

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: A276/2025

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE 2026-06-15

SIGNATURE

In the matter between:

DIETER JOHANNES OOSTHUIZEN

Appellant

and

**JP RAUTENBACH t/a RAUTENBACH, LUNDALL
AND ASSOCIATES**

Respondent

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for handing down is deemed to be 15 June 2026.

JUDGMENT

POTTERILL J

Introduction

[1] Before us is an appeal against the order of Magistrate Mncube AJ granted on 3 February 2025. We do not have the Magistrate's reasons for the order. The record consists of only the founding affidavit, answering affidavit and replying affidavit and the attachments thereto. For ease of reference, I will refer to the appellant in the appeal also being the applicant in the condonation application as the "appellant". It is common cause that the appeal was lodged out of time and the appellant filed an application for condonation for the late filing of the appeal.

[2] The notice for the application for condonation did not afford the respondent any timeframes for when an opposition and answering affidavit were to be filed, if opposing the condonation application. No notice of set-down was served on the respondent, pertaining to the condonation application. On Caselines it was uploaded as "1st interlocutory application – condonation late filing of notice of appeal."

[3] No notice of set-down of the appeal was initially served on the respondent. Pursuant to a complaint from the respondent, the appellant's attorney emailed a "Filing Sheet" with the following content:

"We note your dissatisfaction with our offices in respect of the filing and service of the Notice of Set-down for the appeal.

In this regard, we confirm that the matter has been uploaded onto Caselines, to which you have access. You ought accordingly to have received notification from the Registrar pertaining to the enrolment of the matter. We have further confirmed, both from our own experience and with colleagues, that the standard practice is that notification is issued via Caselines in such instances.

Notwithstanding the above, and for your convenience, hereby presented for filing:

'NOTICE OF SETDOWN FOR HEARING OF APPEAL'."

[4] The respondent's attorney uploaded onto Caselines a letter to the appellant's attorney informing her that there was non-compliance with Rule 51(4) of the Magistrate's Rules due to the Security Bond and Notice of Appeal not having been

duly served and filed. It was also brought to the attention of appellant's attorney that the application for condonation's notice of motion was defective and further that the founding affidavit thereto did not set out the necessary averments. The letter warned that if the defects were not rectified costs *de bonis propriis* would be sought against the attorney for the appellant.

The application for condonation

[5] The first reason for the delay is that although a Rule 51(1) was served on the respondent, it was not filed at Court. The Legal Secretary has failed to do so. The respondent on 31 March 2025 notified the appellant that no Rule 51(1) notice was on the Court file. The response of the appellant was that "It was decided to just serve and file a Notice of Appeal instead of filing another Rule 51(1) on the Court file."

[6] An unsigned notice of appeal was sent to the appellant's correspondent with the instruction to sign, serve and file the Notice of Appeal on 1 April 2025. This was not done and the appellant's attorney signed the notice of appeal on 7 April 2025 and emailed it to the respondent.

[7] On 8 May 2025 the appellant's attorney requested the transcribed record, but they did not receive it and have uploaded onto Caselines only the pleadings.

[8] It is submitted that the appellant did not act wilfully or in disregard of the Court's Rules. The appellant would suffer great prejudice if the application is not granted as he is suffering emotional trauma with threats of arrest against him. It is in the interests of justice to grant condonation.

The respondent's opposition thereto

[9] Two points *in limine* were raised that the notice did not comply with Rule 6(5)(a) and 6(5)(b)(iii) of the Uniform Rules. No timelines for opposition or filing an answering affidavit and replying affidavit were set out in the notice of motion. Out of precaution the Respondent filed a notice of opposition the same day it was received; 27 May 2025.

[10] A further point *in limine* was raised that security for costs needed to be paid before the Appeal could proceed. Numerous costs orders were granted against the

appellant in the Cullinan Magistrate's Court and this Court. The appellant and his attorney do not have the necessary finances to pay the costs of this application.

[11] The last point *in limine* raised was that the appellant has not complied with Rule 27(1) of the Uniform Rules in that only the reasons for delay are set out. None of the other requirements for condonation is set out. The prospects of success is not addressed.

[12] In reply it was submitted that the interlocutory application is on the correct form and there is no defect. It was averred that there is no prejudice to the respondent, but the prejudice to the appellant is clear and condonation should be granted.

[13] The appellant set security as per the Court Rules with the bond of security filed with the appeal record. There are no outstanding costs and the averments of the respondent pertaining to outstanding costs thereto must be struck out.

The appeal

[14] Section 84 of Magistrates' Court Act 32 of 1944 provides, inter alia, that every party noting an appeal shall do so within the period and in the manner prescribed by the Rules. Rule 51(3) of the Magistrates Court prescribes the period for noting an appeal and the period for prosecuting appeals from the Magistrate's Court to the High Court are governed by Rule 50 of the Uniform Rules of Court. An appellant must prosecute an appeal within 60 days after noting it. The appellant must apply for a hearing date and the appellant must deliver a written notice of set-down [Rule 50(6)].

Reasons for decision

Lack of adherence to Rules pertaining to appeal

[15] The appellant's attorney's lack of disregard for the Rules of both the High and Magistrate Courts is plain. She, in writing, expresses that she skips over the required process of a signed, stamped, properly served and delivered Rule 51(1) notice and proceeded to file a Rule 51(4) notice. This conduct is improper and an abuse of process.

