

SOUTH AFRICA / JUDGMENT

Masuku N.O and Others v Minister of Mineral Resources and Others (A263/2022) [2025] ZAGPPHC 37 (28 January 2025)

[2025] ZAGPPHC 37

COURT

North Gauteng High Court, Pretoria

BEFORE

Neukircher, Kubushi, Ally

CASE / FILE NUMBER

A263/2022

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No. A263/2022

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: YES

In the matter between:

MATHIBE HENRY MASUKU N.O First Appellant

MADIMATLE COMMUNITY

Second Appellant

KARA HERITAGE INSTITUTE

Third Appellant

CALFSHELF INVESTMENTS 171 (PTY) LTD

Fourth Appellant

CALFSHELF INVESTMENTS 172 (PTY) LTD

Fifth Appellant

CALFSHELF INVESTMENTS 173 (PTY) LTD

Sixth Appellant

and

MINISTER OF MINERAL RESOURCE

First Respondent

DIRECTOR-GENERAL: DEPARTMENT OF

MINERAL RESOURCES

Second Respondent

REGIONAL MINING DEVELOPMENT AND

ENVIRONMENTAL COMMITTEE LIMPOPO REGION Third Respondent

MOTJOLI RESOURCES (PTY) LTD

Fourth Respondent

MOTJOLI REAL ESTATE (PTY) LTD

Fifth Respondent

AQUILA STEEL (SOUTH AFRICA) (PTY) LTD

Sixth Respondent

SOUTH AFRICAN HERITAGE RESOURCES AGENCY Seventh Respondent

HEAD OF DEPARTMENT OF ECONOMIC

DEVELOPMENT, ENVIRONMENTAL AND TOURISM,

LIMPOPO PROVINCE

Eighth Respondent

MEC: DEPARTMENT OF ECONOMIC

LIMPOPO PROVINCE

Ninth Respondent

MOTJOLI IRON ORE COMPANY (PTY) LTD

Tenth Respondent

NEUKIRCHER J (Kubushi J and Ally AJ concurring)

1] The issue in this matter revolves around the grant of a mining right by the second respondent (the Director General: Department Mineral Resources (“the DG”)) to the sixth respondent (Aquila) on 25 April 2018, and the subsequent consent by the DG for the cession of that right to the tenth respondent (Motjoli) on the following date being 26 April 2018.

2] Aggrieved by those decisions, the six appellants sought to inter alia review and set them aside. The review application was unsuccessful a quo and was dismissed with costs. Leave to appeal to the Full Court was granted by the court a quo on 26 September 2022.

3] Unfortunately, the prosecution of the appeal did not go smoothly and, at the date of the hearing, the first issue that arose for argument was whether or not the appeal had in fact lapsed. The decision on this issue was required at the outset as it informed the further conduct of the appeal and the various applications that had already been filed, which included an application for re-instatement of the appeal, an application in terms of Rule 28[1] and an application in terms of Section 19(b) of the Superior Courts Act 10 of 2013.

4] After hearing argument by all the parties on the issue of whether or not the appeal had lapsed, the court made an order on 20 August 2024 that the appeal had lapsed and that the reasons for this order would follow with the judgment on the subsequent issues argued.

5] The order had the result that the appellants then moved their application for condonation and re-instatement of the appeal (the re-instatement application), which was opposed by the respondents. The respondents also opposed all the other applications, as well as the appeal itself.

The brief factual matrix

6] The uncontroversial facts of this case are that on 25 April 2018 the DG granted a mining right[2] to Aquila on the property known as the Remainder of the Farm Randstephne 455 KQ and the Remainder of the Farm Donkerpoort 448 KQ (the property) which is situated in the area of the Thabazimbi Local Municipality in the Waterberg District, Limpopo Province.

7] The property was originally owned by Aquila but was subsequently purchased by Motjoli and, as stated, the mining right was ceded to Motjoli on 26 April 2018.

8] The property over which the mining right was granted is home to the Maletse Mountain and the Gatkop Cave. The Mountain is also known as Madimatle[3], a name given to it by the local community, which means “beautiful blood”. According to appellants, the Mountain and the Cave house the spirits of the local communities’ ancestors whose lives were lost during the Mfecane wars against the Afrikaners. According to them, the property is therefore a sacred historical, spiritual, cultural and religious heritage site.

9] According to the appellants, the Mountain and the Cave are both geographically and spiritually linked and cannot be separated. They cannot stand or be seen separately from each other. Thus, the contention is that the mining right granted in respect of the

Mountain will directly impact the Caves.

10] Several of the appellants jointly submitted an application to the African Heritage Resources Agency (SAHRA) nominating the property to be graded and protected as a Grade 1 National Heritage Site. The original grant of the application however saw this being set aside on appeal by SAHRA as Aquila had not been afforded an opportunity to participate in the original decision-making process and the process had to commence de novo.

11] SAHRA ultimately declined to make the determination sought. Instead, it referred the issue to the Limpopo Heritage Resources Authority (LHRA) for consideration of the nomination of Madimatle as a Grade 2 Provincial Heritage Site. As at the time that the review application served before the court a quo, no decision had been taken by LHRA. Ultimately, the decision was only communicated by LHRA on 9 February 2024 and formed the subject matter of a s19(b)[4] application before this court.

12] The appellants contend that the review application, and consequently this appeal, involves the balancing of constitutional rights that the DG ought to have considered prior to granting the mining right to Aquila and the subsequent transfer of the right to Motjoli. The appellants contend that the outcome of the proceedings pivot on whether or not the DG exercised his discretion properly and lawfully when approving the mining right and the subsequent cession thereof.

The Appeal

13] As stated, the first issue that arose was whether or not the appeal had lapsed. In *CIR v Burger*[5] the court stated:

“Whenever an appellant realizes that he has not complied with a Rule of Court he should, without delay, apply for condonation.”

