

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE No: HCAA10/2022

COURT AQUO CASE No: 2651/2022

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

SIGNATURE  DATE: 03 September 2026

In the matter between:

KHAKHALA TRADITIONAL COMMUNITY

First Appellant

GEZANI BEN BALOYI

Second Appellant

MASENYANI THOMAS BALOYI

Third Appellant

and

HOSI MKHACANI KENNETH SHIVITI

First Respondent

SHIVITI TRADITIONAL COUNCIL

Second Respondent

SHIVITI TRADITIONAL COMMUNITY

Third Respondent

PREMIER OF LIMPOPO PROVINCE

Fourth Respondent

**THE MEC: CO-OPERATIVE GOVERNANCE;
HUMAN SETTLEMENT AND TRADITIONAL
AFFAIRS**

Fifth Respondent

**COMMISSION ON TRADITIONAL LEADERSHIP;
DISPUTES AND CLAIMS**

Sixth Respondent

**THE LIMPOPO PROVINCIAL COMMITTEE
OF THE CTLDC (KGATLA COMMISSION)**

Seventh Respondent

GOVERNANCE AND TRADITIONAL AFFAIRS

Eighth Respondent

**LIMPOPO PROVINCIAL HOUSE
OF TRADITIONAL LEADERS**

Ninth Respondent

MOPANI HOUSE OF TRADITIONAL LEADERS

Tenth Respondent

Delivered: This judgment is handed down electronically to the parties' representative's email. The date for delivery is deemed to 03 September 2026

Reserved date: 07 August 2026

JUDGMENT

Coram : Naude-Odendaal J *et al*, Pillay J and Malatji AJ

Introduction

1. This is an application for condonation and the reinstatement of an appeal brought by the appellants, purportedly in terms of rule 49(6)(b) of the Uniform Rules of Court. The appeal arises from a judgment delivered by Semenya DJP on 3 August 2021.
2. The appellants applied for leave to appeal against that judgment. On 30 May 2022, Semenya DJP granted leave to appeal to the Full Court of this Division. The appellants thereafter took steps to prosecute the appeal, which was enrolled for hearing on 14 October 2022. On that date, the appeal was struck from the roll with costs.
3. The appeal was subsequently re-enrolled for hearing on 12 May 2023. Before it could be heard, however, the appellants delivered a notice withdrawing the appeal. It did not contemporaneously seek an order preserving its rights, nor did it promptly approach this

Court for leave to revive or reinstate the appeal. The present application was instituted only during October 2025, more than two years after the said withdrawal.

4. The application raises three principal questions. The first is whether rule 49(6)(b), which empowers a court to reinstate an appeal on good cause shown, is available where the appeal was expressly withdrawn rather than merely allowed to lapse through failure to prosecute it. The second is whether, assuming that this Court has the necessary power, the appellant has established good cause for condonation and reinstatement. The third concerns the appropriate order as to costs.
5. The first to third respondents (the respondents) opposed the application on a point of law. They contended that the appellants had voluntarily terminated the appeal and could not invoke a rule directed at an appeal that had lapsed. No other respondents opposed the application or the appeal.

The principle governing Court's power to reinstate the appeal

6. Rule 49(6)(b) provides that the court to which an appeal is made may, on good cause shown, reinstate an appeal. The rule ordinarily operated where an appeal has lapsed because it was not prosecuted within the prescribed period. A party seeking reinstatement consequently asks the court to relieve it from the ordinary consequences of procedural non-compliance.
7. The respondents' contention that a withdrawn appeal is materially different from a lapsed appeal is not without force. A lapsed appeal generally follows automatically from non-compliance with a procedural time limit, whereas a withdrawal is an overt procedural act communicating that the appellants no longer persist with the appeal. The legal consequences of those two events need not necessarily be identical.
8. It is nevertheless unnecessary, for purposes of deciding this application, to determine the outer limits of rule 49(6)(b). I assumed, without deciding, that this Court may in an appropriate case invoke that rule, alternatively the Court's inherent power under section 173 of the Constitution to regulate its own process, to revive an appeal that was previously withdrawn. That assumption favours the appellants. It does not, however, dispose of the application. The power remains discretionary, and its exercise depends

upon the appellants establishing good cause and demonstrating that reinstatement would serve the interests of justice.

