

Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates:	NO



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION MAHIKENG**

CASE NO: CIV APP FB 05/2022

In the matter between

COETZER (BORN STRICKLAND), LYNN N.O. 1st Appellant

In her capacity as trustee for the **Junior Partner Trust**

BERGE, CRAIG N.O. 2nd Appellant

In his capacity as trustee for the **Junior Partner Trust**

THWAITS, SYDCARL GEORGE N.O. 3rd Appellant

In his capacity as trustee for the **Junior Partner Trust**

AND

EXTRASEC SECURITY (PTY) LTD 1st Respondent

MALAN, BAREND HERCULES PETRUS 2nd Respondent

MASOKO, BENJAMIN DIFATLHO 3rd Respondent

BURGER, FRANS HENDRIK

4th Respondent

MALAN, WILLEMINA HENDRIKA

5th Respondent

S.A.N. INVESTMENTS (PTY) LTD

6th Respondent

THE MASTER OF THE HIGH COURT

7th Respondent

**THE TRUSTEES FOR THE TIME BEING
OF THE BEN MALAN FAMILY TRUST**

8th Respondent

CORAM: HENDRICKS JP, REDDY J & MORGAN AJ

Heard: 20 February 2026

Delivered: This judgment was handed down electronically, circulated to the parties' representatives via email, uploaded to CaseLines, and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 20 May 2026 at 14h00.

Summary:

Appeal — Condonation — Late filing of notice of appeal and late prosecution of appeal — Overarching test is the interests of justice — *Melane* factors inform but do not replace that enquiry — Flagrant and continual non-compliance — Where breaches are flagrant and no acceptable explanation advanced, prospects of success irrelevant — Condonation refused — Appeal deemed to have lapsed under Rule 49(6)(a) *ex lege* — Rule 49(6)(a) distinguished from Rule 49(7)(d) — Rule 49(7)(d) not automatic; requires court order — Reinstatement refused — Costs on Scale B.

ORDER

Consequently, the following order is made:

- 1. Condonation for the late filing of the Notice of appeal is refused.**
- 2. Condonation for the late prosecution of the appeal is refused.**
- 3. The appeal is declared to have lapsed.**
- 4. The re-instatement of the appeal is refused.**
- 5. The appellants/applicants in their capacities as trustees of the Junior Partner Trust are ordered to pay the costs of the appeal on a party-and-party basis, on Scale B, to be taxed; which costs include the costs of the application for leave to appeal in the court a quo.**

JUDGMENT

HENDRICKS JP

Introduction

- [1] The appellants as applicants launched an application praying for relief in the following terms: 'that the Junior Partner Trust be declared to be a shareholder in respect of 50% of the issued shares in the first respondent; that the first respondent be wound-up, alternatively, that the second, third and fourth respondents be removed as directors of the first respondent, further alternatively, that they be declared delinquent directors as provided in section 162 of the Companies Act 71 of 2008; and costs of this application.' This application was opposed by the first to sixth and eight respondents. The matter served before Petersen AJ (as he then was) on

11 March 2021, when judgment was reserved. On 19 May 2021, the application was dismissed with costs.

- [2] Dissatisfied with the outcome, the appellants applied for leave to appeal to the Full Court of this division. On 07 December 2021 leave to appeal to the Full Court was granted, with the costs of the application for leave to appeal to be costs in the appeal itself. A notice of appeal was signed on 27 January 2022, served and filed on 31 January 2022. The record of appeal was served on the respondents on 28 June 2023. Not only was the notice of appeal filed late but the prosecution of the appeal itself was only proceeded with approximately a year and five months after delivery of the notice of appeal.
- [3] In terms of Rule 49 (2) of the Uniform Rules of Court, when leave to appeal to the Full Court is granted, a notice of appeal **shall** be delivered to all parties within twenty (20) days after the date upon which leave was granted or within such longer period as may upon good cause shown be permitted. As already alluded to earlier, the notice of appeal was served and filed after the stipulated period of twenty (20) days. No application for condonation for the late serving and filing of the notice of appeal was made at that stage, showing good cause for this Court to allow the delivery (service and filing) of the notice of appeal within a longer period, as required in terms of Rule 49 (2).