14] But condonation is an indulgence and is not simply available for the asking. The party seeking condonation must make out a case for the court to exercise its discretion in its favour and must set out detailed reasons for the delay. Amongst the factors a court will consider are the degree of non-compliance, the explanation therefore, the importance of the case, a respondent’s interest in the finality of the judgment, the convenience of the Court of Appeal and the avoidance of unnecessary delay in the administration of justice.[6] In some circumstances, the absence of a reasonable explanation may be cured by good merits on appeal.[7]

15] However, where the non-compliance is flagrant and cumulative, and where there is no acceptable explanation for the breaches,

condonation may be refused whatever the merits are.[8]

16] In *SA Express* the appellant’s attorney and correspondent had failed to acquaint themselves with the provisions of Rule 8 of the SCA rules and allowed the appeal to lapse. He allowed almost eight months to pass before producing a record in what the SCA described as “an acceptable form” - this after filing two incomplete records. The attorney then blamed his correspondent for the delays - an excuse that the SCA rejected. The delay was compounded by a “wholly defective application” for reinstatement[9].

17] The SCA then stated

“[44] This is, in my view, the type of case in which condonation should be refused irrespective of the prospects of success, and irrespective of the fact that the blame lies solely with the attorney: the breaches of the rules have been flagrant and continual.”

18] The SCA however dealt briefly with the prospects of success and found that

“... had it been necessary to consider SA Express’ prospects of success as part of the condonation application, the answer would have been that its prospects of success are extremely poor and could not assist in relation to condonation.”[10]

19] This now leads me to the issue of the lapse of the appeal, and the argument that followed as a result of that order.

The lapse of the appeal

20] Leave to appeal having been granted on 26 September 2022, the provisions of Rule 49 and the Gauteng Practice Directions apply. Given the compounded failures to comply with several provisions of either, it is necessary to set out the provisions that apply to this appeal.

Rule 49

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21] Rule 49(2) makes provision for the notice of appeal to be delivered twenty days after the date upon which leave to appeal was granted, or “within such longer period as may upon good cause shown be permitted.” It is common cause that the notice of appeal was filed timeously on 25 October 2022.

22] Thereafter, and within sixty days after delivery of the notice of appeal, the appellant:

- a) had to apply to the registrar of this court for a date of hearing, failing which the respondent may within 10 days of expiry of the 60 days make such application, and if no application is made by either party the appeal shall be deemed to have lapsed[11];
- b) at the same time as the date of hearing is requested the appellant “shall” file three copies of the record with the registrar and furnish the respondents with two copies; and
- c) shall provide the registrar “with 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 index”. [12] (my emphasis)

23] In the event that the record is not available when the date of hearing is sought, the registrar may accept the application for a date of hearing without the record if:

- a) the application is accompanied by a written agreement between the parties that copies of the record may be handed in late; or

- b) failing such agreement, the appellant delivers an application together with an affidavit in which the reasons for his omission to hand in copies of the record in time are set out and in which is indicated that an application for condonation of the omission will be made at the hearing of the appeal.[13]

It is common cause that the appellants failed to comply with either of the aforementioned.

24] Rules 49(7)(c) and (d) then state:

“(c) After delivery of the copies of the record, the registrar of the court... shall assign a date for the hearing of the appeal or for the application for condonation and appeal..., and shall set the appeal down for hearing on the said date and shall give the parties at least 20 days’ notice in writing of the dates so assigned.

- (d) 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 appeal has lapsed.”

25] Two further non-compliance issues arose in this appeal: the first was the appellants’ failure to file the required powers of attorney timeously[14]; the second was the failure to provide timeous security for costs in terms of rule 49(13).

26] The relevant portions of the Gauteng Practice Directive Relating to Civil Appeals (the 2018 Appeals Directive)[15] state the following:

“1. Once an appeal has been timeously noted, the registrar shall not accept any appeal matter as contemplated in Rule 49(2), 6(a) and 7(a) or Rule 50(6)(a) and (7)(a)], unless the appellant or the attorney of the appellant simultaneously submits to the registrar:

1.1 A complete record, indexed and paginated;

1.2 The appellant’s heads of argument and practice note.

The registrar shall thereupon, allocate a case number and shall issue an acknowledgement of receipt thereof.

2. The appellant or the appellant’s attorney shall:

2.1 Thereupon serve on the respondent or the respondents attorney of record, the record and the appellant’s heads of argument, practice note and a copy of the registrar's acknowledgement, and further state that the respondent’s heads of argument and practice note must be filed with the registrar not later than 30 court days from the date of that service; and

2.2 File a copy of such service with the registrar within 5 days of such service...”

27] It goes without saying that practice directives of any division do not amend or override the Uniform Rules. At best, all they do is provide the procedure by which compliance with the rules is achieved and enforced. This assists in ensuring conformity within

a division so that all cases of a similar nature are dealt with in the same way.

28] One last Directive upon which appellants rely is Directive 3 of 2022 issued by the Judge President of this division, effective from 29 September 2022. Paragraph 13 of that directive provides that:

“13.1 During Dies Non, from the Monday before Christmas Day until New Year's Day, no applications for hearing date allocations in the ordinary course will be attended to. Date applications received during this period will be attended to during the first week of the new year...”

29] According to the respondents, the appellants filed the record in this appeal almost eight months late. They also contend that the appellants’

powers of attorney were filed out of time. The last bow to their arrow is that the appeal record[16] was not in compliance with Rule 49, that their input was only sought at a very late stage and that the record contains much irrelevant

material.

30] That this is so, is very clear from the joint practice note filed on 25 July 2024 a scant month from the date of hearing. This whittled down the papers (excluding the interlocutory applications) to approximately 2500 pages. This, at the best of times, is unacceptable. But combined with the further application for condonation and re-instatement, the Rule 28 application and the

s19(b)[17] application, it in essence demonstrates that no proper thought or consideration was given to the necessary and vital content of the record which this court had to read.

31] In *Public Protector of South Africa v Speaker, National Assembly and Others*[18] the offending party was not allowed to recover any costs associated with the delivery of the irrelevant and unnecessary documentation

filed as part of the record.

32] In *S v Schoeman*[19], Goldstein J said:

“[2] It seems to me self-evident in the interests of the administration of justice that in appeals involving voluminous material, such as the present one, the parties ought to assist the court by taking the following steps:

...

