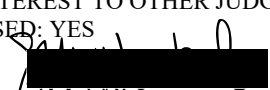


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 2025-153517
Appeal Case No: A2024-
058858
SCA Case No: 143/2024
Court a quo Case
No:35644/2018

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
16/4/2025	
DATE	SIGNATURE

In the matter between:

MASSMART RETAIL (PTY) LTD

Applicant

and

RUSSELL STEAD

Respondent

JUDGMENT

WENTZEL -THOMPSON J

Introduction

[1] This is an interlocutory application in terms of rules 30(1) and 30A(2) of the Uniform Rules of Court. The applicant, Massmart Retail (Pty) Ltd, seeks relief

arising from the manner in which the respondent, Mr Russell Stead, has purported to prosecute an appeal to a full court of this Division after leave to appeal was granted by the Supreme Court of Appeal on 24 April 2024.

- [2] On the one hand, appeals must be prosecuted in accordance with the Uniform Rules and the practice directives of the Division. Rule 49 regulates the orderly enrolment of appeals, the preparation and filing of records, the provision of security, and the procedural fairness owed both to the respondent and to the appellate court. On the other hand, the right of access to courts entrenched in s. 34 of the Constitution requires courts to guard against unduly formalistic applications of procedural rules that have the effect of shutting a litigant out from having a dispute determined in a fair public hearing. That constitutional imperative applies with particular force where a litigant has already obtained leave to appeal from a superior court.
- [3] The immediate question is whether the respondent has complied with the procedural requirements governing the prosecution of that appeal. The wider question is how this Court should reconcile the above considerations and ensure that both the administration of justice is served and the right of the respondent to have his appeal heard.
- [4] In my view, the correct approach is not to subordinate one of those considerations entirely to the other. Section 34 does not dilute the obligation to comply with the rules. Equally, the rules are not to be applied as mechanical instruments to secure a forfeiture of rights where a less drastic order can secure both procedural discipline and fair access to adjudication. The proper inquiry is whether the respondent's defaults are established, whether they are material, whether they have caused prejudice, and what remedy the interests of justice requires.

The procedural background

- [5] The broad chronology is common cause. On 10 August 2023 Malungana AJ granted judgment in favour of the applicant against the respondent and the other defendants. Leave to appeal having been refused by Malungana AJ, the respondent petitioned the Supreme Court of Appeal that on 24 April 2024 granted

the respondent leave to appeal to a full bench of this Court. The respondent thereafter delivered his notice of appeal on 28 May 2024.

- [6] On 30 May 2024 the applicant's attorneys wrote to the respondent's attorneys and expressly stated that the applicant did not waive its right to security for the costs of the appeal in terms of rule 49(13).
- [7] The chronology reflects that on 16 August 2024, being the sixtieth day after the delivery of the notice of appeal, the respondent delivered a number of documents, including a notice in terms of rule 49(6)(a), a practice note, a notice concerning security, a notice of service of record, heads of argument, and a chronology in relation to the appeal.
- [8] On 30 August 2024 the applicant delivered a notice in terms of rules 30(2)(b) and 30A calling upon the respondent to remove the causes of complaint. That notice identified the alleged irregularities and afforded the respondent the opportunity to remedy them. The period stated in the notice expired on 13 September 2024.
- [9] On 16 September 2024 the respondent's attorneys replied. In that reply, two of the complaints were disputed, while the complaint concerning the incompleteness and non-compliance of the appeal record was, in substance, acknowledged. This notwithstanding, no remedial steps were taken to cure the defects in the appeal record.
- [10] The present application to set aside the irregular steps outlined above in terms of Rule 30 and Rule 30A was then launched during October 2024. Although the answering affidavit was delivered late and was accompanied by a condonation application, the applicant did not persist in opposition to condonation and replied to the merits.
- [11] I appreciate the applicant's pragmatic approach to the respondent's application for condonation.

The relief sought

- [12] In the notice of motion, the applicant seeks declaratory and coercive relief. Broadly stated, it asks this Court to declare that the respondent failed to comply

with rules 49(6), 49(7), 49(8), 49(9) and 49(13), to set aside the respondent's purported application for a hearing date and the service of the incomplete record as irregular steps and to declare that the appeal has lapsed. Properly construed, it is only in the alternative that the applicant seeks orders compelling compliance within a fixed period. In both scenarios, costs on Scale B are sought.

[13] With regard to the declarator that the record was incomplete and inadequate, it is pointed out that after the application was brought and shortly before the hearing, the respondent uploaded an application to the Registrar for assistance in terms of Rule 40 as an *in forma pauperis* litigant.

[14] The respondent's case is that he is not obliged to provide security for costs as the Supreme Court of Appeal granted him leave to appeal and did not Order that he provide security for costs. There is recent authority from the Supreme Court of Appeal supporting this stance.¹

The issues

[15] The issues which arise are the following:

- a. whether rules 30 and 30A may competently be invoked in relation to irregular or non-compliant steps taken in the prosecution of an appeal to a full court;
- b. whether the respondent properly complied with rule 49(6) in applying for a hearing date within the prescribed period;
- c. whether the respondent complied with rules 49(7), 49(8) and 49(9), read with the applicable provisions of Consolidated Practice Directive 1 of 2024, in relation to the appeal record;
- d. whether the respondent was obliged to furnish security in terms of rule 49(13);

¹ *Koopman v Minister of Police* (963/2022) [2026] ZASCA 45 (7 April 2026); See also *Allem Incorporated v Baard: In re Baard v Allem* [2022] 1 All SA 680 (GJ); 2022 (3) SA 207 (GJ)

- e. whether the non-compliance established is material and prejudicial; and
- f. what remedy properly gives effect to the Uniform Rules, the Practice Directive, the interests of justice, and s. 34 of the Constitution, that is what remedy balances strict compliance with the Rules and the Practice Directives as well as s34 of the Constitution.

The applicant's case

[16] The applicant raises four main complaints regarding the procedural defects evident in the prosecution of the respondent's appeal:

- a. First, it is said that the respondent failed properly to apply for a date for the hearing of the appeal within 60 days of delivery of the notice of appeal, as contemplated in Rule 49(6) in that he failed to simultaneously file the record.
- b. Second, the respondent failed to file a complete appeal record with the Registrar, electronically or otherwise, as required by rule 49(7)(a).
- c. Third, the record the respondent purported to serve on the applicant was incomplete and non-compliant, consisting only of portions of the trial transcript and omitting the pleadings and documentary exhibits.
- d. Fourth, the respondent failed to furnish proper security for the applicant's costs of appeal in terms of rule 49(13), despite it having expressly stated that it did not waive such security.

[17] The applicant submits that these failures are not technical or immaterial. It says they go to the heart of the prosecution of the appeal and materially prejudice both it, as the respondent in the appeal, and the full court which would ultimately be required to hear the matter on a defective record.

[18] The applicant contends that the respondent's attempt to frame the application as unduly formalistic misses the point. It is argued that its complaints cannot be properly characterised as technical defects; on the contrary, the defects are substantial in that they prejudice the respondent to the appeal and the court itself. The applicant emphasises that the absence of a proper record makes it

exceptionally difficult, if not impossible, for a full bench to properly determine the appeal.

[19] The applicant's case is that what was purportedly served on it as the record consisted only of a transcript of the viva voce evidence, was not properly indexed or paginated, omitted the pleadings and documentary exhibits, included matter that ought not to have been included, and was not prepared in accordance with the Uniform Rules or the Practice Directive. The applicant points out that the respondent's own attorneys later admitted that the record had not properly adhered to the Rules and the Practice Directive.

[20] On the failure to provide security, the applicant argues that rule 49(13) applies because the appeal is to a full bench of the High Court and not to the Supreme Court of Appeal. It submits further that, unless the respondent waived security or was released by the court granting leave to appeal or on application to it, the Rule concerning security remains peremptory. Since the applicant never waived security and the respondent obtained no release from the obligation to provide security from the Supreme Court of Appeal, the default position remained operative; without furnishing security the respondent may not proceed to prosecute its appeal.

[21] Moreover, in response to the respondent's contention that only the court hearing the appeal can determine the issues raised by the applicant, the applicant insists the irregular steps are capable of being set aside in the motion court. In this regard the applicant submits that Rules 30 and 30A are competent remedies in relation to irregularities in the appeal process and that ordinary motion courts have entertained such applications before. In this respect the applicant relies on *Eagle Creek Investments 472 (Pty) Ltd v Focus Connection (Pty) Ltd and another*² and *Dr Maureen Allem v Baard*.³

[22] Finally, the applicant argues that properly construed, Rule 49 provides that an appeal not duly prosecuted in terms prescribed lapses by operation of law.