- [4] The appellants only served and filed a condonation application on 09 February 2024, more than two (2) years after the notice of appeal was filed. This was done merely two (2) weeks before the date of hearing scheduled for 27 February 2024. At that stage, no heads of argument either was filed and served by the appellants. As an explanation proffered for the delay in an affidavit deposed to by the appellants' attorney, Ms. Chantal Rodriguez, the following is stated: due to the time of the year (December) as well as the fact that she was extremely busy, she was in a rush to finalize all the urgent matters she had; she drew the file and put it aside in order to give attention to it as soon as all the urgent matters had been attended; she did not diarize the date when the notice of appeal were to be served and filed; somehow this matter completely slipped her mind until 20 January 2022, after she returned from holiday, when she had gone through her files and discovered this file on her desk. She instructed counsel to draft and settle the notice of appeal, which was done and returned to her on 27 January 2022 and which was served and filed on 31 January 2022.
- [5] Although the notice of appeal was filed late, an application was made for condonation for the late filing thereof only on 09 February 2024, more than two years after the notice of appeal was filed. The appeal was prosecuted a year and five months after the notice of appeal was filed. This despite, the appellants did not by then apply for the reinstatement of the appeal which was deemed to have lapsed. It was only an application for condonation for the late delivery of the notice of appeal that was made. This application for condonation for the late filing and serving of the notice of appeal was opposed by the first, second, fourth to sixth and eight respondents. They take issue with the fact that no detailed explanation is

proffered why the condonation application was not delivered earlier. Furthermore, good cause for the inordinate long delay is not demonstrated by the appellants and/or their legal representative, Ms. Rodriguez.

- [6] To add, copies of the appeal record was not delivered within sixty (60) days of noting the appeal, as required in terms of Rule 49 (6) (a) and the Rule 49 (7) (a). Further, in terms of Rule 49 (6) (b) a court to which the appeal is made may, on application of the appellant, and upon good cause shown, reinstate an appeal which has lapsed. It is common cause and undisputed that the appellants only applied for a date for the hearing of the appeal and delivered copies of the record on 28 June 2023, almost a year-and-a-half after the notice of appeal had been served and filed (delivered). This clearly demonstrates that the appellants did not intend to prosecute their appeal at their earliest convenience and within the stipulated time frames.
- [7] The respondents' countenance this with a counter application in terms of Rule 49 (7) (d), which was delivered on 05 March 2024. On 10 May 2024, more than two months later, the appellants filed a notice applying for an order for the reinstatement of the appeal. It is quite apparent that the appellants only apply for the reinstatement of the appeal, which was deemed to have lapsed, after they received the respondents' Rule 49 (7) (d) application. No attempt is made in the affidavit to explain why the reinstatement application was only delivered on 10 May 2024 and not sooner. The explanation advanced falls woefully short of a detailed explanation for the delay. Substantial periods of delay are unexplained. The periods 09 June 2022 to 14 September 2022, as well as the period

08 November 2022 to 28 February 2023 are unaccounted for. Furthermore, no confirmatory affidavits of any of the three (3) appellants as applicants are attached to the founding affidavit of Ms. Rodriguez, does not have personal knowledge of the financial position of the Junior Partner Trust. This is fatal.

[8] The respondents contended that condonation for the late filing of the notice of appeal should not be granted. Equally so, should condonation not be granted for the belated application for the reinstatement of the appeal, which is deemed to have lapsed, as well as the late prosecution of the appeal. Reliance was placed on the matters of *SA Express Ltd v Bagport (Pty) Ltd*¹; *Ngaka Modiri, Molema District Municipality v Quantibuild*²; and *Harry's Tyres (Pty) Ltd v Symes and Others*³. I find it prudent to quote, in relevant parts, extensively from these aforementioned judgments, which encapsulate the distinct points raised with regard to condonation; the late filing of the notice of appeal; the late filing of the record; the appeal deemed to have lapsed; the late filing of the application for reinstatement of the appeal; the conduct of the appellants and their legal representative in not prosecuting the appeal timeously; and the absence of confirmatory affidavits by the three (3) appellants/ applicants.

[9] The applicable test that governs condonation is well established. Condonation is not for the mere asking. It is a discretionary judicial remedy to be exercised within the prism of the interests of justice. To this end, in

¹ 2020 (5) SA 404 (SCA).

² (CIV APP FB12/2022; 3352/2019) [2024] ZANWHC 101 (12 April 2024).

³ (CIV APP FB 10/2023) [2024] ZANWHC 75 (13 March 2024).