- (5) where the appellant can afford to do so, providing a core bundle which consists of the material documents of the case in a proper, preferably chronological sequence, and which documents may be omitted from the record, which should indicate where each such

document can be found within the core bundle; these are substantially the directions in Rule 8 (7) of the Supreme Court of Appeal; one of the reasons for the preparation of a core bundle seems to be that it facilitates cross-referencing and the finding of the relevant exhibits and thus saves Judges' time; another may well be that it enables Judges who, certainly in this very busy Division, must often work at home, to convey their work more conveniently; in the present case, a separate core bundle for each of the counts would have greatly assisted us

33] Whilst the above was said obiter in the context of a voluminous record in a criminal appeal, it applies equally to civil appeals. Furthermore, the fact that the Gauteng Division utilises an electronic platform does not detract from the words of Goldstein J – the CaseLines index consists of 51 separate folders, many with sub-folders and many of which were either duplications of the record or were irrelevant. All of this could have been paired down to a core bundle of relevant documents. There is no reason whatsoever that the parties could not have put thought, time and effort into the preparation of this appeal.

34] Whilst this may only really have a bearing on the issue of costs at the end of the day, it must serve as a warning to practitioners in future. Legal practitioners have an obligation towards the court that supersedes their duty to their clients. They must put their clients' warring views aside and act in a way that has the effect of ultimately streamlining the litigation and preventing the court from trolling through unnecessary and irrelevant material which is time-consuming and a waste of judicial resources. In this matter, that clearly occurred to them a month before the hearing. This, the appellants tried to use as a mitigating factor in argument – it is not especially considering the provisions of Rule 49(7)(a).

The prosecution of the appeal

35] The fact of the matter is that on 4 September 2023 the re-instatement application seeks the following relief:

“1. That the appellants’ failure to comply with Rules 7(2), 49(7)(a) and 49(13)(a) of the Uniform Rules of Court is condoned;

2. That the appellants appeal is in terms of the Uniform Rules 49(6)(b) of the Uniform Rules reinstated;
3. That costs of this application be costs in the appeal.”

36] As stated, leave to appeal was granted as far back as 28 September 2022 and the notice of appeal was delivered on 25 October

2022. On 7 February 2023 the appellants then delivered what they state is a “electronic format” of the record with a notice of application for an appeal date in terms of Rule 49(6). This notice was however defective, and a new notice was delivered on 17 February 2023.

37] The appeals court registrar allocated the date of 22 May 2024 as a date of hearing, but following a request to the Deputy Judge President of this Division for an expedited date of hearing[20], that date was brought forward to 18 October 2023.

38] At a case management meeting held with the DJP during June 2023, the issue of the filing of the appeal record and the heads of argument was raised and the appellants conceded that the appeal record had not been submitted – only an electronic copy had been uploaded to CaseLines.

39] On 14 June 2023, appellants' attorneys[21] confirmed that “an electronic bundle has been uploaded to CaseLines, however the printed and bound appeal record as envisaged

in the Uniform Rules of Court has not been filed as yet.”

40] On 20 June 2023 Webber Wentzel[22] contended in correspondence that the appeal had lapsed and that it was therefore unnecessary for the DJP to either give directions for the further conduct of the appeal or to arrange for a date of hearing.

41] Motjoli's view was that the appeal had lapsed as:

- a) the appellants had not filed the required powers of attorney in terms of rule 7(2)[23];
- b) the appellants' rule 49(6) notice was not filed within the sixty-day period following the delivery of the notice of appeal – this period expired on 23 January 2023 and the Rule 46(9) notice was filed (at best for appellants) on 7 February 2023;
- c) the rule 49(6) notice was not accompanied by the record as is required by rule 49(7) and no hard copies of the record were filed with the registrar or served on the respondents. Motjoli contended that rule 49 requires a printed and bound record (as was conceded by the appellants at the meeting in June 2024) and that the electronic record fell foul of the provisions of the rule;
- d) the appellants had failed to file their heads of argument and practice note simultaneously with the rule 49(6) notice as is required by the 2018 Appeals Directive.

42] Given this, Motjoli contended that a hearing date should not have been allocated, that no date allocation notice should have been issued by the registrar and that the date of 18 October 2023 should be released as the appeal had lapsed.

43] In response, and on 28 June 2023, Werksmans stated that:

- a) in re rule 7(2): they conceded that they had “overlooked” this rule, but contended that as it does not form part of rule 49, their failure to file powers of attorney do not result in the lapse of the appeal;
- b) a date was allocated by the registrar to which the respondents had failed to object;
- c) they would file the powers of attorney “on such date as [the DJP] directs, alternatively before the appeal is set down for hearing.”

- d) as to the rule 49(6) notice: they contended that the rule only contemplates a lapse of the appeal after the further period of 10 days provided for in the rule[24] and that this period had only lapsed on 6 March 2023 and by which time they had already delivered the rule 49(6) notice;
- e) in any event, the provisions of Directive 3 of 2022[25] meant that the dies non period ran from 19 December 2022 until 1 January 2023 and interrupted the running of the 60 days. As a result of Rule 49(6) notice was filed timeously as the dies only lapsed on 16 February 2023;
- f) as to the record: the registrar had informed the appellants that an electronic copy of the appeal record sufficed in compliance with rule 49(6) and that the failure to file a hard copy occurred as a result of this information;
- g) however:

“8.5 In any event, we have now instructed a professional service providers to commence with the preparation of the fully cross-reference, hyperlinked, printed and bound appeal record, which accords with the Rules. We anticipate that the index should be finalised by no later than 7 July 2023 and that the hard copies should be finalised by no later than 11 August 2023, although we will endeavour to ensure that the process will be finalised prior to these dates...”

- i) as to the appellants’ heads of argument: given the provisions of rule 49(15)[26], the intention was to deliver them in terms of the provisions of this rule.

44] The appellants’ view is that the respondents failed to raise any concerns or objections at the time that a date was allocated for the appeal and that the non-compliances do not prejudice the respondents. They nonetheless intend to approach the court for reinstatement of the appeal “in the event that the Court finds that the appeal has lapsed.”

