

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO LOCAL DIVISION, THOHOYANDOU**

CASE NO. HCA01/2025

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

10.02.2026
DATE.....

SIGNATURE.....

In the matter between:

**THIKHO CONSULTING ENGINEERS
NEVHUTALU CONSULTING ENGINE**

ERS JV

**THIKHO CONSULTING ENGINEERS
(Registration 2008/071927/23)**

**NEVHUTALU CONSULTING ENGINEERS
(Registration 2002/080812/23)**

and

UNIVERSITY OF VENDA

ABDUL MAJEED HABIB ABDOOL CARRIM

FIRST APPELLANT

SECOND APPELLANT

THIRD APPELLANT

FIRST RESPONDENT

SECOND RESPONDENT

JUDGMENT

Heard on: 08 August 2025

Delivered: this judgment was handed down electronically by circulation to the parties' legal representatives by email and release on SAFLII. The date and time for hand-down is deemed to be at 14:00 on 10 February 2026.

SEMENYA DJP

- [1] This appeal is against the judgment and order of Khosa AJ in which the application for the stay of the review proceedings instituted by the first respondent, University of Venda (the University) and for the removal of the second respondent from the office of the arbitrator of the dispute that arose between the appellants and the University, was dismissed. The appeal is with leave of the Court below.
- [2] The common cause or otherwise undisputed facts in this case are that on the 27 November 2012, the appellants and the University entered into a Consultant Professional Service Agreement in terms of which the appellants were to provide civil and structural services to the University. The initial period of the agreement was for three (3) years, with the commencement date of 1 October 2012.
- [3] In terms of the agreement, the contract period may be extended for a period not exceeding 30% of the time that the contract was originally

awarded for with the approval of the Vice Chancellor or his or her delegate. It is not in dispute that the contract was extended from time to time. The University has instituted a legality review of its own decision to extend the contract. The application is still pending in this court.

- [4] Clause 19 of the agreement provides that, should any dispute whatsoever arise between the parties, then either of the parties to the agreement may declare a dispute by delivering notice of the details thereof to the other party, which dispute shall be referred to arbitration. The contract is silent about which rules will be applicable should the need for arbitration arise.
- [5] On or about the 12 March 2021, the appellants sought to invoke the provisions of clause 19 of the contract in view of the disagreements that ensued between the parties. A dispute was declared and same was referred to be dealt with by way of arbitration. The parties did not agree on the arbitrator and the second respondent was provided by the Legal Practice Council. Arbitration proceedings commenced during June 2021. The appellant filed their statement of claim. The University in turn filed its statement of defence. The arbitration proceedings were still pending at the time of the institution of these proceedings. The

appellants are dissatisfied with the manner in which the second respondent is handling the arbitration and seeks the relief in the form of the setting aside of his appointment.

- [6] During January 2022, the University instituted review proceeding in which it seeks the review and the setting aside of the agreement, together with certain ancillary orders. The appellants have filed their answering affidavit. The University has filed its replying affidavit together with its heads of argument. The University contends that the appellants' heads of argument, list of authorities and practice note are the only documents that are outstanding and that precludes the University from applying for a hearing date.
- [7] Instead of complying with the University's request for the filing of outstanding documents, the appellants launched the application for the stay of the review application and the withdrawal of the appointment of the second respondent as the arbitrator in terms of the Arbitration Act 42 of 1965. The application came before Khosa AJ, who dismissed both prayers in a judgment dated the 26 March 2024. Khosa AJ granted leave to appeal the judgment and order on the 6 December 2024.

- [8] The appeal has since lapsed on account of the appellant's failure to comply with the time frames as set out rule 49(7). It is for this reason that the appeal before us is accompanied by an application for condonation for the late prosecution of the appeal and for its reinstatement. The application for condonation is opposed only by the University. On the hearing date, the parties were directed to argue the condonation application together with the merits of the appeal.
- [9] In support of its application for condonation, the appellants relied on the judgments in **Van Wyk v Unitas Hospital and Another**¹ (Unitas Hospital) and **United Plant Hire v Hills**² (United Plant Hire). In Unitas Hospital the Constitutional Court held that an applicant for condonation must give a full explanation for the delay, which must cover the entire period. In addition, the explanation furnished must be reasonable. It further stated that the standard for considering an application for condonation is the interests of justice which depends on the facts and circumstances of each case. The extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal are some of the factors which

¹ 2008 (2) SA 472 (CC) at [22]

² 1976 (1) SA 717 (AD) at 720E-G

according to the Constitutional Court the court should consider in an application of this nature.