*Van Wyk v Unitas Hospital and Another*⁴, *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Limited and others*⁵ and *Grootboom v National Prosecuting Authority and Another*⁶, the apex Court reaffirmed that the overarching enquiry is whether the interests of justice favour the relief being granted. In *Melane v Santam Insurance Co Ltd*⁷, the following factors were identified as considerations relevant to this enquiry. These include the degree of non-compliance; the explanation therefor; the importance of the case; the prospects of success on the merits; the respondent's interests in finality; the convenience of the court; and the avoidance of unnecessary delay in the administration of justice. These considerations are not individually decisive. It axiomatically follows that these considerations must be weighed holistically within the interests of justice enquiry.

- [10] A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.

See: *Uitenhage Transitional Local Council v South African Revenue Service*.⁸

⁴ (CCT 12/07) [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) (6 December 2007).

⁵ (CCT106/16) [2017] ZACC 15; 2017 (7) BCLR 916 (CC); 2017 (5) SA 9 (CC) (23 May 2017)..

⁶ (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) (21 October 2013)

⁷ 1962 (4) SA 531 (A).

⁸ 2004 (1) SA 292 (SCA) at paragraph [6]

[11] In *SA Express Ltd v Bagport (Pty) Ltd*, *supra*, the prosecution of the appeal was beset by numerous delays for which the appellant's attorney attempted to lay the blame at the door of his correspondent. The court was of the view that the attorney had himself appointed the correspondent and could not escape the consequences of his agents' negligence. The primary obligation to produce a proper record and file it timeously lay with him. It must furthermore have been clear to him from an early stage that his correspondent was as out of his depth as he was, yet he continued to rely on the correspondent's advice. The attorney's negligence lay in the fact that he did not acquaint himself with the rules of the court; did not have even the most rudimentary understanding of what had to be done; relied on the correspondent who also proved himself to be unqualified to do the work; and steadfastly failed or refused, until it was too late, to engage the services of people who knew what to do and could do the job. The conclusion was inescapable that the attorney was grossly negligent throughout. The attorneys' explanation was not reasonable and all that it did was to establish his negligence. The SCA found that the present case was the type of case in which condonation should be refused irrespective of the prospects of success and irrespective of the fact that the blame lay solely with the attorney: the breaches of the rules had been flagrant and continual. I find this dictum quite apposite.

[12] The authorities are clear that in cases of flagrant breaches of the rules, especially where there is no acceptable or satisfactory explanation advanced therefore, as *in casu*, it is unnecessary for the court to assess the prospects of success and condonation should not be granted,

whatever the merits of the appeal might be. This applies even where the blame lies solely with the attorney.⁹

[13] In a Full Court judgment in this Division, *Quantibuild (Proprietary) Limited vs Ngaka Modiri Molema District Municipality*¹⁰, the deeming provisions in terms of Rule 49 (6)(a) are dealt with comprehensively. I deem it prudent to quote paragraph [17] to [20] insofar as the deemed lapsing of the appeal is concerned.

*“[17] In terms of Rule 49(6)(a) if written application to the Registrar for the hearing of the appeal is not timeously made, the appeal “shall be deemed to have lapsed”. This begs the question how the deeming provision in Rule 49(6)(a) is to be interpreted. In **Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd t/a Crown River Safari** 2018 (4) SA 206 (SCA) at paragraphs [29] to [34], Navsa JA, writing for the Court, provides a useful exposition on how deeming provisions in legislation has been and is to be interpreted, where he stated as follows:*

“[29] At the outset it is necessary to have regard to how deeming provisions in legislation, have been dealt with in case law and by commentators. Bennion Statutory Interpretation 3 ed 1997 says the following about deeming provisions at 735:

‘Deeming provisions in Acts often deem things to be what they are not. In construing a deeming provision

⁹ See: *P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799D-E;
Rennie v Kamby Farms (Pty) Ltd 1989 (2) SA 124 (A) at 131 H-132A;
Ferreira v Ntshingila 1990 (4) SA 271 (A) at 281J-282A;
Tshivhase Royal Council and Another v Tshivhase and Another: Tshivhase and Another v Tshivhase and Another 1992 (4) SA 852 (A) at 859E-F;
Blumenthal and Another v Thompson NO and Another 1994 (2) SA 118 (A) at 1211-122B;
Darries v Sheriff, Magistrate’s Court, Wynberg and Another 1998 (3) SA 34 (SCA) at 41 D;
AYMAC CC v Widgerow 2009 (6) SA 433 (W) at 451J-452G.
Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein, and Others 1985 (4) SA 773 (A) at 789 C.

¹⁰ CIV APP FB 12/2019 (08 December 2022).

it is necessary to bear in mind the legislative purpose.'
(My underlining.)