9. The fact that leave to appeal had previously been granted does not alter the character of the present enquiry. In *Zweni v Minister of Law and Order*,¹ the Appellate Division explained the requirements governing appealability and leave to appeal. In the present matter, however, appealability is not the obstacle: leave was granted. The difficulty is the appellants' later withdrawal of the appeal and its prolonged failure to seek relief. *Zweni* accordingly does not relieve the appellants of the obligation to establish good cause for reinstatement.
10. The point of departure remains *Melane v Santam Insurance Co Ltd*.² The Court held that condonation entails a judicial discretion exercised upon a consideration of all the facts and, ultimately, fairness to both parties. Ordinarily relevant factors include the extent of the delay, the explanation for it, the prospects of success, the importance of the matter and the respondents' interest in finality. Those factors are interrelated and must not be applied mechanically or considered in isolation.
11. The contemporary formulation is that condonation must serve the interests of justice. *Grootboom v National Prosecuting Authority and Another*³ confirms that the enquiry may include the nature of the relief, the extent and cause of the delay, the reasonableness of the explanation, the effect on the administration of justice and other litigants, the importance of the issues, prejudice and prospects of success. The weight assigned to each consideration depends upon the circumstances of the particular case.
12. Condonation is not available merely for the asking. An applicant must furnish a full, reasonable and sufficiently particularised explanation for the default. Where the non-compliance is time-related, dates, periods, obstacles and the steps taken to overcome them must be stated with enough precision to enable the court to understand the delay and allocate responsibility.

¹ *Zweni v Minister of Law and Order* 1993(1) SA 523 (A).

² *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A).

³ *Grootboom v National Prosecuting Authority and Another* 2014(2) SA 68 (CC).

13. That requirement was emphasised in *Uitenhage Transitional Local Council v South African Revenue Service*,⁴ Generalised causes of delay, disconnected from the relevant timeframe, do not suffice. The explanation must be candid and accurate and must show what was done to achieve compliance at the earliest reasonable opportunity.
14. A further consideration is that an application for condonation must be brought as soon as the need for it becomes apparent. Delay in seeking condonation is itself a matter requiring explanation. The Court must therefore assess not only the conduct that caused the appeal to lapse or be withdrawn, but also the period during which the appellants failed to seek corrective relief.
15. Prospects of success are important but are not invariably decisive. Strong prospects may sometimes compensate for a delay that has been adequately, though imperfectly, explained.⁵ Conversely, an excessive delay coupled with a materially deficient explanation may justify refusing condonation even where the intended appeal raises an arguable issue. The Court must maintain an appropriate balance between deciding disputes on their merits and enforcing procedural discipline, fairness and finality.

The extent of the delay and explanation advanced

16. The delay in this matter was substantial. The appeal was withdrawn on 12 May 2023. Following the withdrawal of the appeal on 12 May 2023, the appellants did not promptly approach the Court for relief. The present application was launched only in October 2025. On any measure, a period exceeding two years was an extraordinary delay in the prosecution of an appeal.
17. The delay was considered against the earlier procedural history. This was not the first occasion on which the appeal failed to proceed. It had already been struck from the roll on 14 October 2022. It was later re-enrolled and then withdrawn shortly before the hearing scheduled for 12 May 2023. Those events placed the appellants on notice that the appeal required active, careful and timeous management.
18. The appellants therefore had to explain, in full, why no prompt application was brought after the withdrawal. It also had to explain in detail what the community and its

⁴ *Transitional Local Council v South African Revenue Service* 2004(1) SA 292 (SCA).

⁵ *Premier Limpopo Province and Others v Hlaneki and Others* (Appeal)(HCAA22/2024)[2026] ZALMPPHC 74 (31 July 2026) para 27.

authorised representatives did during the intervening period to monitor the litigation and protect the right of appeal. The longer the period of inactivity, the more compelling and detailed the explanation had to be.