[10] In *United Plant Hire* the Court held that:

"It is well settled that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice."

[11] Leave to appeal in this case was granted on the 6 December 2024.

Notice of appeal was delivered to the relevant parties on the 8 January 2025, which is within the 20 days as provided for in rule 49(2). In terms of rule 49(6)(a), the appellants were required to apply for the date of the hearing of the appeal within sixty days of the delivery of the notice of appeal. The sixty days in this case expired on the 10 April 2025. The appellants, however, applied for the date after 30 April 2025.

[12] The explanation for the delay furnished by the appellants is indeed detailed and covers the entire period for the delay. The explanation, in

short, is that the delay was occasioned by the transcription and preparation of the appeal record by the transcribers. They explained that the entire process commenced on the 7 February 2025 and completed on the 30 April 2025.

- [13] The record of appeal comprises of 767 pages. It includes, among others, all affidavits and annexures thereto which were filed in the review application and the statement of claim and of defence in the arbitration proceedings. The University contends, correctly so in my view, that the papers which are relevant for the purposes of this appeal are (i) the founding affidavit in the application for stay of the proceedings and the annexures thereto, (ii) the answering affidavit and its annexures, (iii) the replying affidavit and its annexures, (iv) the judgment of the Court below and, (v) the judgment in the leave to appeal. The University submits that the required documents were in their possession at all material times and that there was no need to involve the transcribers. In addition, the University argues that the binding of the record could have been done by the appellants' attorneys in a day. The University argued further that the appellants failed to explain why they had decided to involve transcribers in the first place and to include unnecessary documents in the appeal record.

- [14] The appellants contend that none of the respondents have applied for a declaration that the appeal has lapsed and that there is no court order to that effect. Counsel for the appellants submit that condonation should be granted on that basis. This argument is without merit. In terms of rule 49(6)(a), the appeal is deemed to have lapsed. There is no rule that compels the respondents to apply for a declaratory order to that effect.
- [15] In **Palmer v Goldberg**³ it was held that condonation will more readily be granted where there is some deficiency or irregularity in the noting or prosecution of the appeal than if no steps were taken. However, in the present case, it was not necessary to involve the transcribers in something that the appellants' attorneys could have done. All he had to do was to simply bind, index and paginate the affidavits and all other relevant documents which were already in his possession. The costs of engaging transcribers could have been avoided.
- [16] I agree with counsel for the first respondent's contention that although a period shorter than a month may appear not to be substantial, this fact alone should not be allowed to overshadow the inadequacy of the

³ 1961 (3) SA 692 (N)

explanation offered by the appellants. As stated above, the Court still has to consider other factors relevant to this enquiry.

[17] On the nature of the relief sought in the appeal, the appellants are relying on section 6 of the Arbitration Act 42 of 1965 in their application for stay of the review proceedings. This section provides that if any party to an arbitration agreement commences any legal proceedings in any court against any other party to the agreement in respect of any matter agreed to be referred for arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to court for a stay of the such proceedings. The court may make an order staying the proceedings if there is no reason why the matter should not be referred for arbitration.

[18] As stated elsewhere above, it is common cause that the appellants had already filed further papers or taken further steps at the time of the application for stay of the review proceedings. The court below was correct in its findings in that regard. A condition which precludes the application for stay of the proceedings has therefore materialized.

[19] Section 38 of the Arbitration Act provides for the extension of any period of time prescribed in the Act. All the applicant has to do is to show good cause for the extension. In **Bank of Southern Africa Limited v Proline Trading 60 (Pty) Ltd**⁴ the Court held that:

“[26] It was argued on behalf of the respondent that this section cannot assist the applicant as the period mentioned in section 6(1) is not a *fixed period*. In my view, section 38, would be applicable. The period mentioned is a “*fixed period*” i.e. between the date of a notice of appearance but before the delivery of any pleading or a further step in the proceedings. The cut-off time has been determined and with reference to the date of the notice of appearance the time period can be established. The date is not fixed in the sense of stipulating days or weeks but rather by way of providing the starting and ending dates within which an application for stay could be launched. This period can be determined with precision and would fall within the ambit of a *fixed period* as contemplated in section 38 of the Arbitration Act.”