² *Eagle Creek Investments 472 (Pty) Ltd v Focus Connection (Pty) Ltd and another* [2018] JOL 40609 (GJ)

³ *Dr Maureen Allem v Baard* 2022 (3) SA 207 (GJ)

The respondent's case

[23] The respondent opposes the application on a number of bases:

- a. The first is a competence point and is jurisdictional or procedural in character. He submits that Rules 30 and 30A are not properly available in relation to steps taken in the prosecution of an appeal, and that issues of this kind ought rather to be determined by the full bench hearing the appeal than by the motion court. The respondent also suggests that there are more “topical” remedies within the appellate rules themselves that ought to have been used by the applicant. I am yet to understand what those “topical” remedies are.
- b. The second is that the application is unduly formalistic and is designed to frustrate his appeal which has already been sanctioned by the Supreme Court of Appeal. The respondent says, in substance, that he did take steps within the 60-day period and that the applicant seeks to convert procedural flaws into premature termination of the appeal.
- c. The third is that his financial position was such that he could not afford to engage consultants to assist him in compiling the appeal record. The quotation annexed to the papers for the preparation of an estimated 5,500-page appeal record in the amount of R496,938 is expressly relied upon to demonstrate the practical burden and unaffordability of his compliance with Rule 49 in so far as it concerns the record.
- d. Fourth, the respondent disputes that the appeal has lapsed. In substance, he contends that he did take steps within the 60-day period, that any shortcomings should not have the immediate effect of extinguishing the appeal, and that what the applicant seeks is in truth a premature striking out of the appeal by a court other than the appeal court itself.
- e. Fifth, the respondent contends that security in his case is governed not by Rule 49(13) but by Rule 9 of the Rules of the Supreme Court of Appeal because leave to appeal had been granted by that Court. He accordingly argues that the applicant's insistence on security under rule 49(13) is

misplaced. Indeed he states that if the applicant wanted the respondent to furnish security it ought to have applied to the Supreme Court of Appeal to order that he furnish security should it grant him leave to appeal.

- f. Finally, the respondent invokes s 34 of the Constitution and says that the relief sought would in effect deprive him of the right to have the appeal heard as the effect of the relief sought would summarily extinguish his appeal and undermine his right to access to courts.

The applicable legal principles

a. Rules 30 and 30A

[24] Rule 30 permits a party to apply to court to set aside an irregular or improper step. Rule 30A empowers the court, where a party fails to comply with the Rules or with a request or notice in terms thereof, to direct compliance, strike out a claim or defence, or make such order as it deems fit. The relief under both Rules is discretionary and must be informed by the nature of the irregularity, the prejudice occasioned, and the interests of justice.

[25] It is, however, trite that not every irregularity is necessarily fatal. The court retains a discretion, exercised judicially, to overlook an irregularity that occasions no substantial prejudice. But where the irregularity is material and prejudices the complaining party in the further conduct of the litigation, the court may set it aside and make an appropriate order to alleviate it.⁴

[26] The applicant insists that Rules 30 and 30A are available to set aside the irregular steps taken in prosecution of appeals in terms of Rule 49. In my view, that submission is sound. Once leave to appeal to a full bench has been granted, the appeal remains subject to the Uniform Rules and the court's supervisory control over compliance with them. I can see no basis in the Rules for the blanket exclusion of rules 30 and 30A merely because the irregular steps occur in an

⁴ *Uitenhage Municipality v Uys* 1974 (3) SA 800 (E); *Sasol Industries (Pty) Ltd v Electrical Repair Engineering (Pty) Ltd* 1992 (4) SA 466 (W); *Northern Assurance Co Ltd v Somdaka* 1960 (1) SA 588 (A); *Minister van Wet en Orde v Jacobs* 1999 (1) SA 944 (O) at 958; *De Klerk v De Klerk* [1986] 3 All SA 259 (W); *SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw* NO 1981 (4) SA 329 (O).

appeal rather than at first instance. That conclusion is consistent with the authorities cited in the applicant's heads of argument.⁵

[27] I am thus unable to accept the respondent's submission that Rules 30 and 30A are unavailable to set aside incorrect procedure in the prosecution of appeal proceedings. An appeal to a full court remains governed by the Uniform Rules and the practice directives of the relevant Division. If a party takes an irregular step, or fails to comply with the Rules in prosecuting the appeal, there is no principled reason why the court's ordinary procedural powers under rules 30 and 30A should be excluded.

[28] There is also nothing incongruous in the motion court dealing with procedural non-compliance with Rule 49 that should properly be resolved before the appeal can properly be ripe for hearing. Indeed, orderly administration often requires that such issues be addressed in advance rather than left to burden the court hearing the appeal.

[29] It follows that this Court is competent to entertain the present application.

[30] This is said subject to the caveat that it is only the court hearing the appeal that may consider applications for condonation regarding non-compliance with Rule 49. A court in my position cannot prejudge such an application and must consider the relevance and jurisdictional need for declaratory relief that the appeal has lapsed when that order may in turn simply be overturned by the court hearing the appeal in the event that it finds that there are proper grounds advanced for condonation.

[31] I will advance later in this judgment my view that declaratory relief sought in the motion court that the appeal has lapsed for non-compliance with Rule 49 ahead of the hearing of the appeal is premature and is for all intense and purposes fruitless. This is because any declaratory relief sought is subject to be overturned by the court hearing the appeal that will ultimately hear and determine the respondent's application for condonation for non-compliance with the Rules.

⁵ *Eagle Creek Investments 472 (Pty) Ltd v Focus Connection (Pty) Ltd and another* [2018] JOL 40609 (GJ); *Dr Maureen Allem v Baard* 2022 (3) SA 207 (GJ).

[32] There is thus no purpose served at all in the respondent in appeals to seek declaratory relief ahead of the appeal that the appeal has lapsed for non-compliance with the Rules. Such an Order is not definitive and serves no real purpose as it is always subject to the court hearing the appeal to decide whether to condone non-compliance with the Rules.

b. Rule 49 and the prosecution of appeals

[33] Rule 49 governs appeals to a full court from a decision of a single judge sitting as a court of first instance. That remains so even where leave to appeal to the full court was granted by the Supreme Court of Appeal rather than by the High Court itself. The destination of the appeal, not the forum that granted leave, determines the procedural regime governing the prosecution of such appeal.⁶

[34] This is said subject to the qualification that where the Supreme Court of Appeal grants leave to appeal, it is neither the High Court or the full court to which leave was granted that has jurisdiction to order that security be furnished by the appellant. This is dealt with fully later in this judgment.

[35] It appropriate that I quote the relevant provisions of Rule 49(6) and (7) as it presently stands and in particular after their amendment by GN R6975 of 24 December 2025.

[36] The current Rule reads in relevant part as follows:

“(6) (a)(i) An appellant shall within 60 days after delivery of a notice of appeal, apply to the registrar of the division where the appeal is to be heard, for a date for the hearing of such appeal and shall —

(aa) furnish the registrar with the appellant’s legal representative’s physical and electronic mail addresses; or if the appellant is unrepresented, then the appellant’s full residential address and an electronic mail address, if the appellant has an electronic mail address; and

(bb) furnish the name and address of every other party to the appeal.

(ii) Should the appellant fail to apply for a date of hearing as referred to in sub-paragraph (i) [sic], a respondent may within 10 days after the expiry of the said period of 60 days apply for the set down of the appeal or any cross-appeal which such respondent may have noted.

(iii) If no application for a date of set-down is made by either party, the appeal and any cross-appeal shall be deemed to have lapsed and either party may apply to the court for an order

⁶ *L.G. v J.G.* (32377/2012) [2023] ZAGPJHC 450 (28 April 2023) para 20; *Jeanru Konstruksie (Pty) Ltd v Botes* 2023 (6) SA 305 (GP).

confirming the lapsing of the appeal: Provided that the respondent shall have the right to apply for an order for any wasted costs.

[Paragraph (a) substituted by GN R2164 of 2 October 1987, by GN R2642 of 27 November 1987 and by GN R6975 of 24 December 2025.]

(b) The court to which the appeal is made may, on application of the appellant or cross-appellant, and upon good cause shown, reinstate an appeal or cross-appeal which has lapsed.

(7)(a)(i) Simultaneously with the application for a date for the hearing of an appeal in terms of subrule (6)(a), the appellant shall deliver a copy of the record on appeal: Provided that where the e-justice system is not operational in the division where the appeal is to be heard, the appellant shall file with the registrar three copies of the record on appeal and furnish two copies to the respondent.