19. The appellants attribute the delay principally to the conduct of three successive sets of former attorneys. A fourth set, the present attorneys, was eventually instructed to institute this application. According to the appellants, the first former attorneys obtained leave to appeal and prosecuted the appeal until it was struck from the roll on 14 October 2022. The second set attended to its further prosecution but caused the appeal to be withdrawn when it was enrolled for 12 May 2023. The third set allegedly failed over a period of several months to provide adequate reports or take effective steps to advance the matter.
20. The appellants characterise the conduct of its erstwhile attorneys as negligent, dilatory and, in certain respects, deliberately misleading. It submits that a traditional community with an interest in the underlying dispute should not lose its opportunity to appeal merely because its chosen representatives failed to discharge their professional obligations.
21. Courts are understandably reluctant to visit every procedural failure by an attorney upon an innocent litigant. That consideration is especially important where the litigation concerns a community and the conduct complained of could not readily be attributed to every member of that community. It does not follow, however, that legal representation severed the litigant from all responsibility for the conduct of the case.
22. In *Saloojee and Another NNO v Minister of Community Development*,⁶ the Appellate Division held that there is a limit beyond which a litigant cannot escape the consequences of an attorney's lack of diligence or an insufficient explanation. A litigant who knows that a prescribed period has expired cannot simply entrust the matter to an attorney, remain passive in the face of a manifestly protracted delay, and then expect complete absolution. If reliance is placed on an attorney's remissness, the litigant must explain why responsibility for the default should not also be attributed to it.
23. That principle applies with considerable force in these proceedings. The present matter does not involve a single clerical error followed by an immediate attempt to regularise

⁶ *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A).

the proceedings. The appeal had already been struck from the roll; it was thereafter re-enrolled; it was then expressly withdrawn; and more than two years passed before reinstatement was sought. On the appellants' own version, the matter moved through several firms of attorneys and there were periods during which meaningful updates were not received.

24. The founding papers did not provide a complete chronology. The appellants did not state with adequate precision what instructions were given to each firm of attorneys, when the relevant files were transferred, when written progress reports were requested, what responses were received, when the appellants first learned of the withdrawal, whether that withdrawal had been authorised, when dissatisfaction with each attorney arose, and why the mandate was not terminated sooner.
25. The papers also did not satisfactorily identify the representatives of the community who bore responsibility for communicating with the attorneys and monitoring the appeal. There was no detailed account of meetings, resolutions, correspondence, telephone calls or other enquiries from which the Court could conclude that the appellants acted with consistent vigilance. Broad allegations that attorneys failed to provide updates could not replace a candid, date-specific explanation of a delay exceeding two years.
26. The circumstances surrounding the withdrawal of the appeal were particularly troubling and remained inadequately explained. The appellants asserted that their former attorney misrepresented the position by advising that the appeal had become moot, on the basis that the review application, against which the appeal was directed, had itself been withdrawn. This explanation, however, raised more questions than it answered and did not withstand careful scrutiny.
27. Critically, the appellants have failed to explain why they did not take immediate steps to verify the accuracy of this representation. If the appeal was of sufficient importance to the appellants and the community, one would reasonably have expected that the appellants would have demanded sight of the formal notice of withdrawal of the review application. Such a document would have been readily available and would have confirmed or refuted the attorney's assertion. The appellants' failure to make this elementary enquiry, or to seek independent confirmation, suggested a level of passivity that was inconsistent with the diligence expected of a litigant pursuing an appeal.

28. The absence of any contemporaneous documentation; such as correspondence with the former attorney, instructions given, or enquiries made further undermined the appellants' explanation. In circumstances where a litigant places reliance on the conduct of its legal representatives, it was incumbent upon that litigant to provide a full and candid account of its own actions. The appellants have not done so.
29. In sum, the explanation for the withdrawal was vague, unsupported by corroborating evidence, and fails to account for the appellants' own inaction. The appellants could not simply shift all responsibility to its erstwhile attorneys while offering no explanation for its own failure to act timeously or to take reasonable steps to protect its interests.
30. Nor could negligence simply be inferred from the procedural outcome. The first attorneys obtained leave to appeal and secured an enrolment. The second attorneys took steps that culminated in a withdrawal, but the reasons for and authority underlying that withdrawal were not fully set out. The allegations against the third attorneys were similarly general. A court could not make findings of professional negligence or misrepresentation merely based on averments made by a litigant without the relevant proof and account of the matter not progressing as the litigants expected.
31. Even if one assumed that one or more former attorneys were negligent, the appellants' own conduct remains material. Once an appeal had been struck from the roll and subsequently withdrawn, reasonable litigants would ordinarily have been expected to demand immediate written advice concerning the status of the matter and any available remedy. Repeated procedural setbacks called for enhanced supervision, not continued passivity.
32. The Constitutional Court's reasoning in *Ferris and Another v First Rand Bank Ltd*,⁷ reinforced the point that an attorney's negligence did not invariably provide a reasonable explanation. The effect of professional default depended upon the full facts, including the litigant's knowledge and conduct after learning of the adverse procedural event.
33. Measured against these principles, the explanation was deficient in both detail and substance. It did not cover the entire material period. It did not demonstrate that the appellants acted with reasonable expedition once the appeal had been withdrawn. It did

