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**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Case no: A194/2024

Court *a quo* case no: 4542/2023

In the matter between:

JOHANNES JACOBUS WOLHUTER NO

FIRST APPELLANT

(First Applicant *a quo*)

FANTI BEKKER HATTINGH NO

SECOND APPELLANT

(Second Applicant *a quo*)

STEPHEN FOUCHEE NO

THIRD APPELLANT

(Third Applicant *a quo*)

[in their official capacities as joint trustees of the

QWAHA TRUST – Master’s Reference No: IT1339/2005]

And

MTETWA INVESTMENTS (PTY) LTD

RESPONDENT

[Registration No: 2014/253458/07]

(Respondent *a quo*)

AND

Court *a quo* case no: 4543/2023

JOHANNES JACOBUS WOLHUTER NO

FIRST APPELLANT

(First Applicant *a quo*)

FANTI BEKKER HATTINGH NO

SECOND APPELLANT

(Second Applicant *a quo*)

STEPHEN FOUCHEE NO

[in their official capacities as joint trustees of the

QWAHA TRUST – Master’s Reference No: IT1339/2005**THIRD APPELLANT**(Third Applicant *a quo*)

And

ALFRED ZAKADE MTETWA

[Identity No: 58[...]]

ZINVONOX (PTY) LTD

[Registration No: 2018/329246/07]

JOHANNES STEPHANUS OLIVIER

[Identity No: 88[...]]

FIRST RESPONDENT(Respondent *a quo*)**SECOND RESPONDENT**(Second Respondent *a quo*)**THIRD RESPONDENT**(Third Respondent *a quo*)

Neutral citation: *Wolhuter NO and Others v Mtetwa Investments (Pty) Ltd and Others; Wolhuter NO and Others v Mtetwa and Others* (A194/2024) [2026] ZAFSHC 112 (23 March 2026)

Coram: Van Zyl, Daffue, JJ et Nobanda, AJ

Heard: 10 October 2025

Delivered: This judgment was handed down electronically by circulation to the parties’ representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 12h00 on 23 March 2026.

Summary: Appeal against order of the court *a quo*, dismissing condonation applications in respect of late filing of replying affidavits – held on appeal that the requirements for condonation have been met – appeal upheld.

ORDER

1 The appeal is upheld.

2 Paragraph 1 of the order granted by the court *a quo* is set aside and substituted with the following:

‘1.1 The condonation applications for the late filing of the applicants’ replying affidavits in applications 4542/2023 and 4543/2023 are granted.

1.2 The respondent in application 4542/2023 shall pay the costs of the condonation application.

1.3 The respondents in application 4543/2023 shall pay the costs of the condonation application, jointly and severally, the one to pay the others to be absolved.’

3 The respondents shall pay the costs of the appeal, excluding the costs relating to the preparation and filing of volumes 5 to 10 of the appeal record and inclusive of 50% of the fees of counsel taxed on scale B, jointly and severally, the one to pay the others to be absolved.

JUDGMENT

Daffue J (VAN ZYL, J et NOBANDA, AJ concurring)

Introduction

[1] The issue to be considered in this appeal is whether the court *a quo* erred in dismissing two condonation applications in terms whereof the applicants in two separate, but interlinked, opposed motion proceedings sought leave to file their replying affidavits late.

[2] What should have been simple applications for condonation to be heard by a single judge of this division turned out to be a litigious nightmare. Eventually, an appeal record consisting of ten volumes, containing nearly 2 000 pages, was presented to us. The appellants’ counsel also made a meal of the appeal by presenting us with heads of argument consisting of 111 pages and a reference to 95 judgments.

The parties

[3] The three trustees of the Qwaha Trust, IT 1339/2005, are the appellants before us. They are the applicants in both applications 4542/2023 and 4543/2023. Mtetwa Investments (Pty) Ltd is the respondent in application 4542/2023. It is cited as one of the respondents in this appeal. Mr AZ Mtetwa, Zinvonox (Pty) Ltd and Mr JS Olivier,

cited as first, second and third respondents in application 4543/2023, are also cited as respondents in this appeal.