45] On 3 August 2023, Werksmans had yet to file a hard copy of the appeal record. The letter to the DJP confirms this. In that, they state:

“5.3 The complete, printed and bounded appeal record is in the process of being prepared by a professional third party. To this end, the draft index to the appeal record was circulated to WW and the State Attorney on Monday 10 July 2023;”

46] Thus, as at 3 August 2023 the appeal record that was due to be filed in early February 2023, was now some six months late.

47] As is also clear from the directive of the DJP dated 29 August 2023, by that date:

- a) appellants had yet to furnish the respondents with security for the appeal costs in terms of rule 49(13), which they were obliged to do before lodging copies of the record of appeal with the registrar - on appellants version, they had lodged the electronic record on 7 February 2023. Thus, as at 29 August 2023, they were almost seven months late. The DJP then directed that security for the appeal costs be furnished by no later than 4 September 2023;

- b) they had yet to file a printed and bound appeal record which they were directed to do by no later than 4 September 2023;
- c) they had yet to file an application for reinstatement of the appeal, which they were directed to do by no later than 4 September 2023.

48] Directions for the filing of the sequential affidavits and heads of argument were then given, and the appeal was set down for hearing for one day on 21 February 2024. As it turned out, the appeal had to be postponed as one day was insufficient to finalize the argument. This appeal proceeded on 20 August 2024 and was argued over three days.

49] The appellants powers of attorney were eventually filed on 1 September 2023.

50] The appellants contend that the appeal did not lapse as:

- a) the failure to file a power of attorney does not result in the lapse of an appeal;
- b) due to the provisions of dies non in Directive 3 of 2022, the application for a date of hearing was filed timeously;
- c) an electronic record was filed at the instruction of the appeals registrar which constitutes compliance with rule 49(6);
- d) the failure to file heads of argument in compliance with the 2018 Appeals Directive did not lead to the appeal lapsing and the appellants still intended to comply with rule 49(15);
- e) in any event, the DJP issued directives vis-à-vis all outstanding issues and allocated the date of hearing which the appellants imply gives them immunity/ condonation per se.

Lapse of the appeal

51] But, in my view, the appellants' argument is incorrect.

The powers of attorney

52] In *Aymac CC and Another v Widegrow*[27] (Aymac) the full court stated that the effect of rule 7(3)(a) and rule 49(6)(a) is that,

"Simultaneously with making written application to the registrar for a date of hearing of the appeal, the appellant's attorney (if he is represented by one) shall file the power of attorney. Unless the power of attorney is filed together with the application for a date of hearing, the appellant cannot be considered properly to have made written application in terms of rule 49(6)(a)."

53] As a result, in the absence of a proper application for a date of hearing the appeal is not properly set down and should be struck off the roll.

54] In *Aymac* it appears that the registrar had set the appeal down despite the appellants' failure to file the required powers of attorney

which were eventually filed, albeit late. The appellants' argument was that no application for condonation was required as the registrar had set the appeal down and if he was wrong to do so, the fault lay with the registrar and not with the appellants. This argument was rejected by the full court which held that the appeal had been irregularly set down and that, although a power of attorney is required to set down the appeal, it is not required to set down a reinstatement application. The court stated that it is usual and desirable for the reinstatement application and appeal to be heard together.

55] The appellants in casu attempt to distinguish the facts in Aymac from this appeal and argue that by virtue of the registrar and the DJP allocating a date of hearing, somehow condonation for their lack of compliance is either express or implied. However, it is the principle stated in Aymac that is to be applied irrespective of whether the facts are on all fours. In any event, the fact is that it is the registrar who

initially allocated a date of hearing to this appeal despite non-compliance with the provisions of rule 7 and rule 49. In my view

neither the registrar nor the directives of the DJP bind this court. It is the Uniform Rules to which this court must cast its eye and which must be applied.[28] In any event, I cannot find anything in the Directive of the DJP that constitutes a binding decision on whether or not condonation has been granted by him for any non-compliance with the rules. This is evident from the fact that the DJP directed that the re-instatement

application must be filed by 4 September 2023 – had he granted condonation, no such application would have been required.

56] To compound the issues, the original first appellant subsequently passed away and has been substituted in the present proceedings. But, on 1 September 2023 when the other powers of attorney were filed (over seven months late), no powers of attorney in respect of that substitution had yet been filed.

57] In my view, and on the issue of the late filing of the powers of attorney, the appellants' argument must fail: although I agree that the failure to file the powers of attorney timeously does not per se lead to the lapse of the appeal, the consequence is that the date of hearing was irregularly obtained. I also find that the fact that the appeal was set down for hearing does not mean that condonation for non-compliance with rule 7 and rule 49 has been granted or is implied – as said, only this court has the power to grant that condonation.

58] The appellants take the view that:

“7.3 What is incontrovertible is that notwithstanding the Appellants' oversight non-adherence to the Uniform Rules as referred to in the founding affidavit, the appeal was set down by the Registrar of Appeals and this shows that it clearly never lapsed.

7.4 ...The upshot of non-compliance with Rule 7(2), Rule 49(7)(a) and 49(13)(a) as well as the Appeal Directive, is not that the appeal lapses – it is that the appeal is not set down. Ironically, it was set down and this is what beguiled the Appellants into false-sense compliance. The only issue that was seemingly outstanding was the filing of the heads of argument, which the Appellants were going to file in terms of Rule 49(15) of the Uniform Rules.

7.5 A stone cold fact is that a CaseLines record was accepted by the appeal court Registrar and Motjoli. This was the case until lately. This fact puts paid to any contention that the emails illustrated the lapsing of the appeal. By stating these facts, the Appellants do not intend to apportion blame to the Registrar of Appeals - the Appellants accept that there was an oversight on their side but need to explain their interaction with the Registrar.”

The rule 49(6)(a) notice

59] This notice was filed on 7 February 2023. It was late and failed to comply with the rule as it did not specify the appellants’ residential addresses. A new notice was then filed on 17 February 2023 almost 4 weeks late. But it was defective for the same reason. On this issue the appellants’ state:

“8.1 The Appellants’ residential addresses have been known to Motjoli since the institution of the main application on 11 April

2019. Motjoli’s insistence on finding minor and inconsequential non-compliance with the manner in which the Appellants have litigated this appeal illustrates their attempt to succeed on disposing of this appeal on technical grounds.”