[16] No reasons for the order were received from the Magistrate. The process taken to obtain it, and the reasons, why it failed, is not addressed in the papers at all. The reasons for the order is the basis for the appeal. An appeal from a Magistrate's Court to a High Court is a narrow appeal; i.e. the High Court does not redecide the matter but must determine whether the Magistrate erred in fact or law. Without reasons for the order it cannot do so. If there was only one attempt to obtain the reasons the process followed by the appellant to proceed with the Appeal would be frowned upon, however if multiple attempts failed the High Court may order the Magistrate be compelled to do so, or under exceptional circumstances hear the appeal without reasons. The reason why the appellant's attorney proceeded without the Magistrate's reasons are not before Court and the appeal process before us is defective. The appellant's attorney attempted to from the bar address us on what steps were taken, but it is trite that it must be under oath and not from the bar. Without the reasons for the order and proper substantiation as to why not, the appeal should not be heard.

[17] The notice of appeal does not accord with Rule 51(7)(a) in that it does not state whether "the whole or any part of the judgment is appealed against." This defect is not sufficient not to hear an appeal, but in these circumstances provides further evidence of the total lack of care of the attorney.

[18] In terms of Rule 51(6) a notice of set-down of the appeal must be delivered. This requirement the appellant flaunted on apparent advice from colleagues and her own experience. She indicated that notice by the Registrar on Caselines is sufficient. This is bad in law as the Rule itself requires a notice of set-down.

[19] I am satisfied that a Bond of Security was filed in terms of the Rules.

[20] It is trite that Rules are made for courts, and not courts for the Rules, but combined the lack of adherence to the Court Rules is seriously frowned upon. The appeal on this basis alone should not be heard.

Decision on the application for condonation

[21] Section 84 of the Magistrate's Court Act affords a Court of Appeal, an unfettered discretion to grant condonation and it need not resort to Rule 27 of the Uniform Rules. The principles flowing from Rule 27 must however be applied.

[22] It is trite that "an application for condonation is not to be had merely for the asking, a full, detailed and accurate account of the causes of the delay and their effects must be furnished to enable the court to understand clearly the reasons and to assess the responsibility."¹ In *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC) the Court found:

"It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause."

The Constitutional Court further found that it requires a party to give a full explanation for the non-compliance with the Rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.

[23] In *Melane v Santam Insurance Co Ltd*² the test for condonation was set out as follows:

"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case ... What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."

¹ *Uitenhage Transitional Local Council v South African Revenue Service* [2003] 4 All SA 37 (SCA) par [6]

² *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-Gp

[24] In *Dengetenge Holdings*³ the Supreme Court of Appeal found that the facts the court should weigh in considering on application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.

[25] But more importantly, it is entrenched in our law that the prospects of success are the cornerstone of any condonation application. As found in the *Grootboom* matter if there are no prospects of success, there would be no point in granting condonation. In *Ferris and Another v Firstrand Bank Ltd*⁴ the Constitutional Court added that when determining an application for condonation the test for whether it would be in the interests of justice to grant it, the importance of the matter and the prospects of success would determine whether granting the condonation would be in the interests of justice.

[26] Despite being warned about the defective notice of motion and the lack of foundation in the affidavit in support thereof, the attorney for the appellant, proceeded with the application as is. In the affidavit the prospects of success is not mentioned, let alone set out. In the replying affidavit nothing is made of the prospects of success. This conduct of the attorney is mystifying, and in fact wilful, since she was alerted thereto. It is not the duty of the Court to search for prospects of success from the papers. As the prospects of success is not addressed, there are no prospects of success and the delay need not be addressed. At the minimum the appellant should have shown that the defence is not patently unfounded and is based on a defence with prospects of success. It was not done. No good cause has been shown and the condonation application is refused.

[27] If the appellant cannot show good cause the question of prejudice does not arise.⁵

³ *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] 2 All SA 251 (SCA) par [11]

⁴ *Ferris and Another v Firstrand Bank Ltd* 2014 (3) SA 39 (CC) at 43G-44A

⁵ *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd and Others* 2000 (3) SA 87 (W) at 95E-F

[28] The understanding of the attorney that because on application for condonation is interlocutory no timeframes for opposition or answering affidavits need to be set out on the notice of motion is bad in law. The application, by its nature, can be opposed and timeframes are required. The attorney also did not file a notice of set-down, further prejudicing the respondent. The lack of adherence to Court Rules by the appellant's attorney is worrisome, prejudicial to her client and the respondent.

Costs

[29] On behalf of the respondent it was argued that the attorney for the appellant pay the costs *de bonis propriis*. The appellant's attorney was forewarned that this costs order would be sought.

[30] The appellant's attorney was afforded an opportunity to address the issue at the hearing. Her only submission was that she should not pay the costs and persisted with it would be in the interests of justice to grant the condonation.

[31] In *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* [2013] 4 All SA 346 (GNP); 2014 (3) SA 265 (GNP) the principle of *de bonis propriis* costs against legal practitioners were re-stated as:

“Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioners, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are, dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, and gross incompetence and a lack of care.”

[32] In the circumstances of this matter, the appellant's attorney was remiss in regard to almost every step of the appeal and the application for condonation. The conduct of the attorney cannot be excused as conduct that falls within errors of law or errors that can be classified as everyday occurrences. The flagrant disregard of

the Rules and persistence with this conduct despite being warned, warrants punitive costs to be paid *de bonis propriis* by the attorney.

[33] The order is as follows:

33.1 The application for condonation is dismissed.

33.2 The appeal has lapsed;

33.3 The appellant's attorney is to carry the costs *de bonis propriis* on an attorney and client scale.

S. POTTERILL
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree

N.V. KHUMALO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

CASE NO: A276/2025

HEARD ON: 7 May 2026

FOR THE APPELLANT: MS. R. ERASMUS

INSTRUCTED BY: Riekie Erasmus Attorneys

FOR THE RESPONDENT: MR. J.S. KRUGER

INSTRUCTED BY: Rautenbach Lundall and Associates

DATE OF JUDGMENT: 15 June 2026