(ii) The appellant shall in addition deliver a complete index and copies of all papers, documents and exhibits in the case, except formal and immaterial documents: Provided that such omissions shall be referred to in the said index.

[Paragraph (a) substituted by GN R6975 of 24 December 2025.]

(b) The registrar of the court that is to hear the appeal or any cross-appeal shall thereupon assign a date for the hearing of the appeal or for any application for condonation and the appeal, as the case may be, and shall set the application for condonation and appeal down for hearing on the said date and shall give the parties at least 20 days' notice of the date so assigned.

[Paragraph (b) substituted by GN R6975 of 24 December 2025.]

(c) . . .

[Paragraph (c) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987 and deleted by GN R6975 of 24 December 2025.]

(d) . . .

[Paragraph (d) deleted by GN R6975 of 24 December 2025.]”

[37] Rule 49(6)(a) requires the appellant, within 60 days after delivery of the notice of appeal, to apply in writing to the Registrar for a date for the hearing of the appeal. It further provides that if the appellant fails to do so, the respondent may within 10 days apply for a hearing date; and if neither does so, the appeal is deemed to have lapsed.

[38] The further provision permitting a respondent to apply within 10 days after the expiry of the 60-day period is permissive rather than peremptory. The respondent to an appeal is not obliged to do the appellant's work for him.

[39] Rule 49(7)(a) requires an appellant, when applying for a date, to provide the Registrar with copies of the record and a complete index and copies of all papers, documents and exhibits in the case, save for formal and immaterial documents. Rule 49(8) prescribes the physical and formatting requirements of the record.

Rule 49(9) regulates the omission of immaterial portions and requires party consent where such omissions occur. The Practice Directive supplements those requirements by prescribing, among other things, indexing, pagination, volume structure, cover sheets, and the contents of the combined index.

[40] Rule 49(13) provides that unless the respondent waives security, or the court granting leave to appeal or subsequently on application to it releases the appellant wholly or partially from the obligation, the appellant must, before lodging copies of the record with the Registrar, enter into good and sufficient security for the respondent's costs of appeal. In *TR Eagle Air (Pty) Ltd v Thomson* the Court described the provisions of rule 49(13) as peremptory.⁷

c. Section 34 and procedural proportionality

[41] S. 34 of the Constitution guarantees to everyone the right to have a dispute resolved by the application of law in a fair public hearing before a court. That guarantee extends to the fair enjoyment of appellate remedies where leave to appeal has been granted.

[42] The guarantee does not, however, eliminate the need for procedural compliance. Rules regulating the prosecution of appeals are part of the legal machinery by which fair access to appellate adjudication is made possible. The true constitutional question is whether the judicial response to non-compliance is proportionate and consonant with the interests of justice.

[43] It, however, does not follow that any insistence upon procedural compliance is inconsistent with s 34. The rules themselves are part of the legal framework by which fair access to adjudication is structured. There is therefore no constitutional tension in requiring an appellant to furnish security, file a proper record, and apply properly for a date for the hearing of the appeal. The real constitutional question concerns the appropriate remedy for non-compliance with the Rules.

⁷ *TR Eagle Air (Pty) Ltd v Thomson* (A206/2018) [2020] ZAGPPHC 801 (13 November 2020) para 18

Analysis of the arguments

a. The competence point

[44] For the reasons already given, I am unable to accept that Rules 30 and 30A are unavailable to the applicant where an appeal is prosecuted under Rule 49. The respondent's reliance on the supposed exclusivity of "*topical*" remedies in Rule 49 does not assist him. Rule 49 prescribes the obligations imposed upon a litigant who wishes to prosecute an appeal. Rules 30 and 30A furnish ordinary procedural mechanisms by which non-compliance may be addressed. This includes non-compliance with Rule 49. The two sets of provisions are complementary, not mutually exclusive.

[45] I am also not able to accept that the motion court's intervention amounts to an improper intrusion into the domain of the full bench. Nothing in Rule 49 precludes a motion court from securing compliance with Rule 49 to ensure the proper administration of justice and that the appeal is properly before the full court. This will avoid unnecessary delays in the hearing of the appeal that would otherwise prevent a proper hearing by that court. It is obviously in the interests of the administration of justice that procedural issues required to enable the full court to consider the appeal are resolved before it is seized of the matter and needs to decide the merits of the appeal.

[46] This, however, relates solely to orders requiring compliance with Rule 49; it does not extend to any consideration regarding condonation for non-compliance in seeking to re-instate a lapsed appeal as that is the sole purview of the court hearing the appeal.⁸ This is in line with the express wording of Rule 49(6)(b) that provides that "the court to which the appeal is made" may reinstate an appeal which has lapsed

b. Compliance with rule 49(6)(a): The application of the hearing of an appeal

[47] The respondent did deliver a document styled as a rule 49(6)(a) notice on 16 August 2024, which was the sixtieth day after the notice of appeal. The question,

⁸ *Moodley v Crazy Plastics (Pty) Ltd and Another* (A2024/052750) [2025] ZAGPJHC 241 (28 March 2025) at paras [8] and [19]

however, is not whether some document was delivered on time. The question is whether there was proper compliance with rule 49(6)(a), read with the applicable procedural requirements.

[48] The applicant's complaint is that the purported date of the application for a hearing date was defective because it was not accompanied by the necessary Registrar's date-application documentation, including the blank notice of set down, and because the complete record was not simultaneously filed despite the contrary statement in the notice itself. The applicant further says that the Registrar did not acknowledge or accept the notice as a proper step and thus did not allocate a date for the hearing.

[49] On the papers before me, that complaint is well founded. A purported application for a hearing date that is unsupported by the required record and does not satisfy the Registrar's requirements is not an effective prosecution of the appeal. Rule 49(6)(a) must be construed in a practical and purposive way. Its object is not satisfied by the mere delivery of an application for a date for the appeal if the essential requirements for such an application are absent.

[50] The respondent's suggestion that he "*substantially complied*" by filing or attempting to file a transcript and a descriptive index does not answer the point. Even on his attorney's own version, what was allegedly uploaded did not amount to the complete record contemplated by Rule 49(7)(a).

[51] I accordingly conclude that the respondent did not properly comply with Rule 49(6).

c. *Rule 49(7)(a): The appeal record*

[52] The applicant's evidence is that the record served on it was not indexed, consisted only of the transcript of viva voce evidence, was not consecutively paginated throughout, omitted the pleadings and documentary exhibits without consent and without proper index references, and was not prepared in accordance with the Practice Directive.

- [53] The respondent's attorney's subsequent letter is telling. It admitted shortcomings in the record and referred to "*defective adherence*" to the Rules and the Practice Directive. It also explained that rectification would take time because of the respondent's limited resources and the size of the record.
- [54] The respondent's explanation that he lacked the funds to prepare a fully compliant record can only be partially accepted. Whilst I accept that the compilation of a large record may be onerous and expensive, financial difficulty does not convert non-compliance into compliance. If genuine inability to comply existed, the respondent ought to have availed himself timeously of the procedural mechanisms for indulgence, extension or condonation. Rule 49 does not permit an appellant unilaterally to prosecute an appeal on a reduced or self-selected record simply because compliance is expensive. Moreover, the respondent only belatedly applied to the Registrar under the provisions of Rule 40 for assistance.
- [55] The respondent also argues that he was not obliged to deliver a complete record and that the judges hearing the appeal could request what they required. That proposition cannot be reconciled with the structure of Rule 49 and the Practice Directive. The whole point of the Rule is that the appeal should be placed before the court in a form fit for adjudication, not that the appellate judges should reconstruct or requisition the record piecemeal at the hearing. The judges hearing the appeal would also not necessarily know what documents to call for.
- [56] The prejudice caused by the defective record is substantial. It causes prejudice to the applicant, which must prepare to oppose an appeal without a proper record, but it is also prejudices the court seized with the appeal. A full bench cannot be expected to adjudicate fairly and efficiently on the basis of a fragmentary transcript divorced from pleadings and documentary evidence. That point is well made in the applicant's heads and is, in my view, plainly correct.
- [57] In addition, the respondent should not underestimate the prejudice to his case should a full and complete record not be before the court hearing the appeal as it will effectively preclude the full court from properly hearing the appeal and providing a just result to his appeal.

[58] I therefore find that the record served on the applicant was materially incomplete and non-compliant and that the purported service of that record constituted an irregular step that falls to be set aside.