[4] To prevent confusion, I shall refer to the appellants as the Trust, save insofar as I need to refer to any of the trustees personally in which case I shall refer to them by their surnames. The respondent in application 4542/2023 will be referred to as Mtetwa Investments and the three respondents in application 4543/2023 will be referred to as Mtetwa, Zinvonox and Olivier respectively.

Litigation history

[5] On 30 August 2023 the Trust issued two applications. In application 4542/2023 it seeks the winding-up of Mtetwa Investments, alternatively judgment for the amount of R4 million. In application 4543/2023 it seeks judgment against Mtetwa, Zinvonox and Olivier in their capacities as sureties, jointly and severally, for payment of R4 million. Both applications are now opposed. On 21 September 2023 the parties agreed to postpone the applications from the unopposed roll to the opposed motion court roll of 16 November 2023. The respondents had to file their answering affidavits on/or before 13 October 2023 and the Trust its replying affidavits on/or before 27 October 2023. This agreement was made an order of court.

[6] The Trust failed to comply with the aforesaid order which caused the applications to be postponed by agreement to 25 January 2024. The Trust belatedly filed the replying affidavits in both applications on 6 December 2023. It did not file separate applications for condonation but sought condonation and provided reasons for late filing in the replying affidavits. The respondents neither filed notices to oppose the condonation applications, nor answering affidavits to contest the Trust's version. Eventually, the condonation applications were opposed by Mtetwa Investments and Mtetwa who through their legal representatives made submissions from the bar.

The relief sought in the court a quo and the order granted

[7] As mentioned, the Trust requested the court *a quo* to condone the late filing of its replying affidavits in both applications 4542/2023 and 4543/2025. The two condonation applications were dismissed. The order of the court *a quo* dated 4 April 2024 reads as follows:

- '1. The applications for the condonation of the late filing of the replying affidavits in both cases with numbers **4542/2023** and **4543/2023** are denied with costs.
2. The applicants are granted leave in both cases to set the matter down for hearing of the merits in the main applications.'

[8] There was consensus amongst the parties about the further proceedings, notwithstanding the ruling on the replying affidavits, and therefore, the court *a quo* ordered that the applicants may set down the applications for hearing thereof on the merits.

[9] I shall briefly deal with the court *a quo*'s reasoning and findings to put the reader in the picture. More detail will be provided during my evaluation hereunder. The court *a quo* considered the applications on the basis contained in paragraph 5 of the judgment:

'It is common cause in *casu* that the applicants did not comply with a court order of this court pertaining to the filing of the replying affidavits. This judgment, as result, turns on the admissibility of the replying affidavits by the applicants on the late filing thereof and in addition, the evidence contained therein is alleged to be of the nature of a "new case in reply".'

(Emphasis added.)

[10] In dismissing the condonation applications the court *a quo* reasoned as follows. It blamed the Trust, which failed to file its replying affidavits timeously, for the postponement on 16 November 2023 to 25 January 2024. It recorded that the applications could have been finalised on 16 November 2023. It failed to appreciate the agreement amongst the parties and the fact that none of them, the respondents in particular, filed heads of argument in accordance with the Practice Directives of this Court.

[11] The court *a quo* dealt with prejudice and interest of justice in paragraph 17 as follows:

‘Prejudice and the interest of justice are vital. In this case the replying affidavits were not only late and in non-compliance with a court order, but it was also inundated with new facts and documents that were available when the founding affidavits were compiled and submitted. The respondents were prohibited from defending themselves against the new evidence by the Uniform Rules of Court. They would have had to embark on expensive litigation, for instance rule 30/30A and rule 6(5)(e) application, to curtail the effect of the replying affidavits on their client’s case(s).’ (Emphasis added.)