⁷ *Ferris and Another v First Rand Bank Ltd* 2014 (3) SA 39 (CC).

not adequately separate periods of attorney inactivity from periods of inaction by the appellants themselves. The delay is therefore not satisfactorily explained.

Prospects of success

34. The appellants relied upon the fact that Semenya DJP granted leave to appeal to the Full Court. That fact is relevant. It indicated that the court of first instance had considered that the appeal met the applicable threshold for leave and that another court might reasonably have reached a different conclusion on one or more issues arising from the judgment.
35. The grant of leave was, however, not determinative of an application for reinstatement. It did not excuse subsequent non-compliance, neutralise a voluntary withdrawal, or cure an inadequate explanation for prolonged inactivity. If the position had been otherwise, the grant of leave would effectively have conferred an indefinite entitlement to prosecute an appeal whenever the appellants elected to do so. That would have been inconsistent with the Rules and with the respondent's legitimate interest in finality.
36. The material supplied in support of the present application did not disclose prospects so overwhelming that they outweighed the extreme delay and the absence of a satisfactory explanation. The appellants may have had an arguable appeal; indeed, the grant of leave supports that conclusion. But arguability was not the same as compelling prospects. The Court had not been placed in a position to conclude that refusal of reinstatement would perpetuate an evident injustice or sustain an order that was plainly untenable.
37. In *Uitenhage Transitional Local Council v South African Revenue Service*,⁸ the Supreme Court of Appeal reinstated the appeal despite a deficient explanation because the merits were sufficiently strong to save the application. That case illustrates the flexible nature of the discretion; it does not establish that prospects of success rescued an applicant from serious procedural default. Here, the papers did not demonstrate comparable strength on the merits.

⁸ *Uitenhage Transitional Local Council v South Africa Revenue Service* [2003] ZASCA 76; 2004 (1) SA 292 (SCA).

38. *Melane*⁹ requires an objective conspectus of all relevant circumstances. The factors must be weighed together, but that does not mean that every weakness can be cured by pointing to another favourable consideration. A delay of more than two years following an express withdrawal, an explanation that does not cover the entire period, uncertainty regarding the authority, and an inadequate account of the appellant's own supervision collectively carry considerable weight.

Prejudice, finality and the administration of justice

39. The appellants submit that reinstatement would permit the underlying dispute to be determined on its merits and that this consideration favoured access to justice. That submission was accepted at the level of principle. Courts were to, where reasonably possible, avoid determining substantive rights solely through procedural technicalities. Rules of court are, nevertheless, not technical obstacles without purpose. They promote the orderly, fair and expeditious resolution of disputes.
40. Based on withdrawal of the appeal with no further steps being taken by the appellants it was not far-fetched for the respondents, to have regulated their affairs on the basis that the litigation had reached finality. Although the appellants argued that any prejudice could be addressed by a costs order, prejudice was not confined to wasted legal expense. It included the prolonged uncertainty associated with litigation, the difficulty of reconstructing events after the passage of time, and the loss of the benefit of a judgment that had remained unchallenged in practical effect.
41. There is also prejudice to the administration of justice. The appeal rolls generally are arranged on the footing that litigants will comply with procedural obligations and act promptly when defaults occur. This appeal had already occupied two hearing dates; it was struck from the roll in October 2022 and was withdrawn before the hearing in May 2023. To revive it in October 2025 without a compelling explanation would undermine the discipline necessary for the effective functioning of the courts.
42. *Grootboom*¹⁰ cautions that the effect of delay on the administration of justice and other litigants forms part of the interests-of-justice enquiry. It also stresses that a party must

⁹ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A).