[59] That being said, the respondent has now brought an application before the Registrar to provide assistance to him in compiling a compliant record. I am not aware whether this application was successful or not, but would have thought that if the respondent can show that he is impecunious, the Registrar ought properly to provide assistance to him in compiling the record and hopefully this ground of complaint can be dispensed with in the interest of justice.

d. Rule 49(13): Security for costs

[60] The next issue to consider is security for costs. The respondent's stance has been that because leave to appeal was granted by the Supreme Court of Appeal, Rule 9 of the Supreme Court of Appeal Rules governs the matter and the applicant ought to have sought security from that court when he petitioned it if it wished to do so.

[61] The applicant's stance is this appeal is not an appeal to the Supreme Court of Appeal. It is an appeal to a full bench of this Division. Rule 49 therefore governs the prosecution of the current appeal; that includes rule 49(13). The Supreme Court of Appeal Rules apply where the appeal will be heard by that court; they do not govern a full-bench appeal merely because leave happened to be granted by the Supreme Court of Appeal.

[62] The applicant stresses that the text of rule 49(13) is clear: Unless one of three things occurs - waiver by the respondent of the obligation to provide security for costs, release from this obligation by the court when granting leave, or release by that court subsequently on application - the appellant/respondent in this case must furnish good and sufficient security before lodging the record. In this respect the applicant placed reliance on *L.G. v J.G.*⁹

⁹ *L.G. v J.G.* (32377/2012) [2023] ZAGPJHC 450 (28 April 2023) para 20; *Jeanru Konstruksie (Pty) Ltd v Botes* 2023 (6) SA 305 (GP)

[63] In the matter before me it is clear there was no waiver by the applicant of the requirement to furnish security. On the contrary, the applicant expressly stated on 30 May 2024 that it did not waive security and no court has released him from his obligation to provide security. He therefore remained obliged to furnish security before lodging the appeal record.

[64] Rule 49(13) provides:

“13)(a) Unless the respondent waives his or her right to security or the court in granting leave to appeal or subsequently on application to it, has released the appellant wholly or partially from that obligation, the appellant shall, before lodging the record on appeal with the registrar, enter into good and sufficient security for the respondent’s costs of appeal.

[Paragraph (a) substituted by GN R6975 of 24 December 2025.]

(b) In the event of failure by the parties to agree on the amount of security, the registrar shall fix the amount and the appellant shall enter into security in the amount so fixed or such percentage thereof as the court has determined, as the case may be.

[Subrule (13) amended by GN R1299 of 29 October 1999.] “

[65] I can do no better than quote from Erasmus in the seminal work on Superior Court Practice with respect to the default position provided for in Rule 49(13):

“Subrule (13)(a): ‘The court in granting leave to appeal or subsequently on application to it.’ As pointed out in the notes to rule 49 s v ‘General’ above, the rule deals with civil appeals from the order of a court constituted before a single judge of a division of the High Court, sitting as a court of first instance, to a full court of that division. An appeal to the full court arises from the fact that leave to appeal was granted by the single judge or by the Supreme Court of Appeal in terms of ss 16 and 17 of the Superior Courts Act 10 of 2013, as the case may be. Rule 49, including this subrule, does not find application where leave to appeal to the Supreme Court of Appeal was granted from the order of a court constituted before a single judge of a division of the High Court, sitting as a court of first instance. In such an event rule 9 of the Rules of the Supreme Court of Appeal finds application as far as the giving of security for costs of the appeal is concerned. The position under this subrule must accordingly be clearly distinguished from the one that prevails under rule 9 of the Rules of the Supreme Court of Appeal.

This subrule provides for the following situations:

(a) a waiver by the respondent of its right to security for costs, which waiver should clearly be made at any time after leave to appeal to the full court has been granted and before the lodging of copies of the record on appeal with the registrar of the division of the High Court where the appeal by the full court is to be heard;

(b) a whole or partial release from the obligation of the appellant to provide security for costs by the court that grants leave to appeal as part of its order granting leave to appeal;

(c) in the event that the court which granted leave to appeal did not make an order as referred to in (b), a whole or partial release from the obligation of the appellant to provide security for costs by the court that granted leave to appeal on application by the appellant;

(d) absent (a), (b) and (c), the entering into good and sufficient security for the respondent’s costs of appeal by the appellant before lodging copies of the record on appeal with the registrar of the division of the High Court where the appeal by the full court is to be heard.

In the premises the default position under subrule (13)(a) is that the appellant is compelled to enter into good and sufficient security for the respondent's costs of appeal before lodging copies of the record on appeal with the registrar of the division of the High Court where the appeal by the full court is to be heard except if (a) the respondent has waived its right to security; or (b) the court that granted leave to appeal had wholly or partially released the appellant from its obligation to enter into security."

[66] Erasmus expresses the view that the default position applies to all full court appeals regardless whether or not leave to appeal was granted by the Supreme Court of appeal and relies on *L.G v J.G*¹⁰ in which the Supreme Court of Appeal granted the respondent leave to appeal to a full court from an order of a single judge sitting as a court of first instance. The respondent was then served by the applicant with a notice in terms of rule 47(1) to provide security for costs of the appeal. He did not provide the security, causing the applicant to launch an application for the payment of security in terms of rule 47(3). In opposing the application, the respondent contended that the applicant's reliance on rule 47 was misplaced as the rule, in its entirety, was not applicable to appeals. He contended that rule 49(13), read with rule 9 of the Rules of the Supreme Court of Appeal, was applicable and as it was the Supreme Court of Appeal that had granted leave to appeal and not the High Court, it was only the Supreme Court of Appeal that could order the respondent to provide security. 189 The court pointed out that rule 49(13)(a) was applicable as the case concerned an appeal to the full court. In this regard the court, Erasmus submitted that the court, correctly said the following:

"[20] Rule 49 governs all Full Court appeals in the high court. Rule 49(13) must therefore be given effect to when the SCA grants leave to appeal to the Full Court. In terms of this rule, an appellant "shall provide security before lodging copies of the record on appeal with the registrar", unless the respondent waive security or an appellant is released of such obligation. This approach to Rule 49(13)(a) is sensible and also accords with the dictum in Strouthos v Shear (Strouthos).

[21] The facts in Strouthos are similar to the facts in the present matter. The respondent was found guilty of contempt of court and sentenced to a term of imprisonment. The respondent applied for leave to appeal that was refused. The SCA then granted the respondent leave to appeal to the Full Court. The applicant approached the high court for an order to compel the respondent to lodge security and leave to apply for the dismissal of the appeal on the same papers, duly supplemented, should the respondent fail to furnish security. The court held as follows:

"Since leave to appeal was granted by the Supreme Court of Appeal, or properly put, the President of that Court, it is only that Court that can conceivably release the respondent from his obligation to provide security, and the Court hearing the appeal accordingly does not have jurisdiction to do so. This much follows from a proper reading

¹⁰ supra

of the subrule. Should the appellant be so inclined he could apply to that Courts for such relief. In considering such an application the Court has a wide discretion which will be judicially exercised. (See Chasen v Ritter 1992 (4) SA 323 (SE); Chopra v Sparks Cinemas (Pty) Ltd and Another 1973 (2) SA 352 (D) and Mynhardt v Mynhardt 1986 (1) SA 456 (T).) However, until such time as such an order is obtained, the respondent is obliged to provide security, and this must be done before lodging copies of the record on appeal with the Registrar in terms of subrule 13(a).””

- [67] Erasmus was critical of the decision by Engelbrecht AJ in this Division in *Dr Maureen Allem Inc v Baard*.¹¹ The facts of that matter were similar to those presently before me. In that matter the respondent obtained leave from the Supreme Court of Appeal to appeal to a full court. In its order granting leave to appeal the Supreme Court of Appeal did not absolve the respondent from furnishing security for the costs of the appeal. The applicant applied in terms of rule 30A(2) for an order to compel the respondent to furnish security for costs as contemplated in subrule (13)(a), failing which the applicant be authorized to apply for the respondent's appeal to be struck from the roll or dismissed with costs.
- [68] The court concluded that under circumstances where the Supreme Court of Appeal, in granting leave to appeal in a matter, did not set a requirement that the appellant provide security and the applicant considered that it would be appropriate for security to be provided (as was the case before the court), it would be for the applicant to approach the Supreme Court of Appeal for an order to such an effect. Put differently, it would only be once the respondent in an appeal brought an application and obtained an order that it could then invoke rule 30A for want of compliance with the obligation created under that provision. That did not transpire in the case before the court. The rule 30A application was accordingly dismissed with costs.
- [69] Erasmus submitted that Engelbrecht AJ's decision in *Allem* incorrectly failed to recognize the fact that the default position under subrule (13)(a) is that the appellant is compelled to enter into good and sufficient security for the respondent's costs of appeal before lodging copies of the record on appeal with the registrar of the division of the High Court where the appeal is to be heard by the full court and argued that her findings were obiter.