[12] Wolhuter, one of the trustees and financial manager of the Trust, went overseas in October 2023. After dealing with Wolhuter’s absence during his overseas trip and counsel’s attendance to his flooded home in the Western Cape, the court *a quo* stipulated that the settlement negotiations ‘may not justify non-compliance with a court order.’ It then pointed out that the respondents did not have to file answering affidavits to the condonation application, as it ‘would have added to costs and time.’ It recorded that answering affidavits would not resolve the issue of new facts in reply. Therefore, so it argued, the respondents were entitled to take issue with the manner in which the Trust litigated during their arguments.

[13] Finally, in paragraph 33 of the judgment, the court *a quo* turned to Harms¹ and the following quotation to bolster its reasoning:

‘It has been mentioned that normally an applicant must stand or fall by his founding affidavit. It follows from this that an applicant will not be permitted to introduce new matter in reply except within a very narrow ambit, and the court may ignore or strike out matter in the replying affidavit that should have been contained in the founding affidavit. The present tendency seems to permit greater flexibility, at least in the absence of prejudice. Unless there is an objection to such new matter, the court will not *mero motu* disregard it or strike it out. An important

¹ LTC Harms, *Civil Procedure in the Superior Courts*, Part B High Court, Uniform Rule 6 Application, reply and thereafter at B6.37. Last updated: November 2023 – SI 78.

consideration is whether the applicant was in possession of the “new” facts when the founding affidavit was prepared or whether the answer broadened the issues. . .

. . . Main arguments in support of the relief sought should be advanced in the founding affidavit and not in the replying affidavit. . .’

Evaluation of the evidence, the court a quo’s reasoning and the parties’ submissions

[14] This Court’s power to interfere with the order of the court *a quo* has been reiterated yet again in *Ferris and Another v Firststrand Bank Limited and Another*² (*Ferris*) in the following words:

‘An appeal court may interfere with the exercise of a discretionary power by a lower court only if that power had not been properly exercised. This would be so if the court has exercised the discretionary power capriciously, was moved by a wrong principle of law or an incorrect appreciation of the facts, had not brought its unbiased judgment to bear on the issue, or had not acted for substantial reasons.’³

[15] Rule 27(1) of the Uniform Rules of Court stipulates as follows:

‘Extension of time and removal of bar and condonation

(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these Rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.’ (Emphasis added.)

[16] I mentioned above that the respondents did not file answering affidavits to contest the Trust’s evidence in support of the applications for condonation. They merely took issue with the manner in which the Trust litigated in their heads of argument.

² *Ferris and Another v Firststrand Bank Limited and Another* [2013] ZACC 46; 2014 (3) BCLR 321 (CC); 2014 (3) SA 39 (CC).

³ *Ibid* para 28.

[17] The party seeking condonation must show that it is entitled to an indulgence. Sufficient cause must be shown. In *Grootboom v National Prosecuting Authority and Another*⁴ (*Grootboom*) the Constitutional Court confirmed the trite principle ‘that condonation cannot be had for the mere asking’. The court in *Grootboom* reiterated that if it is in interests of justice that condonation be granted, it will be granted and if not, it will not be granted. The court then repeat the well-known factors to be taken into account in considering condonation which include:

- ‘(a) the length of the delay;
- (b) the explanation for, or cause for, the delay;
- (c) the prospects of success for the party seeking condonation;
- (d) the importance of the issue(s) that the matter raises;
- (e) the prejudice to the other party or parties; and
- (f) the effect of the delay on the administration of justice.’

[18] Clearly, the interest of justice is paramount. Lateness is not the only consideration. The applicant’s prospects of success and the importance of the issue to be determined are also relevant factors.

[19] No doubt, the Trust failed to comply with a court order. The replying affidavits were filed 40 days late. This must be seen in context as I shall indicate hereunder. The respondents did not timeously oppose the applications, which required postponement of the applications set down on the unopposed motion court roll of 21 September 2023. The Trust had to provide a full and reasonable explanation for its non-compliance with the court order to excuse the default. The application for condonation should have been considered based on its version. The respondents failed to file answering affidavits. Consequently, the allegations contained in the replying affidavits have not been denied under oath. There was no reason for the court *a quo* to reject the uncontested facts presented by the Trust.

