the uncontradicted evidence reflects that there is a chain of events leading up to the appellants' legal representative's decision-making process. The appellants' legal representative admitted that he had erred in filing the first security as it was not in compliance with the Rules and accepted that the correct security that was finally filed was filed late. The appellants concede that the bond was due to be filed on 25 September 2025 but was filed on 28 November 2025. Crucially, the appellants accept that the security was filed 63 days late. Thus, they failed to meet the prosecution deadline. The appellants also concede that they had a statutory duty to adhere to the prescribed deadlines. Accordingly, the concession ultimately narrowed the scope of this condonation application.

[49] This 63-day period cannot be viewed in isolation from the failure to deliver a complete record for the appeal. This is so because, where a party is already 63 days late in providing security, the continuing failure to meet the prosecution deadline [resulting from the failure to cure the defects in the record] is not a fresh mistake but a direct consequence of the initial, [unresolved] breach. As I have already mentioned, viewing the 63-day delay in isolation would unfairly minimise the total time the respondent has been kept out of their judgment [of the court a quo]. It is important to keep in mind that the conceded failure to furnish a complete record is an ongoing [non-compliance] committed by the appellants. The clock of non-compliance has not stopped as the appellants have not requested the reasons from the Magistrate as contemplated by Rule 51 (1). Without requesting the magistrate's reasons, it is difficult to ascertain whether the Magistrate has any further justifications to be added to the record.

[50] The starting point, of course, is that it is clear that the appellants' legal representative pleads ignorance of the law. However, it appears to me that the appellant's legal representative seeks a one size fits all remedy for the failure to

comply with the Rules. Accordingly, such a scenario would leave this Court guessing about the Magistrate's thought process.

[51] The central question presented by this admission of ignorance of the law is whether it constitutes sufficient or good cause and thus warrants condonation. In other words, the question is whether the conduct amounts to an excusable neglect. The answer to this pertinent question depends upon this Court's vested discretion to admit an appeal, after the prescribed deadline, if the appellant shows sufficient grounds for not prosecuting the appeal within the prescribed time.

[52] As the appellants' legal representative correctly noted, there are long-established precepts in our law governing this issue. In determining whether condonation is appropriate, I must apply these principles to the specific circumstances of the present case.

[53] In the absence of a complete record, any application for condonation is premature and substantively hollow, as the underlying non-compliance remains unrectified.

Lack of due diligence

[54] Due diligence is what is lacking in this matter. It is also important to remember that at this stage we still do not know as to whether the magistrate was going to augment his ruling by furnishing further reasons.

[55] The attorney did not show the required degree of diligence. It would appear, therefore, that due to gross ignorance of the Rules, this case falls within the ambit of lack of good cause or sufficient excuse for condonation.

[56] In this matter, the attorney is bringing the application to cover his own tracks. To this end, this Court views the condonation application as the attorney seeking a favour for his own mistake. Leaving aside the issue of the attorney's culpability for a moment, the question remains whether the appellants can be bound by the conduct of their lawyer. That then leaves the question as to whether the appellants can be bound by the conduct of their lawyer.

[57] Certainly, the failure to apply due diligence and to make an effort to understand the Rules of courts is inexcusable. Consequently, the decision to file security late was palpably unreasonable; a fact easily identified by the state of the record itself.

[58] As mentioned in paragraph 23 of this judgment, the appellants' attorney argued that the fault was his and his clients cannot be penalised for it. And of course, the appellants may say that they should not be affected by the conduct of their lawyer. However, generally a client is bound by the actions of his lawyer. I should emphasise, at the outset, that regardless of whether they are legally represented, litigants bear an affirmative duty to monitor their proceedings and ensure the case is advanced with the necessary diligence.

Delay caused by legal representative

[59] For all practical purposes, presented with the facts of this case, a court ordinarily would be more sceptical when an attorney asks for mercy for their own error than when a client asks for indulgence for the delay caused by a lawyer's neglect.

[60] In *Rossouw v Blignaut and Wessels and Another* (1234/2023) [2025] ZASCA 146 (7 October 2025), the minority judgment stated at paras 21-29 that a litigant cannot escape the consequences of their attorney's negligence if they themselves have been passive or failed to provide a full explanation for the delay.