¹¹ *supra*

[70] However, Engelbrecht AJ's approach has recently found favour by the Supreme Court of Appeal in the recent decision of *Koopman v Minister of Police*¹² that was delivered on 7 April 2026, after this matter was argued before me.

[71] Matojane JA (Coppin JA and Kganyago AJA concurring) were faced with the question whether condonation for the failure to provide security should be granted where leave was granted by the Supreme Court of Appeal and whether Rule 49(13) of the Uniform Rules applies at all to an appeal where leave was granted by the Supreme Court of Appeal rather than by a judge of the High Court. In considering this question Matojane JA set out the applicable Rules thus:

[10] *Rule 49(13)(a) of the Uniform Rules requires any party granted leave to appeal to the full court to furnish security for the respondent's costs of appeal before a hearing date may be obtained. The obligation is peremptory and is displaced only by the respondent's waiver or a court order.*

[11] *Section 17(1)(a) of the Superior Courts Act regulates the granting of leave to appeal by the judge or judges who gave the decision under challenge. Where leave is refused, the aggrieved party may petition this Court under s 17(2)(b) of the Superior Courts Act.*

[12] *Rule 9 of the Rules of the Supreme Court of Appeal (the SCA Rules) governs the position where an appeal is to be heard by this Court. It does not, on its terms, apply to cases in which this Court has granted leave to appeal to the full court of a high court division. It authorises this Court, when granting leave to appeal, to order that security for costs be furnished, but only upon the respondent's request. No automatic obligation arises. Unless the respondent makes the request and this Court makes an order.*

[13] *Rule 1 of the Uniform Rules defines 'court' as the high court of South Africa referred to in s 6 of the Superior Courts Act. This Court is established under the Superior Courts Act as a distinct institution governed by its own procedural rules. It falls outside that definition."*

[72] The learned judge of appeal then considered whether Rule 49(13) applied and held:

[18] *The Uniform Rules, as rules of high court procedure, are directed at the divisions of the high court and not at this Court. The SCA Rules and the Superior Courts Act govern this Court's procedures. Rule 49(13) of the Uniform Rules operates within the procedural domain of the high court. Its mechanism is straightforward: a judge of the high court hears an application for leave to appeal in the matter they decided at first instance and, upon granting leave, activates the security obligation. Where a single judge refuse leave, that mechanism is never triggered; Rule 49(13) of the Uniform Rules is not activated, and no obligation under it arises. The matter then proceeds on petition before this Court under s 17(2)(b) of the Superior Courts Act, governed by the SCA Rules.*

[19] *The issue is whether Rule 49(13) of the Uniform Rules is revived when this Court, acting under its own jurisdiction in terms of Rule 9 of the SCA Rules, grants leave to appeal to the full court. The answer turns on the definition of "court" in the Uniform Rules, which is expressly limited to the high court and does not extend to this Court. Accordingly, an order made by this Court directing that an appeal be heard by the full court does not constitute an order of the "court" as contemplated in Rule 49(13). It follows that the consequences ordinarily associated with that rule are not triggered or governed by it in such circumstances.*

¹² Supra

- [20] *Rule 9 of the SCA Rules confirms this conclusion. It provides a regime that is complete in itself and governs security for costs in proceedings before this Court. Its structure differs fundamentally from rule 49(13): security is not automatic; it requires a respondent's request and a court order. Where, as here, the respondent made no request at the petition stage, and no order for security for costs was made when leave was granted on 12 December 2022, no security obligation arose. To apply Rule 49(13) of the Uniform Rules in this setting would be to impose a peremptory obligation where the SCA Rules impose only a conditional one, without any textual basis for doing so.*
- [21] *The contrary argument, that Rule 49(13) of the Uniform Rules governs all full court appeal and therefore applies whenever leave to appeal to a full court has been granted, regardless of who granted it, does not survive scrutiny. Rule 49(13) of the Uniform Rules ties the security obligation to a grant of leave by a high court judge who dismissed the original application. The destination of the appeal, whether to a full court or to this Court, does not determine whether Rule 49(13) of the Uniform Rules applies. The source of the order does.*
- [22] *In Strouthos v Shear, the court held, without analysis of the text of Rule 49(13) of the Uniform Rules or Rule 9 of the SCA Rules, that leave granted by the Chief Justice did not relieve the petitioner of the obligation to furnish security under Rule 49(13)(a) of the Uniform Rules, and that only this Court had power to release the petitioner from it. The court assumed, without establishing the point, that an obligation under Rule 49(13) of the Uniform Rules had arisen in the first place. For the reasons set out above, that assumption cannot be sustained. The decision in LG v JG followed Strouthos without engaging directly with the textual and structural considerations material to the question.*
- [23] *In Dr Maureen Allem Incorporated v Baard, a full court of the Gauteng Division of the High Court. Johannesburg (GJ) considered the question directly. It held that Rule 9(1) of the SCA Rules contemplates that any precondition for security in petition proceedings must derive from an order of this Court; that, since the respondent had not requested security, no entitlement to it had arisen; and that Rule 49(13) of the Uniform Rules did not apply because leave had been granted by this Court and not by a high court within the meaning of the Uniform Rules. The full court of the Limpopo Division reached the same conclusion in Maake and Others v Chemfit Finechemical (Pty) Ltd.*
- [24] *The reasoning in Allem, in my view, is correct. It is the only decision that engages directly with the text and structure of the applicable rules. The court in Strouthos assumed what was to be established and, on this point, erred. Rule 49(13) of the Uniform Rules does not apply to Ms Koopman's appeal. Since this Court did not order her to furnish security, she was under no obligation to do so, and the Minister acquired no entitlement to demand it in the absence of a court order."*

[73] On the facts the Supreme Court of Appeal felt that enforcing security for costs would constitute an unjustifiable limitation of the right to access to courts entrenched in s. 34 of the Constitution:

- "[25] *Enforcing the security requirement in these circumstances would permanently foreclose the appeal. That result would constitute an unjustifiable limitation of the right of access to courts entrenched in s 34 of the Constitution. Ms Koopman's grounds of appeal are substantive. The interaction of s 40(1)(q) of the CPA read with s 3 of the DVA in the particular circumstances of this arrest, effected two days after the alleged incident, at a residence the complainant had already vacated, in the complainant's absence, with an infant present, raises genuine and unresolved questions of law. Leave having been granted, the prospects of appeal are reasonable. Against the prospect of Ms Koopman's permanent loss of access to the appellate process, the Minister has demonstrated no real prejudice. The security issue was raised only at the last moment, after more than two years of appellate proceedings conducted without objection. The evidence is finalised, and the record is complete. The uncontested facts would, on the alternative ground, favour release from any security obligation."*

[74] This is dispositive of the security argument. I accordingly find that there was no obligation on the respondent to furnish security for the costs of the appeal and that the respondent's refusal to waive security is irrelevant.

e. *Whether the appeal has lapsed*

[75] This brings me to the critical question of remedy. The applicant seeks a declaration that the appeal has lapsed as a matter of law, alternatively that it be struck out. It relies in this regard on the wording of rule 49(6)(a), which states that if no proper application is made by either party within the prescribed time, the appeal shall be deemed to have lapsed. It also relies on the proposition that an appeal lapses as a matter of law when the requirements for prosecuting an appeal in terms of the rule are not met.¹³

[76] There is force in this submission. The procedural defaults established are not trivial. They go to the heart of the appeal process. An appellant who does not properly apply for a date, does not file a proper record, and does not furnish security cannot claim to have prosecuted the appeal in accordance with the Rules.

[77] It cannot be denied that the effect of this is the lapsing of the appeal as a matter of law, but this is not determinative as Rule 49 also provides that the court hearing the appeal can grant condonation and in effect reverse the lapsing of the appeal. As it is only the court hearing the appeal that can consider whether or not to grant condonation, it makes little sense that the appeal be regarded as a nullity as by necessary implication it is allowed to limp on until the court hearing the appeal decides whether to condone the non-compliance with the Rules.

[78] In *Symes NO and Others v Harry's Tyres (Pty) Ltd*,¹⁴ the North West Division of the High Court, Mahikeng, dealt with distinction between the lapsing of an application for the date of an appeal as opposed to the lapsing of the appeal itself. The relief sought was as follows:

¹³ *Symes NO and Others v Harry's Tyres (Pty) Ltd* (CIV APP FB 10/2023) [2023] ZANWC 171 (15 September 2023) para 24; *Ngaka Modiri Molema District Municipality v Quantibuild (Pty) Ltd* (CIV APP FB12/2022; 3352/2019) [2024] ZANWHC 101 (12 April 2024) para 8.