The first sentence of the quote is demonstrated by the facts in Mouton v Boland Bank Ltd 2001 (3) SA 877 (SCA). In that case the court was dealing with a deeming provision contained in the Close Corporations Act 69 of 1984, relating to the reregistration of a close corporation. The deeming provision there in question read as follows:

'The Registrar shall give notice of the restoration of the registration of a corporation in the Gazette, and as from the date of such notice the corporation shall continue to exist and be deemed to have continued in existence as from the date of deregistration as if it were not deregistered.' (Emphasis added.)

That provision deemed something to be what in fact was not so, namely, that the close corporation was never deregistered.

[30] *An exposition of types of deeming provisions and how they should be construed is to be found in the decision of this court in S v Rosenthal 1980 (1) SA 65 (A). Trollip JA said the following at 75G-H:*

'The words "shall be deemed" ("word geag" in the signed, Afrikaans text) are a familiar and useful expression often used in legislation in order to predicate that a certain subject-matter, eg a person, thing, situation, or matter, shall be regarded or accepted for the purposes of the statute in question as being of a particular, specified kind whether or not the subject-matter is ordinarily of that kind. The expression has no technical connotation. Its precise meaning, and especially its effect, must be ascertained from its context and the ordinary canons of construction.'

[31] The court in *Rosenthal* went on to explain:

'Some of the usual meanings and effect deeming provisions can have are the following. That which is deemed shall be regarded or accepted (i) as being exhaustive of the subject-matter in question and thus excluding what would or might otherwise have been included therein but for the deeming, or (ii) in contradistinction thereto, as being merely supplementary, ie, extending and not curtailing what the subject-matter includes, or (iii) as being conclusive or irrebuttable, or (iv) contrarily, thereto as being merely prima facie or rebuttable. I should add that, in the absence of any indication in the statute to the contrary, a deeming that is exhaustive is also usually conclusive, and one which is merely prima facie or rebuttable is likely to be supplementary and not exhaustive.'

...

[33] The court in *Rosenthal*, at 76B-77A, had regard to *R v Haffejee & another* 10945 AD 345, ... At 352-353, Watermeyer CJ, in considering the meaning and effect of deeming provisions, with reference to English case law, said the following:

'It is difficult to extract any principle from these cases, except the well-known one that the Court must examine the aim, scope and object of the legislative enactment in order to determine the sense of its provisions...

[34] From what is set out above, it follows that a deeming provision must always be construed contextually and in relation to the legislative purpose..."

(my emphasis)

[18] Of importance to note is that there is no application before this Court by the respondent seeking a declaratory order that the appeal has lapsed. This is despite the fact that the respondent knew as far back as 17 May 2022, when it was served with the notice of set down,

that there was non-compliance with Rule 7(2), 49(13)(a) and 49(7)(d) of the Uniform Rules of Court.

[19] *In Genesis One Lighting (Pty) v Bradley Lloyd Jamieson and Others* (3212/2019) [2021] ZAGPJHC 862 (23 July 2021), the central issue in the matter was whether the respondents' appeal had lapsed. At paragraphs [33] to [38], Gilbert AJ provides a useful exposition in this regard where the following is said:

[33] Rule 49(6)(a) expressly provides that if written application to the Registrar for the hearing of the appeal is not timeously made, the appeal "shall be deemed to have lapsed". Accordingly, the consequence of a failure to comply with rule 49(6)(a) is a deemed lapsing of the appeal. **Should there be a dispute about this, then the court can be approached for the appropriate declaratory relief as to whether the appeal has lapsed or not.**

[34] In contrast, as pointed out by the respondents, non-compliance with rule 49(7)(a) relating to the filing and furnishing of an appeal record does not contain a similar provision that there is a deemed lapsing of the appeal. Rather, rule 49(7)(d) provides that:

"If the party who applied for a date for the hearing of the appeal neglects or fails to file or deliver the said copies of the record within 40 days after the acceptance by the registrar of the application for a date of hearing in terms of subrule 7(a) **the other party may approach the court for an order that the application has lapsed.**"

[35] Although rule 49(7)(d) does not refer to the "appeal" as lapsed but rather "the application" as lapsed, the application referred to is the application for a date for the

hearing of the appeal in terms of rule 49(6)(a), the lapsing of which would have the effect as the appeal itself having lapsed.

[36] One interpretation of rule 49(7) is that upon a failure of a party to timeously file and furnish the record, the appeal lapses, as is the position with non-compliance with rule 49(6)(a). If this is correct, then the court when approached under rule 49(7) would be confirming that the appeal has lapsed.