60] But the appellants’ obdurate stance does them no favour. The point is not whether or not the respondents have had knowledge of the appellants’ residential addresses since inception. The point is that it is required in terms of the rule which is couched in peremptory terms in the use of the word “shall”. A reason for this could well be that a person's residential address could change because of the lapse of time between the date of the original proceedings and the date of the appeal. In casu this was a lapse of some four years. Also in casu the first appellant has passed away and thus the details of her successor were required. I am also of the view that the respondents

have not raised this issue as a mere technical point – there is merit in their argument. Thus, in my view, the appellants’

argument on this issue falls to be rejected.

The record

61] The electronic format of the record was filed on 7 February 2023. It runs to some 5700 pages. It is common cause that five hard copies of the record were not filed – the now 8100 page record was only filed on 8 September 2023, which is four days later than that directed by the DJP. The respondents complain that even this record was not compliant as it contained duplications and irrelevant documents.

62] In the replying affidavit in the reinstatement application, the appellants have taken a very unfortunate stance. Instead of accepting the failure to comply with rule 49(6)(a) – as they had in the meeting with the DJP - they have dug in their heels. In my view the electronic record was clearly insufficient. Firstly, the rules of court do not provide for an electronic copy of the record; secondly, the electronic record was simply accompanied by a 50 page index and comprised a continuous stream of documents that, as stated, ran to some 5700 pages. It completely failed to comply with the 2018 Appeals Directive which requires that

“...in all civil appeals the record shall be securely bound in volumes of no more than 120 pages each, save to avoid splitting a document, in which case the volume may be longer but only to that extent.”

63] The reason for all of this is obvious: the rules are there for the court. Especially in a matter as voluminous and complex such as this, it streamlines the process and cuts out the unnecessary clutter of irrelevant material and aids the court in the timeous preparation, hearing and finalisation of the matter. The appellants have simply ignored the most basic rules of court and those are the ones that regulate procedure that apply to all High Courts throughout the country. Whilst, as stated supra, practice directives regulate the conduct of a matter in a specific division, the rules of court regulate the conduct of litigation throughout the country.

64] The fact is that the electronic record was non-compliant with the Uniform Rules. Had it been, it begs the question as to why appellants then thought it at all necessary to appoint a professional service provider to prepare an appeal record which accords with the rules and practice directive. Had the appellants' record in fact been compliant, it could have served a hard copy immediately upon receipt of the respondents' complaint in this regard.

65] Furthermore, in my view, the dies non period upon which the appellants rely to found the argument that their rule 49(6) notice was not late does not apply to the delivery of that notice. It applies only to the allocation by the registrar of dates of hearing. This is very clear from the wording of the directive which specifically states that no allocations for dates “will be attended to” in this period. Any such applications received during the dies non period “will be attended to during the first week of the new year”. Thus, not only was the appellants rule 49(6) notice not filed within the 60 days required, but it was filed past the further 10 day period set out in rule 49(6)(a). Therefore the appeal had lapsed by 7 February 2023.

66] It is for this reason that this court made the order that the appeal had lapsed, on 20 August 2024.

Security for costs

67] The appellants then compounded their woes by failing to set timeous security for the appeal costs. In my view, however, this does not cause the lapse of the appeal, but may well delay its adjudication until security is properly set.

The re-instatement application

68] An application for re-instatement of an appeal may be granted on good cause shown. In *United Plant Hire (Pty) Ltd v Hills and Others*[29] it was stated:

“It is all settled that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all the facts; and that in essence it is a question of fairness to both sides. In this inquiry, relevant considerations

may include the degree of non-compliance with the rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent’s interest in the finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.

These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay, and a good explanation may be held to compensate for prospects of success which are not strong.”

69] In both *Aymac* and *SA Express* the courts considered the effect that a gross breach of the rules had on the outcome of the re-instatement application. Whilst in *Aymac* the full court refused the application for re-instatement despite good prospects of success on appeal, in *SA Express* the SCA briefly considered the prospects of success, which were poor, and then refused the application for re-instatement.

70] In *casu*, the appellants’ attorneys committed one error after the other. The remark made by the court in *Aymac* is very appropriate: “there is little that Mr Klinkenberg did right. There is nothing more that I can think of that he could have done wrong.” And so it is in this appeal: the rule 49(6)(a) notice was late; no powers of attorney were filed timeously: the original record was not filed in the correct form; the corrected record was filed extraordinarily late; security for costs was not set timeously and practice directives of this court were ignored or, at best, overlooked. The prosecution of this appeal was, quite simply, inadequate.

71] To compound this, instead of the appellants’ attorneys accepting its hand in all these flagrant breaches of the rules and directives, one excuse after the other was raised, culpability laid at the door of the registrar, the compilers of the record and the respondents (for their objections and alleged lack of co-operation). And then, instead of the re-instatement application being launched as soon as the appellants were made aware of the respondents’ view that the appeal had lapsed, it took the DJP’s directive to provide the impetus for the application. This conduct falls far short of that expected from a party or their representatives.

72] In *Blumenthal and Another v Thomson NO and Another*[30] the SCA stated:

“This Court has often said that in cases of flagrant breaches of the Rules, especially where there is no acceptable explanation therefore, the indulgence of condonation may be refused whatever the merits of the appeal are; this applies even where the blame lies solely with the attorney...As I have said, the facts in casu show that the Rules were flagrantly breached; nor is there any acceptable explanation for such breaches. In these circumstances it is unnecessary to make an assessment of the prospects of success since the cumulative effect of the factors already mentioned,

including the first respondent's interest in the finality of the court a quo's judgment, is such as to render the application for condonation unworthy of consideration..."[31]

73] Although this is the view I take in this matter, as was done in *Air Express*, I pause to consider an aspect that, in my view, puts to bed the consideration of the prospects of success.

Prospects of success

74] One of the grounds raised in the respondents' argument in the main review application is that the appellants have failed to exhaust their internal remedies. This argument was raised in the answering affidavits filed as far back as 2021. They argue that this is fatal to the review application and thus to any prospects of success on appeal, which they argue are in any event, nil.