¹⁴ *Supra*

[79] A declaration order that the respondent's application for a date for the hearing of its appeal, dated 15 August 2022, is declared to have lapsed pursuant to Uniform Rule 49(7)(d) of the Uniform Rules of Court; and

[80] By reason of the lapsing of the respondent's application for a date for the hearing of its appeal as ordered in prayer 1 above, it be confirmed and declared that the respondent's appeal to the full court of this Division has lapsed in terms of Uniform Rule 49(6)(a).

[81] The court formulated the issue before it as whether the ex lege lapsing of the appeal in terms of Uniform Rule 49(6)(a) results therein that the appeal itself has lapsed in terms of Uniform Rule 49(7)(d). It was argued that the condonation / reinstatement application of the lapsed appeal to be determined by the court hearing the appeal in due course was not a barrier to the court pronouncing on whether the respondent's appeal, as a matter of law, has lapsed.

[82] Like in the present matter, in *Symes* the respondent was unable to file the completed appeal record together with the application for a date for hearing, as required by Uniform Rule 49(7)(a). In terms of Rule 49(7) (d) the respondent had to file the complete appeal record within 40 days of the application for a date for hearing. Because it failed to do so, the applicant lodged an application in terms of Rule 49(7)(d) that the application for the date of the hearing had lapsed.

[83] In *Symes* Reid J stated at paragraph [23] and [24]:

[23] Rule 49(6)(b) in its express wording specifies which court should deal with the application for the reinstatement of appeal. There cannot be any ambiguity that the court of appeal, which will be the full bank that will be constituted to hear the appeal, is the correct court to deal with the condonation applications. The meaning of the words The court to which the appeal is made may, on application of the appellant... and upon good cause shown, reinstate an appeal ... which has lapsed does not leave room for any other interpretation.

[24] Rule 49(6) expressly determines an appeal to have become lapsed ex lege but with the proviso that condonation can be granted by the court that hears the appeal and the appeal can then be reinstated."

[84] Reid J went on to explain:

"[26] In South African Allied Workers' Union (in liquidation) and Others v De Klerk and Another 1992 (3) SA 1 (A) the following was held by the Appeal Court (Headnote):

“The current practice in applications for the condonation of a failure to comply with the Rules of the Appellate Division relating to the prosecution of an appeal is for such application to be set down at the same time as the hearing of the appeal. Since the Court would have before it and would have studied the judgment of the Court a quo, the heads of argument and, indeed, the full appeal record, the prospects of success or otherwise would be reasonably apparent.”

[27] *The wording of Uniform Rule 49(7) echoes that of Uniform Rule 49(6) and it clearly specifies that it is the court “that is to hear the appeal” is the court to hear the application for condonation for failure to comply with the Uniform Rules.*

[28] *It is a well-established practice that the court that hears the appeal, is the court that considers the condonation applications on the reinstatement of the appeal.”*

[85] Reid J then significantly reasoned:

[29] *The difference, it seems, between the status of the appeal in relation to Rule 49(6) opposed to Rule 49(7), is that Rule 49(6) determines a lapse of the appeal ex lege on the appellants’ failure to comply with the Rule, where Rule 49(7) determines that the opposing party may approach the court to have the appeal declared lapsed, on the appellants’ failure to comply with the Rule.*

[30] *One of the reasons or one ratio for the court of appeal to be the court best suited to adjudicate the applications for condonations is that the prospects of success is an essential factor to consider in whether condonation should be granted for the appeal to be reinstated or not.*

[31] *I find it difficult to understand the reasoning of the applicant in seeking declaratory orders that the appeal has become lapsed, where the applicants concede in their heads of argument, as set out in paragraph [4] and [5] above, that the court of appeal will be the correct court to determine whether condonation should be granted and the appeal should proceed.*

[32] *The applicants request an order that the appeal itself has lapsed. Simultaneously, the applicants concede that the appeal can be reinstated on successful application for condonation, which application for condonation is to be considered by the court that hears the appeal. The court that hears the appeal is obviously the full court.*

[33] *On this basis, I respectfully hold the view that this application is an exercise in futility.”*

[86] I agree with Reid J’s reasoning. Paragraph [24] of his judgment cannot be read in isolation. The learned judge had similar misgivings as me regarding the effect and application of sub-rules (6) and (7). It is a great pity that the legislature did not see fit to remedy the obvious paradox in the Rules when it effected amendments to the Rule on 24 December 2025. Why one aspect of non-compliance set out in sub-rule (6) should have as a consequence that the appeal lapses *ex lege*, while that set out in sub-rule (7) requires that declaratory relief be sought is confusing and it makes no sense that an appeal is regarded as *ipso facto* lapsed when the court hearing the appeal can grant condonation for non-compliance. There also appears to be little point in declaring that the appeal has lapsed when the court hearing the appeal can decide otherwise.

[87] But what is clear from the judgment is that with regard to the respondent's non-compliance in failing to simultaneously file a record of the appeal when applying for a date for the appeal, the appeal would not be regarded as lapsed ex lege as contended by the applicant; first it would be necessary for it to apply for declaratory relief to this effect in respect of which the court would have a discretion. The authority cited thus does not support the proposition advanced by the applicant's counsel.

[88] The other authority relied upon by the applicant regarding the automatic lapsing of the appeal is *Ngaka Modiri Molema District Municipality v Quantibuild (Pty) Ltd*,¹⁵ also a judgment of the North West High Court, Mahikeng. This was a decision of the full court hearing the appeal as well as the application for condonation brought by the Municipality. The full court simultaneously granted the declaratory relief that the appeal had lapsed and condonation for the late filing of the power of attorney, security for costs and the corrected record of appeal.

[89] Interesting the full court against whose judgment the appeal lay, was recorded as having found that :

"[8] In giving effect to a proper interpretation of Rule 49(6)(a), the Full Court on 8 December 2022 found that should the appellant fail to comply with Rule 49(6)(a), its appeal is "deemed to have lapsed", and the respondent in the appeal is entitled to apply for an order to that effect and for the wasted costs. As indicated supra Quantibuild as the respondent filed an application to that effect on 27 January 2023, seeking an order by the Full Court before which the appeal serves, that the appeal has lapsed. This is based mainly on the fact that no power of attorney was filed as well as the lack of security for costs, which renders the appeal fatally defective.

See: *Corlett Drive Estates Ltd v Boland Bank en 'n ander another 1978 (4) SA 420 (C).*"

[90] The full court thus conflated the consequences of Rule 49(6)(A) and 49(7)(b).

[91] In dealing with the findings of the full court, the appeal court held:

"[9] The first prayer in the interlocutory application by Quantibuild is that the Court should order that "the appeal against the judgment and order of Acting Judge Makoti dated 02 March 2021 is deemed to have lapsed in terms of Uniform Rule 49(6)(a)". That this Court should still order that the appeal "is deemed to have lapsed" is incorrect. What this Court should find is that the appeal has lapsed and not "deemed to have lapsed in terms of Uniform Rule 49 (6)(a)" as prayed.

¹⁵ supra

[10] *The Municipality contended that the appeal, although deemed to have lapsed in terms of Rule 49(6)(a), should not be declared to have lapsed. This Court is implored to condone the non-compliance with the Rules of Court, which is premised solely on the lack of diligence and negligence on the part of the attorneys of the Municipality, for its failure to comply with the requirements for the timeous prosecution of the appeal, to put up security for costs, to file a power of attorney, and to file a completely compliant record of appeal. Furthermore, in the event that this Court pronounces that the appeal has lapsed, then in that regard, the Municipality contends that this Court should grant an order reinstating the appeal.*

[92] This further demonstrates the futility in motion courts being approached to make declarations that the appeal has lapsed; this is an issue that should be dealt with by the court hearing the appeal that would also simultaneously decide whether or not to grant condonation and re-instate the appeal.

[93] It was later held by the court that:

[19] *An appeal that has lapsed (or deemed to have lapsed) can be resurrected via a successful application for condonation and re-enrolment. It is trite that insofar as condonation is concerned, that the test for determining whether condonation should be granted or refused is the interests of justice. In *Turnbull-Jackson v Hibiscus Court Municipality and Others* 2014 (6) SA 592 (CC) at paragraph 23 the Constitutional Court referred to certain “factors” which the Court seized with adjudicating an application for condonation should consider. The following was stated in this regard by the Constitutional Court:*

“Factors that the Court weighs in that enquiry include: the length of the delay; the explanation for, or cause of the delay; the prospects of success for the party seeking condonation; the importance of the issues that the matter raises; the prejudice to the other party or parties; and the effect of the delay on the administration of justice. It should be noted that although the existence of prospects of success in favour of the party seeking condonation is not decisive, it is a weighty factor in favour of granting condonation.”