⁴ *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) para 50 and see also *Ferris and Another v Firstrand Bank Limited and Another* [2013] ZACC 46; 2014 (3) BCLR 321 (CC); 2014 (3) SA 39 (CC) para 10.

[20] Wolhuter was overseas during the period 13 to 25 October 2023. He was the only person with the requisite knowledge to reply to the allegations contained in the answering affidavits. Although it may often be possible to consult nowadays with witnesses by making use of a platform such as MS-Teams to prepare affidavits, I am satisfied that the facts *in casu* did not present this as a proper option. I do not agree with the court *a quo*'s criticism that 'the court and other litigants must merely go onto the back burner because of the vague statement that one person went overseas.' Wolhuter and the Trust did not have prophetic foresight to anticipate the defences raised, bearing in mind the correspondence before the applications were issued. The Trust elected to rely on numerous documents attached to the replying affidavits because the respondents had broadened the issues in the answering affidavits. The number and contents of the documents would make virtual consultation extremely difficult, if not impossible. The answering affidavits were filed on 13 October 2023, which made consultations with Wolhuter before he left for overseas impracticable if not impossible.

[21] There is also no doubt that the flooding of counsel's home necessitated his attention and prevented him from giving his attention to the matter at hand. Credible, uncontested evidence was presented. This had nothing to do with counsel's alleged busy schedule, but with an emergency. The court *a quo*'s criticism is unfair and indicative of an incorrect appreciation of the facts and thus a material misdirection. In any event, the totality of the uncontested facts must have been considered, to wit, the absence of Wolhuter, the flooding of counsel's house and finally, the settlement negotiations to which I shall now return.

[22] The court *a quo* insisted that the Trust failed to comply with the court order for the whole period of 40 days from 27 October 2023 to 6 December 2023. This refers to calendar days and not court days. The settlement negotiations were brushed aside. The court *a quo* unjustifiably held that settlement negotiations did not justify non-compliance with the court order. It incorrectly suggested that such negotiations 'should not obstruct

litigation.’ This is a material misdirection. In *Eke v Parsons*,⁵ the Constitutional Court emphasised the importance of settlement agreements to expedite and/or end litigation which is not only in the parties’ interest, but also that of the administration of justice.

[23] It is common cause that Mtetwa and Mtetwa Investments agreed that the Trust could file the replying affidavits on 10 November 2023. Consequently, and bearing in mind the wording of rule 27(1), there was no need at that stage to apply for condonation. Furthermore, the parties agreed that the applications, enrolled for hearing on 16 November 2023, be postponed as is evident from the documents, inclusive of the draft order, filed of record. This being the case, only the lateness from 16 November 2023 onwards had to be considered which the court *a quo* failed to do. The Trust should have been required to explain the delay from 16 November 2023 to 6 December 2023, a period of 15 court days. The court *a quo* should have been satisfied that the condonation applications were not only bona fide but that a reasonable explanation for the default has been provided. It is clearly in the interest of justice that the court eventually hearing the two opposed applications on the merits be presented with the full facts.

[24] In *Standard Bank of South Africa Ltd and Others v Mpongo and Others*⁶ the Supreme Court of Appeal emphasised in a matter, which I accept is not on all fours with the facts *in casu*, that a party relying on prejudice must establish it as decisions cannot be made in the abstract. Such party is expected to present a factual foundation for the allegation of prejudice. In this instance and in the absence of answering affidavits, no facts were presented by the respondents for the court *a quo* to find prejudice. Evidence presented during oral arguments from the bar should not have been allowed. The Trust is the party that needs finalisation of the disputes rather sooner than later. It seeks a winding-up order against Mtetwa Investments and judgment in the amount of R4 million against Mtetwa, Zinvonox and Olivier. These parties, and not the Trust, would rather prefer the matters to be dragged out for some time.

⁵ *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) paras 22 and 31.

⁶ *Standard Bank of South Africa Ltd and Others v Mpongo and Others* [2021] ZASCA 92; 2021 (6) SA 403 (SCA) at para 59-60.