¹⁰ *Grootboom v National Prosecuting Authority and Another* 2014(2) SA 68 (CC).

make out a proper case for the indulgence sought. In the present matter, the importance of obtaining a merits determination did not eclipse the appellants' failure to provide the Court with the facts necessary to excuse the default.

43. The appellants' status as a traditional community was a relevant contextual consideration, but it could not confer immunity from the Rules. The Court had not been told of any structural, financial, governance or communication difficulty within the community that caused particular periods of delay. It would be speculative to attribute the default to circumstances peculiar to communal decision-making when the founding papers did not establish those circumstances.

Evaluation

44. Even on the assumption that rule 49(6)(b), alternatively this Court's inherent power, permits the reinstatement of an appeal that was expressly withdrawn, the appellants were obligated to have established good cause. The appellants failed to do so.
45. The delay was extreme. The explanation was general, incomplete and insufficiently linked to a coherent chronology. It did not adequately explain the withdrawal, the authority for it, the date upon which the appellants became aware of it, or the failure to institute proceedings promptly thereafter. It did not demonstrate sustained vigilance by the appellants while the matter was in the hands of successive attorneys.
46. The blame attributed to the former attorneys could not, in the circumstances, carry decisive weight. Saloojee makes clear that there comes a point at which a litigant cannot avoid the consequences of its chosen representative's lack of diligence, particularly where prolonged delay has become obvious and the litigant does not explain its own efforts to obtain progress. That point was reached in this matter.
47. The grant of leave to appeal indicated that the intended appeal was arguable, but it did not establish prospects of such strength as to overcome the cumulative deficiencies in the application. No sufficient basis had been shown for concluding that the interests of justice required the appeal to be revived after the appellants withdrew it and then remained inactive for more than two years.
48. Fairness should operate in both directions. The appellants had an interest in having the dispute reconsidered on appeal. The respondents had an interest in finality, compliance

with the Rules and freedom from the indefinite revival of proceedings. On the facts placed before the Court, the latter considerations, together with the requirements of the proper administration of justice, prevailed.

49. As a result, the reinstatement application stands to be dismissed.

50. For clarity, the dismissal of this application effectively means that the appeal remains withdrawn and lapsed. Nothing in this judgment determines the merits of the underlying appeal nor does it express a view on whether the appellants' former attorneys were negligent or not. The conclusion rests upon the appellants' failure to establish good cause for condonation and reinstatement.

Costs

51. The ordinary rule is that costs follow the result. That rule is not inflexible. A court retains a discretion, to be exercised judicially, having regard to the conduct of the parties, the manner in which the proceedings were opposed, and what fairness requires in the particular circumstances.¹¹

52. The first to third respondents opposed the application for condonation and reinstatement from the bar. No answering affidavit directed at the factual basis for condonation and reinstatement was delivered, and no notice of intention to raise a question of law was filed.¹² The answering affidavit that was filed dealt with the substance of the appeal rather than the condonation and reinstatement relief presently before the Court.

53. Although the first to third respondents have been successful, its manner of opposition did not justify an award of costs in its favour. In the exercise of this Court's discretion, the appropriate order is that each party bear its own costs.

Order

54. The following order is made:

54.1. The application for condonation and reinstatement of the appeal is dismissed.

54.2. There is no order as to costs.

¹¹ *Fripp v Gibbon & Co* 1913 AD 354; *Kruger Bros & Wasserman v Ruskin* 1918 AD 63; *Ferreira v Levin No; Vryenhoek v Powel No* 1996(2) SA 621 (CC) at para 3.

¹² Uniform Rules of Court: Rule 6(5)(d)(i)-(iii).



T.M. MALATJI AJ
Acting Judge of the High Court,
Limpopo Division, Polokwane

I agree:



NAUDE-ODENDAAL J
Judge of the High Court,
Limpopo Division, Polokwane

I agree:



PILLAY J
Judge of the High Court,
Limpopo Division, Polokwane

APPEARANCES:

FOR THE APPELLANTS: Adv Moela (with Adv Chauke)

INSTRUCTED BY: Mavundla Attorneys

FOR THE FIRST TO THIRD RESPONDENTS: Adv C Malatji (with Adv Hutamo)

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