*(See *Brummer v Gorfil Brothers Investment (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC) at para 3 read with *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC) at para 20.)*

[94] The court then referred to *Collatz* and stated :

[24] *In *Collatz and Another v Alexander Forbes Financial Services (Pty) Ltd and Others* (A 5067/2020; 43327/2012 [2022] ZAGPJHC 93 (10 February 2022) at paragraphs [19], [20], [22], [23], the Court notwithstanding delays and dilatory conduct on the part of the appellant applying for condonation and numerous “... unsatisfactory aspects in the condonation application...”, granted the appellant’s application for condonation for its failure to provide security and granted an order for reinstatement of the appeal, which had lapsed, stating that:*

“All things considered, the interests of justice, fairness and finality necessitates that the appeal be heard, determined and disposed of on its merits, and I intend to do so. I am not prepared to kick the can down the road. Accordingly, I am prepared to grant the condonation sought by the appellants. While the appellants do not ask for condonation therefore, I am also prepared to overlook, for purposes of this appeal, their failure to furnish security in the appeal. The cost consequences of the issue of the appellants’ outstanding security and the appellants’ condonation application are dealt with at the end of this judgement.”

[25] *In the founding affidavit of the Municipality, it provided a detailed explanation for its non-compliance with the Rules of Court. I agree with the approach adopted in Collatz when regard is had to the peculiar circumstances of this matter and the prospects of success on appeal. I am therefore of the considered view, in the interests of justice, to condone the late prosecution of the appeal; the late filing of the power of attorney; the late putting up of security for costs, as well as the late filing of the corrected, compliant record of appeal. However, this Court will mark its disapproval with the way the attorneys for the Municipality conducted the appeal on behalf of the Municipality, with an appropriate cost order, on a punitive scale, mindful that this Court has already ordered costs in favour of the respondent (Quantibuild) when the matter was removed from the roll and again when it was postponed for the filing of heads of argument on the merits of the appeal.*

[26] *The application for condonation by the Municipality is accordingly granted and the appeal is reinstated."*

[95] This makes it clear that the failure to comply with the provisions of Rule 49 does not by any means deprive the appellant of his right to have his appeal heard; in appropriate cases where the delay of non-compliance be explained, and provided that there are prima facie prospects of success in the appeal, the court hearing the appeal may and probably would condone the non-compliance and hear the appeal.

[96] The applicant's present application can thus cannot by way of deeming provisions or declaratory relief prevent the ventilation of a proper appeal. It is not, however, at this stage incumbent upon me to determine the reasonable prospects of the appeal; that if for the court hearing the application for condonation and the appeal.

The relationship between Rule 49(6)(a) and Rule 49(7)

[97] A central issue raised on the papers concerns the proper construction of Rule 49(6)(a) read with Rule 49(7) of the Uniform Rules of Court, and in particular whether a timeous but procedurally deficient application for a hearing date suffices to prevent the lapsing of an appeal. The respondent's position, in essence, is that the mere delivery of a notice in terms of Rule 49(6)(a) within the prescribed 60-day period constitutes compliance with the Rule, notwithstanding that the appeal record was incomplete or non-compliant. The applicant, by contrast, contends that such an approach divorces Rule 49(6)(a) from Rule 49(7)(b), and that no valid application for a hearing date can exist in the absence of a properly prepared and furnished record.

[98] In my view, the applicant's construction is to be preferred. The Rules governing the prosecution of appeals must be read purposively and as an integrated whole. Rule 49(6)(a) does not operate in isolation. It prescribes a time period within which an

appellant must take a defined procedural step, namely the application for a hearing date. Rule 49(7), in turn, prescribes the substantive requirements which must accompany that step, including the furnishing of a complete, properly indexed and paginated record. The two provisions are therefore not independent; they are interdependent components of a single procedural act, namely the proper enrolment of an appeal for hearing.

[99] It follows that a purported application for a hearing date which is not accompanied by a record that complies with Rule 49(7) and the applicable practice directives does not constitute proper compliance with Rule 49(6)(a). To hold otherwise would be to elevate form over substance and to permit an appellant to preserve an appeal through the delivery of a nominal or formal notice, while failing to place the matter in a condition fit for adjudication. That cannot have been the intention of the Rule.

[100] This approach finds support in authority. Courts have recognised that the requirements for prosecuting an appeal under Rule 49 are peremptory and that failure to comply may result in the appeal lapsing by operation of law. In particular, it has been held that an appeal lapses where there has not been proper compliance with the requirements for applying for a hearing date within the prescribed period. The emphasis in those decisions is not on the mere delivery of a document, but on the taking of a procedurally effective step in accordance with the Rules.

[101] The same reasoning applies with equal force to the requirement of furnishing a proper record. The appeal record is not a procedural afterthought. It is the foundational document upon which the appellate court performs its function. An incomplete or defective record not only prejudices the respondent to the appeal, but also undermines the ability of the court to adjudicate the matter fairly and efficiently. For that reason, the obligation to furnish a compliant record is integral to, and not separable from, the obligation to apply for a hearing date.

[102] Academic commentary likewise recognises the difficulty that arises if the Rules are read disjunctively. It has been observed that uncertainty in the preparation and filing of appeal records has led to inconsistency in practice, and that a purposive reading is required to ensure that the appeal is genuinely ready for hearing when it is

enrolled. Such commentary reinforces the conclusion that Rule 49(6)(a) and Rule 49(7) must be construed together, rather than as discrete procedural silos.

[103] That is not to say that every defect in a record will necessarily result in the lapsing of an appeal. The court retains a discretion, informed by considerations of prejudice and the interests of justice, to overlook minor or non-prejudicial irregularities or to grant appropriate relief, including condonation or directions for compliance. But where the defect is material - as in the case of a record that is incomplete, improperly prepared, or not furnished at all - the purported application for a hearing date cannot be regarded as valid compliance with Rule 49(6)(a).

[104] The position may therefore be summarised as follows. Rule 49(6)(a) establishes the temporal requirement for the prosecution of an appeal; Rule 49(7)(b) supplies the substantive content of that requirement. A valid application for a hearing date presupposes the existence of a proper, compliant record. In the absence of such a record, the procedural step contemplated in Rule 49(6)(a) is defective and, in an appropriate case, incapable of preventing the appeal from lapsing.

[105] However, while it is so that non-compliance with Rule 49(6)(a), read with Rule 49(7), may result in the lapsing of an appeal by operation of law, that conclusion does not exhaust the Court's enquiry. The Rules, though peremptory in form, do not operate in a vacuum divorced from the Court's inherent jurisdiction to regulate its own process and to prevent injustice. As reflected in the authorities and the modern approach to appellate procedure, lapsing is a *prima facie* consequence of material non-compliance, but it is not necessarily dispositive in every case.

[106] The Court retains a judicial discretion, to be exercised in the light of all relevant considerations, including the nature and extent of the default, the explanation therefor, the degree of prejudice to the opposing party, and the broader interests of justice, to condone non-compliance, to reinstate an appeal, or to fashion an order regulating its further prosecution. In exercising that discretion, the Court must strike an appropriate balance between, on the one hand, the imperative of strict adherence to procedural rules which serve the orderly administration of justice, and, on the other, the constitutional injunction that disputes be determined on their merits where it is fair and practicable to do so. Accordingly, even where the procedural

gateway created by Rule 49(6)(a) has not been properly traversed, the Court is not *functus officio*, but remains vested with the power to ensure that procedural default does not produce a disproportionate or unjust outcome, provided that the integrity of the appellate process is not thereby undermined

[107] In the recent case of *Moodley v Crazy Plastics (Pty) Ltd and Another*¹⁶ Du Plessis J sitting in this Division was faced with the question whether an appeal was deemed to have lapsed. The issue before the court was framed thus:

[6] *The applicant's case raises questions about procedural compliance and a single judge's appropriate role in appeal proceedings. The essence of the complaint is that the appeal notice was not properly issued in terms of the Practice Directive and that the appeal should, therefore, be regarded as a nullity or deemed to have lapsed. The court must determine whether these defects justify that conclusion. This requires a careful balance between the duty to enforce procedural rules and the obligation to ensure that technicalities do not unjustly impede the right of appeal. The key question is whether the non-compliance was so serious and incapable of cure that it renders the appeal fatally defective at this stage.*