[61] The majority decision in *Blignaut*, supra, found that the applicant was neither "wilful" nor "inactive" in a way that deserved blame.

[62] The majority finding in *Blignaut*, unlike in the minority view, drew a distinction between delays attributed to professional negligence by legal representatives to those caused by a blameless lay litigant. The view was that a client cannot be blamed for not knowing the technical requirements. In essence, the *Blignaut* majority view states that if no blame can be apportioned to the client, then the client should not suffer due to the attorney's lack of diligence.

[63] I should emphasise at the outset that the majority view of *Blignaut* articulated a narrow exception to the rule that a client cannot escape negligence of his lawyer; and that a client is bound by the actions of his lawyer. The narrow exception recognised by the SCA in *Blignaut* is related to the conduct of the litigant and not that of the attorney. It is my view that the facts of this application do not fall within the narrow exception. On that basis, I am of the view that it cannot be said that the view expressed by the majority [in *Blignaut*] stands four squares with this case.

[64] Obviously, culpability of a party should be assessed on a case-by-case basis and in the light of its particular circumstances. It is important to note that, in this case, in contrast to *Blignaut*, the application for condonation is brought by the appellant's attorney, and the appellant's attorney deposed to the founding affidavit. Yet, in the *Blignaut* matter, the litigant [the applicant] was the one who brought the matter to court and who explained to the court why she was seeking condonation.

[65] Moreover, she [the litigant in *Blignaut*] made a case against her erstwhile attorney, and the attorney was also cited as a respondent in the condonation application. Furthermore, in *Blignaut*, the litigant herself gave evidence [in the form of an affidavit].

[66] As far as I am concerned, the very nub of the *Blignaut* case is that the party [the applicant for condonation] demonstrated directly to the court her personal diligence, frustrations with her erstwhile attorney, and her blamelessness.

[67] In light of the authorities which have been set out above it is axiomatic that the question as to whether condonation should be granted will be shaped by a close examination of the facts of the individual case which is under consideration. Upon these facts, the question that also aptly arises is whether, in the context of this case, it can be said that diligence on the part of the litigant has been shown.

Diligence on the part of the litigant

[68] The system of legal representation does not entirely ascribe to the idea that the failures of the legal representative cannot be visited upon the client. This is so because the client chose the legal representative to represent him, as such he cannot as a rule escape professional actions or omissions of his attorney. As stated above, a principal

[client] is bound by the professional conduct of their legal representative and is legally presumed to possess all knowledge officially imparted to said representative.

[69] Thus, there a personal duty upon a client to always follow up on the progress of his appeal and not to wash his hands off it by giving it to an attorney. It appears to me, therefore, that some, albeit not perfect, analogy can be drawn between a taxpayer and the appellants in this case. For instance, it would be wrong to say it is reasonable for a taxpayer to assume that a tax practitioner would comply with the Income Tax Act by meeting submission deadline. The mere fact that the taxpayer has an agent does not relieve the principal [taxpayer] of his /or her duty to comply with the requirements of the tax laws.

[70] A litigant, therefore, whether represented or not, must have their finger on the pulse of the proceedings or litigation. While deferring to an attorney's professional judgment, clients should maintain consistent oversight of their case to ensure all matters are handled with due diligence. A litigant cannot simply fold his or her arms. In this matter, the record manifests a "washing of hands" attitude in the face of a protracted, unexplained [until condonation application] delay, that no reasonable layperson should have passively accepted.

[71] The appellants in this instance have remained passive and silent, allowing their legal representative to depose to an explanation that seeks to excuse his own professional neglect. In other words, in the present case, the attorney is the one telling the story. As a result, there are no excuses given by the appellants; the application is absolutely silent as to any assertions for the delay from the appellants. As such, contrary, to the *Blignaut* case, this Court cannot easily verify whether the appellants were truly diligent or just passive.

[72] Of special importance in the *Blignaut* case is the fact that the litigant took an adversarial stance against her own former representative and proved that she was actively dissatisfied by taking action. I should emphasise that unlike in our case, the *Blignaut* case postulates a scenario where a victim of neglect [client] seeks justice. Put differently, in *Blignaut* the client sought relief for attorney's neglect.