[25] I am satisfied that the Trust has proven the requisites for condonation and that the court *a quo* has misdirected itself materially. *Ex facie* the application papers the Trust has sufficient prospects of success, and the interest of justice dictates that the court hearing the main applications is presented with all the facts presented by the parties. The respondents failed to show any prejudice. I shall deal with the alleged introduction of new cases in reply under the next heading.

The alleged introduction of new grounds in the replying affidavits

[26] The respondents argued that the Trust had made out new cases in the replying affidavits which should not be countenanced. Each of the replying affidavits with annexures are in excess of 400 pages. I do not intend to deal with the excessive duplication.

[27] It is debatable whether the court *a quo* should have considered the condonation applications on the basis that the evidence in the replying affidavits contains new facts. I do not intend to enter the debate bearing in mind the conclusion arrived at. I accept that it is impermissible for a party to make out a new case in reply as emphasised in *Director of Hospital Services v Mistry*.⁷ An applicant must stand or fall by the averments made in the founding affidavit. Consequently, the respondent in such a case would be within their rights to apply for striking out of those parts of the replying affidavit which the applicant intends to rely on to bolster its case. The issue before the court *a quo* was whether the Trust really presented new cases in their replying affidavits.

[28] The court *a quo* held that the replying affidavits were not only late but also inundated with new facts and documents that were available when the founding affidavits were compiled and submitted. According to the court *a quo*, the respondents were prohibited from defending themselves against the new evidence and would have to embark on expensive litigation, for instance, utilising rule 30/30A and rule 6(5)(e)

⁷ *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 636A; see also *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008] ZASCA 78; [2008] 4 All SA 225 (SCA); 2008 (5) SA 339 (SCA) paras 29-30; *Mostert and Others v Firststrand Bank t/a RMB Private Bank* [2018] ZASCA 54; 2018 (4) SA 443 (SCA) para 13.

procedure to curtail the effect of the replying affidavits. Contrary to its conclusion, there was no reason to find that the respondents 'were prohibited from defending themselves'. The court did not consider that the respondents could have elected to apply to file rejoinders to deal with any alleged new issues, or to apply in terms of rule 6(15) for the striking out of new facts based on irrelevance or vexatiousness.

[29] In *Drift Supersand (Pty) Limited v Mogale City Local Municipality and Another*⁸ (*Drift Supersand*), the Supreme Court of Appeal found that the municipality's replying affidavit did not introduce new grounds for the application but merely clarified and elaborated on its version regarding standing and the effect of its decision. In *Lagoon Beach Hotel v Lehane*,⁹ Leach JA, writing for a unanimous court, dealt with the rule amplifying a case in reply and held that the material relied upon in the replying affidavit should not be ignored based on a practical and common-sense approach.

[30] I am satisfied that the Trust merely amplified its version. It did not introduce new causes of action or new grounds to make out cases not made out in the founding affidavits. I do not intend to adjudicate the merits of the two main applications but there can be no doubt that sufficient allegations have been made in both applications in support of the causes of action relied upon. The Trust relies in both applications on a written acknowledgement of debt in terms whereof Mtetwa Investments admitted liability for payment of R4 million. Mtetwa, Zinvonox and Olivier signed suretyships for this debt *ex facie* this document. I reiterate, in respect of the winding-up application, that it is the Trust's case that it has proven that Mtetwa Investments is unable to pay its debts, particularly the R4 million, based on s 345(1)(c) of the Companies Act 61 of 1973 and that it is commercially insolvent. As mentioned, the Trust relies on the same acknowledgement of debt and the suretyships of Mtetwa, Zinvonox and Olivier to obtain judgment against them. Nothing has changed. The causes of action have been properly

⁸ *Drift Supersand (Pty) Limited v Mogale City Local Municipality and Another* [2017] ZASCA 118; [2017] 4 All SA 624 (SCA) para 10.

⁹ *Lagoon Beach Hotel v Lehane* [2015] ZASCA 210; [2016] 1 All SA 660 (SCA); 2016 (3) SA 143 (SCA) para 16.

pleaded in the founding affidavits and bolstered with the relevant evidence in support of the relief claimed.