75] The court a quo found that there was a duty on the appellants to exhaust internal remedies before launching the review application, that this duty is peremptory and that the failure to comply renders any judicial process premature.

76] On 10 May 2024, months after the appeal was noted and a mere three months before this appeal was heard, the appellants filed a Notice of their Intention to Amend the Notice of Motion[32](the rule 28 application). The main effect of this is to be found in prayer 1 which states:

"1. That in the event that the above Honourable Court is inclined to find that the Appellants were under a duty to exhaust internal remedies as prescribed in section 96 of the Mineral and Petroleum Resources Development Act No, 28 of 2002 ("the MPRDA") prior to instituting its review application...that the Appellants are exempted from this duty in terms of section 96(4) of the MPRDA read with sections 7(1) and 7(2) of the Promotion of Administration of Justice Act No. 3 of 2000...(PAJA)."

77] Section 96 of the MPRDA provides as follows:

"(1) Any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this Act may appeal within 30 days becoming aware of such administrative decision in the prescribed manner to—

- (a) the Director-General, if it is an administrative decision by a Regional Manager or any officer to whom the power has been delegated or a duty has been assigned by or under this Act;
- (b) the Minister, if it is an administrative decision that was taken by the Director-General or the designated agency.

(2)(a) An appeal in terms of subsection (1) does not suspend the administrative decision, unless it is suspended by the Director-General or the Minister, as the case may be.

- (b) Any subsequent application in terms of this Act must be suspended pending the finalisation of the appeal referred to in paragraph (a).

- (3) No person may apply to the court for the review of an administrative decision contemplated in subsection (1) until that person has exhausted his or her remedies in terms of that subsection.
- (4) Sections 6,7(1) and 8 of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), apply to any court proceedings contemplated in this section. “

78] The appellants’ view has throughout been that it was the Minister who made the impugned decision and that therefore s96 of the MPRDA does not apply to them because it does not provide for an appeal against the decisions of a Minister. This argument was finally, and correctly, abandoned at the hearing a quo, although it was raised before us in an attempt to justify why this exemption had not been sought sooner. In this appeal, and in the rule 28 application, they also contend that the proposed amendment does not raise new facts and that, at best, all the issues now raised were actually raised when the main review application was heard and that they “are not factually controversial”. They contend that there is thus no prejudice to the respondents.

79] But, quite frankly, this argument is misleading and amounts to little more than obfuscation. The appellants argue that they only became aware of the fact that the DG had granted the mining right and its cession when the review record was filed. They state that when the review application was launched on 11 April 2019 they were unaware of this. They placed the blame for their ignorance squarely at the feet of the respondents: they argue that, had the respondents simply provided copies of the mining right and consent at the time that it was requested in March 2019, the issue would have been resolved back then already.

80] But this excuse simply cannot pass muster. On their own version, they were provided with a copy of the mining right as part of the review record on 21 June 2019. They concede that this document indicates that it had been granted by the DG on authority delegated to him by the Minister. However they argued that

“... the Mining Right also indicated that the Minister had granted the mining right. It was accordingly unclear to the Appellants

whether it was in fact the DG or the Minister who had granted the Mining Right.”

81] They then concede that:

“It only became clear to the Appellants that the Minister had delegated his authority to the DG following the delivery of the First and Second Respondents Answering Affidavit on 9 February 2021, which contained the delegation as annexure AA1.”

And they state that it is for these reasons that they did not include the relief now sought.

82] The argument is, in my view, astounding, especially bearing in mind that the appellants have sought to amend their notice of motion several times before the application was argued before the court a quo. Why they did not seek this relief two years ago remains a mystery.

83] In fact, it is clear that despite the concession made in the rule 28 application the appellants dug in their heels in November 2021[33] and argued that because the respondents had failed to provide critical information to them at the time requested, they were unable

to exhaust the internal remedies within the 30 day period provided for in s96(1) of the MPRDA. But in my view this argument must be rejected:

- a) a mining right is a real right which used to be registered in the Deeds Office. It is now registered in the Registration Office for Mineral and Petroleum Titles which is open for public scrutiny;
- b) the appellants have placed no information before this court, or the court a quo, that they attempted to obtain copies of the mining right or its cession from either of these two offices;
- c) there is no application in terms of the provisions of the Promotion of Access to Information Act, 2000;
- d) they were made aware at a SAHRA meeting held on 27 February 2019 already that the mining rights had been granted – this was some two months prior to the launch of the review application;
- e) they failed to launch the internal appeal, request condonation and request a stay of the review application, despite being made aware of the true state of affairs;
- f) Section 7 of PAJA and s96 of the MPRDA do not require an actual copy of the mining license - they require knowledge of the decision for purposes of the internal appeal process.

84] In *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Co Ltd*[34] (*Dengetenge*) the majority held that the promulgation of PAJA has made it compulsory for an aggrieved party to exhaust internal remedies before

approaching a court for review unless it is exempted from this duty by a competent court.[35] The Constitutional Court stated

“[116] The exemption is granted by a court, on application by the aggrieved party. For an application for an exemption to succeed, the applicant must establish “exceptional circumstances”. [36] Once such circumstances are established, it is within the discretion of the court to grant an exemption. Absent an exemption, the applicant is obliged to exhaust internal remedies before instituting an application for review. A review application that is launched before exhausting internal remedies is taken to be premature and the court to which it is brought is precluded from reviewing the challenged administrative action until the domestic remedies are exhausted or unless an exemption is granted. Differently put, the duty to exhaust internal remedies defers the exercise of the court’s review jurisdiction for as long as the duty is not discharged.”

85] *Dengetenge* also restates the position in *Nichol and Another v Registrar of Pension Funds and Others*[37] (*Nichol*);

“It is now compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies unless exempted from doing so by way of a successful application under s7(2)(c). Moreover, the person seeking exemption must satisfy the court on two matters: first, that there are exceptional circumstances, and second, that it is in the interest of justice that the exemption be given.”