[73] Though there may be some possible parallels between *Blignaut* case and the present condonation application, I consider *Blignaut* to be distinguishable from this case. At the risk of repeating myself, but I need to emphasise: the *Blignaut* matter, wasn't just about a lawyer being inefficient; it was also about a client being proactive.

[74] Without the client's own affidavit, there is no proof of that "active dissatisfaction" on the part of the appellants. The corollary of this is that this Court is left with the "passive scenario" warned against in the matter of *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135(A) at page 41 B-H.

[75] In a somewhat analogous situation, the Supreme Court of Appeal held in *Saloojee supra*:

"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 result 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 the Court. Consideration *ad misericordiam* should not be allowed to become an invitation to laxity. In fact, this Court has lately been burdened with undue increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due 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 relationship, no matter what the circumstances of the failure are. . . A litigant, moreover, who knows, as the applicants did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney. . . and expect to be exonerated of all blame; and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself. That has not been done in this case. In these circumstances, I would find it difficult to justify condonation unless there are strong prospects of success..." **Emphasis added.**

[76] At the cost of repetition, accordingly, the *Blignaut* litigant was a "victim of neglect" and the appellants in this matter can be described as "passive participants" in the delay.

[77] Both the appellants and the attorney of record had a duty to pursue litigation in a reasonably diligent manner. That being said, it does, of course, follow that absent a personal account from the appellants themselves, there is no factual basis to reasonably infer that they were blameless victims of their attorney's neglect. From what is contained in the record, it is a fair inference that the appellants were aware that the respondents were insisting on payment of security.

[78] In *Otto v Kolobe and Others (LCC11R/99) [1999] ZALCC 14 (12 March 1999)*, the following was stated:

"I must add that it will not always be possible for litigants to shelter behind the ineptness or neglect of their legal representatives. Each case must be judged on its own merits. There may well be cases where the interests of the other parties will require a litigant to suffer the consequences of ineptness or neglect on the part of his or her legal representative."

[79] That leaves only the question as to whether the merits of this matter evince prospects of success.

Prospects of success

[80] The law is trite that no enrichment lien will exist against the owner of property unless such owner has been enriched at the expense of the possessor claiming such lien.

[81] In *Abrahams and Others v De Wet (Appeal) (A249/2024) [2025] ZAWCHC 187 (30 April 2025)*, the court restated what is required to prove a claim of lien, and stated the following:

"To rely on a lien, the appellants need to prove the following:

- 20.1. Lawful possession of the property.
- 20.2. That the expenses incurred were necessary or useful for the improvement of the property.
- 20.3. The actual expenses incurred and the extent of the respondents' enrichment.

20.4. That there was no contractual arrangement between the parties in respect of the expenses....

To compound the uncertainty, the appellants claimed to have paid for the building works in cash, but provided no supporting evidence, such as bank statements, beyond the invoices. The onus of proving the amount of the lien is on the appellants. The facts are peculiarly within their knowledge.

..

The evidence suggests that the works neither enhanced the property's value nor benefited the first respondent. Without proof of actual enrichment, the appellants' reliance on an enrichment lien is unfounded. Their failure to call an independent valuer or quantity surveyor left the claim unsubstantiated.

These discrepancies cast serious doubt on the reliability of the appellants' version and undermine their claim. The SCA has commented as follows in similar circumstances:

"[19] As to the details regarding exactly which improvements they were, when they were effected and at what cost, the appellant is exceedingly vague. More importantly, the appellant does not presently have the necessary evidence available to establish the enrichment lien on which he wishes to rely; such evidence must still be found. According to him, it has been 'very difficult . . . to track down the builders' who carried out the improvements in question. He has also experienced difficulty finding 'any records of such transactions and in most instances payment took place in cash transactions the records of which have been disposed of'. This court is therefore quite unable to evaluate the cogency of the evidence that the appellant proposes to place before the High Court, should leave be granted. Such evidence as has been adduced by the appellant, in the form of a report prepared by an architect, Mr John Cornish, has persuasively been refuted on behalf of the respondent. On the basis of information supplied by the appellant, Mr Cornish drew a schedule, illustrated by an aerial photograph, of improvements the appellant claims to have made after 1 August 2001. With reference to building plans obtained from the local authority, however, it was demonstrated by the respondent that most of the improvements claimed by the appellant have in fact been in existence at least since October 1985 and therefore could not have been improvements effected by him after August 2001." Emphasis added and foot notes removed.