[31] The Trust submitted that the issue whether it made new cases in reply was not up for consideration during the application for condonation. I mentioned above that it is not necessary to enter this debate. The condonation applications should have been granted. Once condonation is granted, the respondents will be within their rights, notwithstanding the *prima facie* views expressed herein in this regard, to apply for striking out of all paragraphs which they believe support alleged new causes of action and/or to apply in terms of rule 30/30A and/or to apply for consent to file rejoinders. I shall now deal with the costs unnecessarily incurred.

The appeal record

[32] I referred to the appeal record consisting of 10 volumes and about 2 000 pages. Numerous unnecessary documents have been inserted in the record and many pages were duplicated. The parties' bundles of authorities presented to the court *a quo* form part of the appeal record, to wit, from page 817 in volume 5 to page 1713 of volume 9. Volumes 5 to 10, consisting of about 1 200 pages, are totally irrelevant. The parties' irrelevant heads of argument in respect of the application for leave to appeal are contained in volume 10, consisting of 120 pages. In any event, the Trust's counsel repeated his submissions contained in those heads in the heads of argument presented to us.

[33] It is the duty of attorneys responsible for the preparation and lodging of appeal records to ensure that unnecessary documents are excluded from the record to obviate the incurring of unnecessary costs. In *Government of the Republic of South Africa v Maskam Boukontrakteurs (Edms) Bpk*¹⁰ (Maskam) Corbett JA, writing for a unanimous court, stated the following regarding the inclusion of unnecessary documents in an appeal record:

¹⁰ *Government of the Republic of South Africa v Maskam Boukontrakteurs (Edms) Bpk* 1984 (1) SA 680 (A) 692G-693A.

'In the circumstances, I am of the opinion that appellant should not be allowed the costs of appeal relating to the aforementioned pages of the record. (See *Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd* 1978 (4) SA 675 (A) at 680H - 681F.)

In recent years this Court has on a number of occasions drawn attention to the unnecessary inclusion in appeal records of numerous and sometimes lengthy documents and has made appropriate orders relating to the needless costs occasioned thereby. (See eg *Omega Africa Plastics case supra*; *Olivier NO v Rondalia Versekeringsmaatskappy van SA Bpk* 1979 (3) SA 20 (A) at 36B - D; *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) at 1030; *Die Meester v Joubert en Andere* 1981 (4) SA 211 (A) at 228.) Despite what has been said and ordered in these and other cases the practice of including unnecessary documents in appeal records persists. In my opinion, it is the duty of attorneys responsible for the preparation and lodging of appeal records to ensure that, if possible, this does not occur and thereby to obviate the incurring of unnecessary costs. Failure to perform this duty could amount to a breach of the duty of care owed by the attorney to his client. The time may come when this Court may consider it appropriate in such cases to order that such unnecessary costs be paid by the attorney concerned de bonis propriis (cf *Machumela v Santam Insurance Co Ltd* 1977 (1) SA 660 (A) at 664A - C).'

[34] In *Salviati & Santori (Pty) Ltd v Primesite Outdoor Advertising (Pty) Ltd*,¹¹ a punitive costs order was issued. The court expressed itself as follows:

'[17] It should have been clear to the respondent's attorney that he was, notwithstanding the agreement in respect of the status of the documents in the agreed bundle, required to apply his mind to the matter in order to determine which of the documents in the agreed bundle were relevant to the appeal. He failed to do so. In the result many documents were included in the appeal record although they had not been referred to in the Court *a quo*, could not have been expected to be referred to in the appeal, were not referred to in the appeal and were in fact not relevant to the appeal. Having been referred to previous warnings by this Court that it was his duty to ensure that no unnecessary documents be included in the appeal record, the inference is irresistible that the respondent's attorney wilfully failed to comply with his duty to apply his mind to the question which documents should be included in the appeal record. In the