[108] Du Plessis J provided a useful exposition of the legal position that I am in agreement with:

[7] *In Genesis One Lighting (Pty) Ltd v Jamieson and Nawa v Marakala, the courts recognised that a single judge may, in certain circumstances, declare an appeal to have lapsed, mainly where there has been a clear failure to file the appeal record or to apply for a hearing date. However, that principle must be applied with caution.*

[8] *Intervention by a single judge is warranted only where there is a clear and irreparable failure to prosecute the appeal. Ordinarily, questions regarding the lapsing of an appeal, particularly where issues of condonation or reinstatement may arise, are best determined by the full court seized with the appeal. The respondents have not applied for a set down in the present case, citing the pending interlocutory application. This has produced an unusual procedural posture: the appeal is not set down because its procedural validity is under challenge, yet part of that challenge suggests that the matter is not properly set down. If the matter is not set down, then the appeal court is not seized with it, which is why it is before this court. In these circumstances, this court proceeds with caution.*

[9] *Rule 49(6)(a) 3 provides that an appellant must apply for a hearing date within 60 days of delivering a notice of appeal. If this is not done, and no application for set down is made by either party within 10 days thereafter, the appeal is deemed to have lapsed. This rule underscores the importance of timely prosecution of appeals. Non-compliance means that the appeal automatically lapses, and such a lapse does not require judicial intervention. This is because the appeal may be reinstated on application.*

[10] *Rule 49(6)(b) provides that the court "to which the appeal is made" may reinstate an appeal which has lapsed. This is at the discretion of the appeal court, which exercises its discretion judicially upon consideration of the facts. As was explained in *AYMAC CC v Widgerow* not every irregularity or delay is fatal. The defect must be such that it materially undermines the proper prosecution of the appeal of a gross disregard of the rules.*

¹⁶ *supra*

- [11] *Rule 49(7)(d)5, in contrast, deals with cases where a party has applied for a hearing date but fails to file the appeal record within 40 days. In such cases, the opposing party may apply to the court for an order declaring that the application for a hearing date has lapsed. Importantly, this is not automatic. Judicial intervention is required, and it typically falls within the jurisdiction of a single judge.*
- [12] *The distinction between Rule 49(6) and Rule 49(7) was clarified in MDM v LBM,⁶ where the court held that a single judge could not dismiss an appeal already on the roll of the full court, as that would fall within the exclusive jurisdiction of the appeal court. In terms of Rule 49(6)(a), where no application for a hearing date is made within 60 days, the appeal lapses automatically by operation of the rule and any application for reinstatement must be brought before the appeal court. By contrast, Rule 49(7)(d) allows a single judge to declare that an application for a hearing date has lapsed where the appellant has failed to file the appeal record after requesting a hearing date. The court in MDM confirmed that this authority rests with a single judge and not with the full court. In the Rule 49(6) context, reinstatement can be sought from the full court, while Rule 49(7) contemplates a single-judge inquiry into the lapsing of the hearing date application, which includes the completeness of the records, as required by the Rules and set out in the Practice Directives.*
- ...
- [15] *The question in this matter is whether the defect in the service of the notice rendered the appeal fatally defective. A single judge may only intervene where the lapse is plain, the defect is irremediable, and prejudice evident. That is not the case here.*
- [16] *The notice of appeal was served within the prescribed period, albeit without a case number. The case number was obtained the next day. The applicant was at all times aware of the respondents' intention to prosecute the appeal. The absence of a stamp and case number, later corrected, does not warrant a finding that the appeal has lapsed in the context of Rule 49(7). To do so would elevate form over substance and run contrary to the constitutional right of access to courts, which includes the right to appeal.*
- [17] *I am thus not persuaded that the procedural defects were so grave as to justify nullifying the appeal process at this stage. If condonation is required in the context of Rule 46, it may yet be sought. That is for the full court to decide.*
- [18] *This judgment does not imply that the non-compliance is condoned. Whether condonation is necessary or appropriate is a matter for the full court when the appeal is properly enrolled. Nothing in this judgment precludes the full court from making such directions as it deems fit." (Footnotes omitted)*

f. **Section 34 of the Constitution and the appropriate remedy**

[109] Declaring that the appeal has lapsed is not the only remedy open to me. The court must also take account of proportionality and the interests of justice. Several features of this case persuade me that, despite the seriousness of the defaults, it is not necessary at this stage to grant a final declarator that the appeal has lapsed:

- a. The first is that the respondent did take some steps within the 60-day period, albeit defective ones. This is therefore not a case of complete abandonment or total inaction.

- b. The second is that the respondent's financial explanation, though insufficient to excuse the defaults, is not irrelevant. The papers show that the compilation of the record was costly, and that the respondent sought to rely on that circumstance as explaining why he could not furnish a compliant record timeously.
- c. The third is that a declaration of lapse is a drastic measure. In substance, it may operate to deprive the respondent of the appellate process already authorised by the SCA. Such an Order would seriously impede the respondent's rights to access to courts, including higher courts enshrined in s.34 of the Constitution. A court should be slow to impose that consequence where a less drastic order can adequately protect the respondent to the appeal and the court's own processes.
- d. The fourth is that the prejudice to the applicant and the institutional prejudice to the court are both remediable by an order that firmly sets aside the irregular steps and compels proper compliance within a short, peremptory period. Such an order would vindicate the Rules without resorting immediately to the most drastic and final consequence.

[110] In my view, that is the correct course. The respondent must not be permitted to continue with the appeal on the basis of defective steps and fragmentary compliance. But the just and proportionate response is to set those steps aside, declare the non-compliance, direct strict compliance within a short period, and provide that failing such compliance the applicant may return on the same papers for further relief, including a declaration that the appeal has lapsed or stands to be struck out.

[111] That conclusion is, in my view, also the one most consonant with s 34. A rigidly formalistic order finally extinguishing the appeal would not sufficiently recognise the constitutional importance of preserving access to adjudication where it remains fairly possible to do so.

[112] At the same time, the order I propose does not compromise the principle of strict compliance. It treats the non-compliance as material, sets aside the irregular steps, and requires proper prosecution. Section 34 is not used

here as a charter for laxity; it informs the calibration of the remedy. The rules retain their full force. The respondent is not excused from compliance. He is afforded one final and strictly regulated opportunity to comply and properly prosecute his appeal.

[113] That being said, it is hoped that the applicant will assist the respondent in preparing the record of the appeal in the event that the Registrar does not do so. This will facilitate the hearing of the appeal and advance the administration of justice .

Costs

[114] The applicant has been substantially successful. It has established the material irregularity and non-compliance of the respondent's conduct. It was compelled to bring this application because of that conduct. In those circumstances the ordinary rule that costs follow the result should apply.

[115] At the same time, I must bear in mind that the respondent is impecunious and has been successful in establishing that he was not obliged to furnish security for costs and considerable time was spent dealing with this issue in argument.

[116] Thus, in the exercise of my discretion I find that the appropriate order in the circumstances is that the costs in the present matter be costs in the appeal.

Order

[117] The following order is made:

1. It is declared that the respondent has failed to comply with rule 49(6) of the Uniform Rules of Court, read with the applicable provisions of the Consolidated Practice Directive 1 of 2024, in the prosecution of appeal case number A2024-058858.
2. The respondent's purported notice in terms of rule 49(6)(a), delivered on 16 August 2024, is set aside as an irregular step.

3. It is declared that the respondent has failed to comply with rules 49(7), 49(8) and 49(10) of the Uniform Rules of Court, read with the applicable provisions of the Consolidated Practice Directive 1 of 2024, in that the record purportedly served did not constitute a complete and compliant appeal record.
4. The purported service of that incomplete and non-compliant record is set aside as an irregular step.
5. The respondent is directed, within 3 (three) months of the date of this order, to:
 - 5.1 file with the Registrar and serve on the applicant a complete, indexed, paginated and rule-compliant appeal record in accordance with rule 49 and the applicable practice directive; and
 - 5.2 take all steps necessary to lodge a proper application for a hearing date in accordance with the Registrar's requirements and the practice directive.
6. In the event that the respondent fails to comply with paragraph 5 within the period stated, the applicant may, on the same papers duly supplemented, approach this Court for further relief, including an order declaring that the appeal has lapsed or that it stands to be struck out.
7. Costs are to be costs in the appeal.



WENTZEL-THOMPSON J
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant:

P Bosman instructed by Edward
Nathan Sonnenbergs Inc.

For the Respondent:

F Slabbert instructed by David Mey
and Partners

Date of the hearing:
Date of judgment:

2 March 2026
16 April 2026