86] It held further:

[119] In clear and peremptory terms, section 7(2) prohibits courts from reviewing “an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted”. Where, as in this case, there is a provision for internal remedies, the section imposes an obligation on the court to satisfy itself that such remedies have been exhausted. If the court is not satisfied, it must decline to adjudicate the matter until the applicant has either exhausted internal remedies or is granted an exemption. Since PAJA applies to every administrative action, this means that there can be no review of an administrative action by any court where internal remedies have not been exhausted, unless an exemption has been granted in terms of section 7(2)(c). This is apparent from the terms of section 7(2)(a) which begins with the words “[s]ubject to paragraph (c)”...

[125] All of these decisions were taken in terms of the MPRDA by the Regional Manager and the Deputy Director-General. Therefore, in accordance with section 96(1), they were subject to an internal appeal. Section 96(1) provides:

“Any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this Act may appeal in the prescribed manner to

—

- (a) the Director-General, if it is an administrative decision by a Regional Manager or an officer; or
- (b) the Minister, if it is an administrative decision by the Director-General or the designated agency.”

[126] Even if section 96(3) did not exist, the duty to exhaust domestic remedies would have been triggered by the mere provision of the internal appeal. It will be recalled that section 7 of PAJA precludes a court from reviewing an administrative action until internal remedies provided for in other laws are exhausted. There can be no doubt that section 96(1) constitutes such other law.”

87] The appellants argue that the court a quo erred by not adopting a flexible approach to the requirement that internal remedies must first be exhausted. In *Koyabe and Others v Minister for Home Affairs and Others* (Lawyers for Human Rights as amicus curiae)[38] (Koyabe) the Constitutional Court stated:

“[37] Internal administrative remedies may require specialised knowledge which may be of a technical and/or practical nature. The same holds true for fact-intensive cases where administrators have easier access to the relevant facts and information. Judicial review can only benefit from a full record of an internal adjudication, particularly in the light of the fact that reviewing courts do not ordinarily engage in fact-finding and hence require a fully developed factual record.”

[38] The duty to exhaust internal remedies is therefore a valuable and necessary requirement in our law. However, that requirement should not be rigidly imposed. Nor should it be used by administrators to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny. PAJA recognises this need for flexibility, acknowledging in section 7(2)(c) that exceptional circumstances may require that a court condone non-exhaustion of the internal process and proceed with judicial review nonetheless. Under section 7(2) of PAJA, the requirement that an individual exhaust internal remedies is therefore not absolute.

[39] What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.”

88] The appellants have argued that the fact that the Minister is opposing the review and this appeal is demonstrative of the fact that the internal appeal remedy would be a futile process and its dismissal a foregone conclusion. But this argument cannot be upheld – to do so would mean that in every such application, the mere allegation would mean that a court would be obliged to provide the exemption sought. That could very well result in an applicant simply ignoring the provisions of either s96(4) of the MPRDA or s7 of PAJA and trying their proverbial luck. Furthermore, no internal appeal was noted and therefore the Minister had no opportunity to apply his mind to those facts at the time. The fact that the Minister has raised this issue is not proof of his bias.

89] In any event, the argument in respect of bias seems somewhat contradictory in light of the fact that the appellants do not seek substitution of the decision if the appeal is successful – they seek a remittal to the very decision-maker they accuse of bias. They cannot have it both ways.

90] The appellants also argue that the fact that the time period for the internal review has lapsed also constitutes exceptional

circumstances. But Koyabe[39] firmly puts paid to this argument:

“[47] Although the duty to exhaust defers access to courts, it must be emphasised that the mere lapsing of the time-period for exercising an internal remedy on its own would not satisfy the duty to exhaust nor would it constitute exceptional circumstances.[40] Someone seeking to avoid administrative redress would, if it were otherwise, simply wait out the specified time-period and proceed to initiate judicial review. That interpretation would undermine the rationale and purpose of the duty. Thus, an aggrieved party must take reasonable steps to exhaust available internal remedies with a view to obtaining

administrative redress. The applicants relied in this regard on the decision in Kiva v Minister of Correctional Services.[41] To the extent that this decision indicates otherwise, it cannot be endorsed.”

91] The point is that, whichever way one views it, the appellants have been extraordinarily remiss in pursuing the remedies that they allege are so crucial to preserve their rights, as well as those of the local community:

- a) on their own version, they have known since February 2019 of the grant of the license;
- b) instead of complying with s96(c) of the MPRDA, they launched review proceedings in April 2019;
- c) they knew when the record was filed who the decision-maker was: they still failed to comply with s96 of the MPRDA and also failed to apply for exemption in terms of s7(2)(c) of PAJA;
- d) they continued on this path even after the answering affidavits were filed and a copy of the Minister’s delegation was provided;
- e) despite amending their Notice of Motion previously, they failed to include a prayer for exemption in terms of s7(2)(c) of PAJA, although this point had been raised in the answering affidavits;
- f) they failed to act timeously after noting this appeal and only filed the rule 28 application some 20 months later.

92] Over and above this, the appellants have failed to demonstrate any exceptional circumstances that warrant the non-compliance with s96 of the MPRDA. The conclusion of the court a quo on this issue was that “the duty to exhaust internal remedies before launching a review application is not a mere formality which may be ignored by litigants. It is peremptory and failure to comply may render any judicial process premature with disastrous consequences for the affected parties”. I agree with this conclusion.

95] What is worse is that the appellants have failed to explain why they failed to launch the Rule 28 application prior to June 2024.

96] In Nichol the appellant had applied to the High Court for an exemption to exhaust his inter appeal in terms of s7(2)(c) of PAJA in circumstances where he had already instituted review proceedings and where he had deliberately decided not to pursue the internal appeal procedure. He alleged that there were exceptional circumstances that rendered the exemption in the interests of justice and contended that

the grounds of review constituted exceptional circumstances. He argued that by the time he brought the application for exemption he had been out of time to pursue the internal appeal process.

97] The response of the SCA was the following:

“[17] The exceptional circumstances upon which reliance is placed in support of an application for exemption in terms of s 7(2)(c) should primarily be facts and circumstances existing before or at the time of the institution of the review proceedings. This does not mean that the court may not, in principle, take into consideration events occurring after the launch of such proceedings. Apart from the judgment of the Cape High Court handed down on 17 October 2003 – the relevance of which I will discuss below – the alleged ‘exceptional circumstances’ ultimately relied upon by Nichol all existed prior to the commencement of the main application.”