¹¹ *Salviati and Santori (Pty) Ltd v Primesite Outdoor Advertising (Pty) Ltd* 2001 (3) SA 766 (SCA) at 774.

circumstances this is a case in which a punitive costs order should be made against the respondent's attorney. I consider it appropriate that the respondent's attorney be ordered to pay, *de bonis propriis*, 50% of the costs incurred by the appellant in respect of the inclusion of the agreed bundle in the appeal record. In addition it should be ordered that the respondent's attorney may not recover from the respondent any fees on appeal in respect of 50% of the agreed bundle.¹²

[35] More recently, the Supreme Court of Appeal commented again on the status of the appeal record in *President of the Republic of South Africa and Others v Prince Mbonisi and Others*:¹³

'Not only the appellants' attorneys but also the respondents' should apply their mind to the matter and neither is entitled merely to rely on the status of the documents in making the decision. Whilst the primary obligation to prepare the record rested with the appellants, in this case, it is apparent that all parties were equally to blame for the non-compliance. This is especially so in this case since the respondents were granted leave to cross-appeal against certain aspects of the high court's order. I have considered whether a punitive order for costs should not be made. But in view of the fact that no party can be singled out, and that all the parties were at fault in respect of the preparation of the record, it seems to me that the special cost order is not clearly warranted.'¹⁴

[36] Over and above the bundles of authorities presented to the court *a quo*, it is evident that the two replying affidavits are mirror images of each other. Both affidavits are in excess of 60 pages. The taxing master's attention shall be drawn to this aspect. The Trust unnecessarily duplicated its averments, well knowing that the two applications would be heard by the same judge. It could have avoided the duplication by incorporating the evidence in the one replying affidavit in the other.

[37] Corbett JA continued in *Maskam*¹⁵ as follows:

¹² Ibid para 17.

¹³ *President of the Republic of South Africa and Others v Prince Mbonisi and Others* [2025] ZASCA 143.

¹⁴ Ibid para 114.

¹⁵ Footnote 7 at 693A-B.

'In the Court below the trial Judge had occasion to remark on the mass of documents annexed to the pleadings and to the unnecessary reduplication of documents placed before the Court. She said:

"The Taxing Master is urged to be meticulous in disallowing unnecessary reduplication of documents, and the attorneys are not to charge their respective clients for such unnecessary copying. It is high time steps were taken to prevent all involved in litigation, including the Bench, from drowning in a flood of paper."

The attention of the Taxing Master is drawn to these remarks, which have particular relevance to the costs in the Court *a quo*.'

[38] The Trust's counsel should also be penalised for presenting us with excessive heads of argument and unnecessary authorities. I pointed this out in paragraph 2 above. He repeated evidence unnecessary. He could have presented his submissions in not more than 20 pages.

Order

[39] The following order is granted.

1 The appeal is upheld.

2 Paragraph 1 of the order granted by the court *a quo* is set aside and substituted with the following:

'1.1 The condonation applications for the late filing of the applicants' replying affidavits in applications 4542/2023 and 4543/2023 are granted.

1.2 The respondent in application 4542/2023 shall pay the costs of the condonation application.

1.3 The respondents in application 4543/2023 shall pay the costs of the condonation application, jointly and severally, the one to pay the others to be absolved.'

3 The respondents shall pay the costs of the appeal, excluding the costs relating to the preparation and filing of volumes 5 to 10 of the appeal record and inclusive of 50% of the fees of counsel taxed on scale B, jointly and severally, the one to pay the others to be absolved.

JP DAFFUE
JUDGE OF THE HIGH COURT

I concur.

C VAN ZYL
JUDGE OF THE HIGH COURT

I concur.

PL NOBANDA
ACTING JUDGE OF THE HIGH COURT

Appearances

For the Appellants:

Instructed by:

L Meintjies

Noordmans Inc, Bloemfontein

For the Respondent (4542/2023) and

First Respondent (4543/2023):

Instructed by:

SJ Reinders

Lovius Block Inc, Bloemfontein.

For the Second and Third Respondent (4543/2023):

Instructed by:

A Smith

Annelize Smith