[20] The Constitutional Court in **Crompton Street Motors CC v Bright Idea Projects 66 Pty Ltd**⁵ held that:

“As a matter of fact, the applicant did not apply for a stay *before* delivering its pleadings, and, therefore, the High Court was correct to find that it did not comply with the provisions of section 6(1) of the Arbitration Act. The incorporation of the application for a stay in the applicant’s conditional

⁴ (30282/2020) [2022] ZAGPJHC 639 (5 September 2022) at [26]

⁵ 2022 (1) SA (317) (CC) at [32]

counter-application and answering affidavit was a step beyond entering an appearance, and therefore one of the prerequisites for a stay in terms of section 6(1) was absent. However, non-compliance with section 6(1) does not render the request for a stay invalid. There are two avenues to apply for a stay of proceedings: a substantive application in terms of section 6 of the Arbitration Act may be made, or a special plea requesting a stay of the proceedings pending the determination of the dispute by arbitration."

[21] In my view, Crompton lends support to the University's contention that section 6 does not fix a period within which stay proceedings should be initiated. The taking of a further step is an eventuality and once taken the party to an arbitration clause cannot apply for it unless it has raised it in a special plea of its answering affidavit. The appellants failed to raise it in their answering affidavit in the review application. I therefore respectfully differ with the views expressed in *Proline Trading* case, above that section 38 is applicable in this case.

[22] It follows that the nature of the relief sought in the appeal calls for the dismissal of the application for condonation. The appellants cannot rely on section 6 of the Arbitration Act for the reasons stated above.

[23] On the effect of the delay on the administration of justice, the University, as an organ of state, seeks review and setting aside of its own decision. In **State Information Technology Agency SOC Limited v Gijima Holdings (PTY) Ltd**⁶ the court held that:

“[39] *Pharmaceutical Manufacturers* tells us that the principle of legality is “an incident of the rule of law”, a founding value of our Constitution. In *Affordable Medicines Trust* the principle of legality was referred to as a constitutional control of the exercise of public power. Ngcobo J put it thus:

“The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.”

[40] What we glean from this is that the exercise of public power which is at variance with the principle of legality is inconsistent with the Constitution itself. In short, it is invalid. That is a consequence of what section 2 of the Constitution stipulates. Relating all this to the matter before us, the award of the DoD agreement was an exercise of public power. The principle of legality may thus be a vehicle for its review. The question is: did the award conform to legal prescripts? If it did, that is the end of the matter. If it did not, it may be reviewed and possibly set aside under legality review.”

⁶ 2018(2) SA 23 CC (14 November 2017) at [39] to [40]

- [24] It follows from *Gijima* and all other cases referred to in that case, that it is in the interests of justice that the legality of agreements entered with organs of state be determined before any of the parties may seek to enforce the rights that emanates from such agreements. In addition to what has been said regarding section 6, the interests of the administration of justice dictates that the application for condonation should be dismissed. The issues raised in the review application are, in my view, more important than those raised in the intended appeal.
- [25] The interests of justice in this case dictates that the application for condonation for the late prosecution of the appeal should fail. The explanation for the delay is, in itself, unreasonable. Furthermore, the condonation will not be in the interests of justice. It is in the interests of justice that the legality of the agreements be determined in the review application. Should the court in the review application find in favour of the appellants in this matter, the appellants will have the opportunity to enforce the agreement according to its terms, including referral of the dispute for arbitration. As Cameron JA stated in **North West Provincial Government & Another v Tswaing Consulting & Others**⁷, arbitration clause embedded in a fraud-tainted agreement could not stand.
- [26] The application for condonation of the late prosecution of the appeal and the reinstatement of the appeal stands to fail. On the issue of costs, the general rule is that a successful party is entitled to costs. I find no compelling reasons to find otherwise.

- [27] In the result I make the following order:

⁷ 2007 (4) SA 452 (SCA)

- i. The application for condonation is dismissed;
- ii. the appeal is dismissed; and
- iii. The appellants are ordered to pay the costs of the application.


MV SEMENYA
DEPUTY JUDGE PRESIDENT
LIMPOPO DIVISION

I agree.


AML PHATUDI
JUDGE OF THE HIGH COURT
LIMPOPO LOCAL DIVISION, THOHOYANDOU

I agree.


TC TSHIDADA
JUDGE OF THE HIGH COURT
LIMPOPO LOCAL DIVISION, THOHOYANDOU

APPEARANCES

For the Appellants: Adv P Tshavhungwe with Adv P Bvumbi

Instructed by: Matsheka Attorneys Inc.

c/o Sigogo Attorneys Inc.

For the 1st Respondent: Adv NM Majopelo with Mr MR Maphutha

Instructed by: Madima Attorneys

THOHOYANDOU HIGH COURT