98] This is precisely the situation in this appeal: the appellants all argue that the Mountain and Cave hold significant cultural and religious meaning for them and that mining of the Mountain would impact on the Caves and their cultural practices. But this argument has been the argument from the outset and there is nothing new to add to it that would justify a departure from the provisions of s96 of the MPRDA in the specific circumstances before us.

99] The appellants now attempt to argue that it is in the interests of justice to exempt them from their obligations under s96 of the MDRPA. But in considering this, in my view, the court must also consider the prejudice to the respondents were an exemption to be granted in these circumstances which would be that they have no finality to the proceedings and they are unable to exercise their right to mine granted to them 5 years ago.

100] In my view, given all the circumstances set out supra, the Rule 28 application falls to be dismissed.

101] Given then that the appellants have failed to exhaust their internal remedies, the court a quo correctly dismissed the application.

102] As to the appeal: the appellants have clearly failed to prosecute the appeal. Their non-compliance is so flagrant that it warrants an outright dismissal of the appeal.

103] For the reasons stated above, the application for re-instatement of the appeal likewise falls to be dismissed.

104] As to costs: the matter is complex and important to all the parties. The appellants and the DG and Minister all employed two sets of counsel. The appeal took three days to argue in full and there were several interlocutory applications that were argued, over and above the merits of the appeal itself. Costs to be taxed on Scale C are therefore justified, as is the employment of a senior counsel and a junior.

Order

105] The order that is made is the following:

1. The appeal is dismissed with costs.
2. The costs shall include those consequent upon the employment of two counsel of which one is a Senior Counsel, which costs are to be taxed in accordance with Scale C.

B NEUKIRCHER

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.

EM KUBUSHI

GAUTENG DIVISION PRETORIA

I agree

G ALLY

ACTING JUDGE OF THE HIGH COURT

This judgment was prepared and authored by the judges whose names are reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be ____ January 2025.

Parties' representatives

For the appellant: Adv A Subel SC, with him Adv M Majozi

Instructed by : Werksmans Attorneys

For the first and second

respondents: Adv K Pillay SC, with her Adv L Gumbi

Instructed by: State Attorney

For the fourth, sixth and

Tenth respondents: Adv D Smit

Instructed by: Webber Wentzel

Matter heard on: 20 to 22 August 2024

Judgment

date: ____ January 2025

- [1] Which was no more than an application to exempt the appellants from the obligation to pursue the internal remedy provisions of s96 of the MPRDA
- [2] The mining right was notarially executed on 26 August 2018
- [3] In Setswana

[4] Superior courts act 10 of 2013: “19. The Supreme Court of appeal or a division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law – ...

(b) receive further evidence...”

[4] Superior courts act 10 of 2013:

“19. The Supreme Court of appeal or a division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law –

(b) receive further evidence...”

[5] 1956 (4) SA 446 (A) at 457

[6] SA Express Ltd v Bagport (Pty) Ltd 2020 (5) SA 404 (SCA) para 12-14 (SA Express)

[7] Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA)

[8] Blumenthal and Another v Thomson NO and Another [1993] ZASCA 190; 1994 (2) SA 118 (A) at 121I – 122B

[9] SA Express par 34 - 43

[10] Par 55

[11] Rule 49(6)

[12] Rule 49(7)(a)

[13] Rule 47(7)(a)(i) and (ii)

[14] Rule 7(2)

[15] Dated 17 April 2018

[16] Which runs to some 8100 pages

[17] Superior Courts Act, 2013 to adduce further evidence on appeal

[18] 2023

(4) SA 205 (WCC) para 92

[19] 2009

(2) SACR 459 (W) para 2

[20] Which was opposed by the respondents

[21] Werksmans

[22] Who act for the fourth, fifth and tenth respondents (Motjoli)

[23] Rule 7(2): “The registrar shall not set down any appeal at the instance of an attorney unless such attorney has filed with the registrar a power of attorney authorizing him to appeal and such power of attorney shall be filed together with the application for a date of hearing.”

[23] Rule 7(2):

“The registrar shall not set down any appeal at the instance of an attorney unless such attorney has filed with the registrar a power of attorney authorizing him to appeal and such power of attorney shall be filed together with the application for a date of hearing.”

[24] Paragraph 22 supra

[25] Paragraph 28 supra

[26][26] “Not later than 15 days before the appeal is heard the appellant shall deliver a concise and succinct statement of the main points (without elaboration) which he intends to argue on appeal, as well as a list of the authorities to be tendered in support of each point, and not later than 10 days before the appeal is heard the respondent shall deliver a similar statement...”

[27] 2009 (6) SA 433 (W) para 6

[28] Fedco Cape (Pty) Ltd v Meyer 1988 (4) SA 207 (E) at 209 C/D – E: “In my judgment the [registrar], in acting as he did, arrogated unto himself powers which reside in the Court. The facts are that a notice was filed and copies of the record were filed. Whether such notice or copies comply with the Rules it's a matter for the Court to decide, not the Registrar. Even if such notice or copies do not comply with the Rules, the Court has the power in appropriate circumstances to condone any non-compliance and it is not for the Registrar to purport any pre-emption of the Court's powers by simply returning documents whence they come nor does that bind the Court by purportedly accepting documents “in compliance” with the Rules.”

[29] 1976

(1) SA 717 (A) at 720E - G

[30]

[1993] ZASCA 190; 1994

(2) SA 118 (A) at 121I - J

[31] Case references omitted

[32] In terms of Rule 28

[33] When the review application was argued

[34] 2014

(5) SA 138 (CC)

[35] Dengetenge para 115

[36] In section 7(2)(c).

[37] 2008

(1) SA 383 (SCA) para 15

[38] 2010 (4) SA 327 (CC) para 37 - 39

[39] At para 47

[40] See Nichol above n 28 at para 32.

[41] [2007] 1 BLLR 86 (E).

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Prepared on 12 October 2026 · Esheria