[82] Back to the present case, concerning the prospects of success, it was argued on appellants' behalf that the court a quo misdirected itself by finding that the first respondent [new owner of the property] is not liable in terms of the lien agreement that the appellants allege was entered into between the second respondent [erstwhile owner of the property] and the appellants. In the particular circumstances of this case,

the magistrate did not only reject the version of the appellants on that aspect alone, but he also mentioned that the appellants could not prove the existence of the lien.

[83] The learned Magistrate in his ruling stated the following:

“The facts of this matter in this courts (sic) view do not support the existence of a lien. This argument fails to get out of the starting blocks as the respondents in this matter factually did not spend any of their money on the property. In fact, it appears from the submissions that the second applicant spent its money in improving its own property. The underlying deal between the parties does not in this courts (sic) view change the fact i.e. that the second respondent spent its money improving its property.”

[84] In their replying affidavit the respondents stated that the invoices attached in the answering affidavit are tax invoices and, as such do not constitute proof of payment. Accordingly, the respondents asserted during the hearing of the application before the court a quo that the first appellant did not established that he made the alleged payments for improvement. To this end, the appellants averred in their replying affidavit that the respondents' version was speculative and lacked documentary support for the alleged payments.

[85] Indeed, a review of the answering affidavit, specifically paragraphs 44 and 48–50, reveal that the first appellant fails to state that he actually made payment for any of the amounts or invoices cited therein. While the first appellant refers to spreadsheets, the furnishing of the premises, and the fact that he was billed and invoiced, he provides no proof of payment to establish a lien. Moreover, the first appellant did not even assert that he still owes the contractors for the improvements [and thus has not paid yet].

[86] To that extent, the appellants' failure to state that payments were made constitutes an incomplete version to sustain the claim of right of lien. Hence, the respondents in the founding affidavit assert that the first appellant did not incur any costs to raise the property's value and did not incur a single cent for the property. Stated another way, the evidence placed before the Magistrate did no prove that there was an expenditure incurred by the appellants that enriched the second respondent.

[87] Against this background, I find it difficult to envisage that the appellants have hope to succeed on appeal. Under these circumstances, it would be highly prejudicial to the respondents to condone the series of non-compliance with the Rules.

[88] Moreover, the interrelated balance required by *Melane* case supra, weighs heavily against the appellants. The unreasonableness of filing security late, when the necessity of such was palpable on the face of the record, demonstrates a lack of requisite diligence. In the absence of a compelling explanation for this persistent neglect, even the existence of potential merits cannot 'save' the application, as granting an indulgence here would reward a tactical or negligent delay.

[89] Finally, the principle of finality and the administration of justice (*Brummer*) dictate that the respondents are entitled to certainty. To grant condonation where the delay was interrupted only by the 'receipt of opponents' heads of arguments', rather than a genuine and timeous intent to prosecute the appeal, would undermine the integrity of the Court's Rules and result in unfair prejudice to the respondents.

Conclusion

[90] In the circumstances, it would not be in the interests of justice to grant the condonation sought. Accordingly, the appeal has lapsed and thus is not properly before this court. As far as costs are concerned, the appellants have already tendered the costs occasioned by the respondents' application for a declaratory order and striking of the appeal from the roll.

[91] In as far as this application is concerned, the respondents indicated that they would abide by this Court's decision. As such, regarding costs, since the respondents did not oppose the condonation application, it is appropriate that no costs order be made in respect of the condonation application.

[92] In the result, I make the following order:

- 87.1 Application for condonation for late filing and prosecution of the appeal is dismissed;
- 87.2 The appeal has lapsed;
- 87.2 The appeal is struck from the roll and

87.3 There is no order as to costs.



CN NZIWENI
JUDGE OF THE HIGH COURT

I agree



T MGENGWANA
ACTING JUDGE OF THE HIGH COURT