[37] An alternate interpretation of rule 49(7) is that if the appellant fails to file or furnish the record, the appeal is not deemed to have lapsed (in contrast to rule 46(6)(a)) but the court can then be approached for an order to effectively decide whether the appeal has lapsed rather than confirming what would already have been a deemed lapsing of the appeal. This would enable the court to take into account a variety of factors in deciding whether to grant an order that the appeal has lapsed.

[38] One of those factors may be whether by the time the application in terms of rule 49(7)(d) is heard there is a compliant appeal record and the appellant has launched an application for the appeal court to consider in due course as envisaged in rule 49(7)(a)(ii) condoning its failure to have timeously filed and furnished that record. Rule 49(7)(a)(ii) expressly provides that an appellant who fails to timeously file and furnish the record can apply for condonation for the omission. The condonation application will be considered by the appeal court at the hearing of the appeal. Rule 49(7)(c) further provides that the Registrar after delivery of the copies of the record shall assign a date for the hearing of the appeal or for the application for condonation and appeal, as the case may be. It is clear that it is for the appeal court to consider the condonation application. Accordingly, a court faced with an

application in terms of rule 49(7)(d) for an order that the appeal has lapsed may decline to an order that the appeal has lapsed provided that there is an application for condonation that will serve before the appeal court in course.

(my emphasis)

[20] Having regard to the approach to be adopted when dealing with a deeming provision as espoused in **Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd** and the useful exposition in **Genesis One Lighting (Pty) v Bradley Lloyd Jamieson and Others**, the alternate interpretation of Rule 49(7) that if the appellant fails to file or furnish the record, the appeal is not deemed to have lapsed (in contrast to Rule 46(6)(a)), but the court can then be approached for an order to effectively decide whether the appeal has lapsed, rather than confirming what would already have been a deemed lapsing of the appeal is to be preferred. This would enable the court to take into account a variety of factors in deciding whether to grant an order that the appeal has lapsed.”

[14] It is important to underscore the two mechanisms by which an appeal may lapse under Rule 49. The distinction is exploited as follows. In terms of Rule 49(6)(a), the failure to timeously apply to the Registrar for a date for the hearing of the appeal causes the appeal to be deemed to have lapsed automatically, by operation of the rule itself. No court order is required to give effect to that deeming; it operates *ex lege* upon non-compliance. The position under Rule 49(7)(d) is materially different. Where an appellant fails to timeously file and furnish copies of the appeal record, the rule does not deem the appeal to have lapsed. It instead entitles the respondent to approach the court for an order to that effect, clothing the court with a discretion to consider all relevant circumstances, including whether a condonation

application is pending. As this Division is held in *Quantibuild*, the preferable interpretation of Rule 49(7)(d) is that the court is empowered to decide whether the appeal has lapsed, rather than merely confirming a lapse that has already occurred by operation of law. In the present matter, the appeal was deemed to have lapsed under Rule 49(6)(a) by reason of the appellants' failure to timeously apply for a hearing date. The respondents' Rule 49(7)(d) counter-application reinforces that conclusion. On a conspectus of the procedural history, and having refused both condonation and reinstatement, we are satisfied that the appeal has lapsed and that no order for reinstatement is warranted.

- [15] Insofar as the costs of the appeal are concerned, it should follow the result and be awarded in favour of the successful litigants, the respondents, on a party-and-party basis, on Scale B, to be taxed. This should include the costs of the application for leave to appeal in the court *a quo*.

Order

- [16] Consequently, the following order is made:

- 1. Condonation for the late filing of the Notice of appeal is refused.**
- 2. Condonation for the late prosecution of the appeal is refused.**
- 3. The appeal is declared to have lapsed.**
- 4. The re-instatement of the appeal is refused.**
- 5. The appellants/applicants in their capacities as trustees of the Junior Partner Trust are ordered to pay the costs of the appeal on a party-and-party basis, on Scale B, to be taxed; which costs**

include the costs of the application for leave to appeal in the court
a quo.



R D HENDRICKS
JUDGE PRESIDENT OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG

I agree



A REDDY
JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG

I agree



L M MORGAN
ACTING JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG

Appearances

Counsel for the Appellants: Adv. Hayes

Instructed by: LFS Inc. Attorneys

Counsel for the 1st, 2nd, 4th, 5th & 6th Respondents: Adv. Prinsloo

Instructed by: Maree & Maree Attorneys Inc