49 Civil Appeals from the High Court

[Heading substituted by GN R518 of 8 May 2009.]

(1)*(a)* When leave to appeal is required, it may on a statement of the grounds therefor be requested at the time of the judgment or order.

(b) When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within fifteen days after the date of the order appealed against: Provided that when the reasons or the full reasons for the court's order are given on a later date than the date of the order, such application may be made within fifteen days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of fifteen days.

[Paragraph *(b)* substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(c) When in giving an order the court declares that the reasons for the order will be furnished to any of the parties on application, such application shall be delivered within ten days after the date of the order.

[Paragraph *(c)* substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(d) The application mentioned in paragraph *(b)* above shall be set down on a date arranged by the registrar who shall give written notice thereof to the parties.

(e) Such application shall be heard by the judge who presided at the trial or, if he is not available, by another judge of the division of which the said judge, when he so presided, was a member.

(2) If leave to appeal to the full court is granted the notice of appeal shall be delivered to all the parties within twenty days after the date upon which leave was granted or within such longer period as may upon good cause shown be permitted.

[Subrule (2) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(3) A notice of cross-appeal shall be delivered within ten days after delivery of the notice of appeal or within such longer period as may upon good cause shown be permitted and the provisions of these Rules with regard to appeals shall mutatis mutandis apply to cross-appeals.

[Subrule (3) substituted by GN R472 of 12 July 2013.]

(4) Every notice of appeal and cross-appeal shall state —

(a) what part of the judgment or order is appealed against; and

(b) the particular respect in which the variation of the judgment or order is sought.

[Subrule (4) substituted by GN R2164 of 2 October 1987, by GN R2642 of 27 November 1987 and by GN R472 of 12 July 2013.]

(5) In the case of an appeal against the judgment or order of the court of the Witwatersrand Local Division, the judge president of the Transvaal Provincial Division shall determine whether the appeal should be heard by the full court of the said local division. As soon as possible after receipt of the notice of appeal or cross-appeal, if any, the registrar of the local division shall ascertain from the judge president his direction in the particular case. If the judge president has directed that the appeal be heard by the full court of the Witwatersrand Local Division,

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the said registrar shall immediately inform the parties of the direction. If not so directed by the judge president, the said registrar shall inform the registrar of the provincial division as well as the parties accordingly.

(6)*(a)* Within sixty days after delivery of a notice of appeal, an appellant shall make written application to the registrar of the division where the appeal is to be heard for a date for the hearing of such appeal and shall at the same time furnish him with his full residential address and the name and address of every other party to the appeal and if the appellant fails to do so a respondent may within ten days after the expiry of the said period of sixty days, as in the case of the appellant, apply for the set down of the appeal or cross-appeal which he may have noted. If no such application is made by either party the appeal and cross-appeal shall be deemed to have lapsed: Provided that a respondent shall have the right to apply for an order for his wasted costs.

[Paragraph *(a)* substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

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

(7)*(a)* At the same time as the application for a date for the hearing of an appeal in terms of subrule (6)*(a)* of this rule the appellant shall file with the registrar three copies of the record on appeal and shall furnish two copies to the respondent. The registrar shall further be provided 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 said index. If the necessary copies of the record are not ready at that stage, the registrar may accept an application for a date of hearing without the necessary copies if—

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

(ii) failing such agreement, the appellant delivers an application together with an affidavit in which the reasons for his omission to hand in the 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.

(b) The two copies of the record to be served on the respondent shall be served at the same time as the filing of the aforementioned three copies with the registrar.

(c) After delivery of the copies of the record, the registrar of the court that is to hear the appeal or cross-appeal shall assign a date for the hearing of the appeal or for the application for condonation and appeal, as the case may be, and shall set the appeal down for hearing on the said date and shall give the parties at least twenty days' notice in writing of the date so assigned.

[Paragraph *(c)* substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(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 application has lapsed.

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(8)*(a)* Copies referred to in subrule (7) shall be clearly typed on A.4 standard paper in double spacing, paginated and bound and in addition every tenth line on every page shall be numbered.

(b) The left side of each page shall be provided with a margin of at least 35 mm that shall be left clear, except in the case of exhibits that are duplicated by photoprinting, where it is impossible to obtain a margin with the said dimensions. Where the margin of the said exhibits is so small that parts of the documents will be obscured by binding, such documents shall be mounted on sheets of A4 paper and folded back to ensure that the prescribed margin is provided.

(9) By consent of the parties, exhibits and annexures having no bearing on the point at issue in the appeal and immaterial portions of lengthy documents may be omitted. Such consent, setting out what documents or parts thereof have been omitted, shall be signed by the parties and shall be included in the record on appeal. The court hearing the appeal may order that the whole of the record be placed before it.

(10) When the decision of an appeal turns exclusively on a point of law, the parties may agree to submit such appeal to the court in the form of a special case, in which event copies shall be submitted of only such portions of the record as may be necessary for a proper decision of the appeal: Provided that the court hearing the appeal may require that the whole of the record of the case be placed before it.

(11) . . .

[Subrule (11) repealed by GN R317 of 17 April 2015.]

(12) If the order referred to in subrule (11) [*sic*] is carried into execution by order of the court the party requesting such execution shall, unless the court otherwise orders, before such execution enter into such security as the parties may agree or the registrar may decide for the restitution of any sum obtained upon such execution. The registrar's decision shall be final.

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

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

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

(14) The provisions of subrules (12) and (13) shall not be applicable to the Government of the Republic of South Africa or any provincial administration.

(15) Not later than fifteen 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 ten days before the appeal is heard the respondent shall deliver a similar statement. Three additional copies shall in each case be filed with the registrar.

[Subrule (15) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

RS 22, 2023, D1 Rule 49-4

(16) A notice of appeal in terms of section 76 of the Patents Act, 1978 (Act 57 of 1978), or section 63 of the Trade Marks Act, 1963 (Act 62 of 1963), may be served on the patent agent referred to in the Patents Act, 1978, or the agent referred to in section 8 of the Trade Marks Act, 1963, who represented the respondent in the proceedings in respect of which an appeal is noted.

(17) In the case of appeals to the full court in terms of the provisions of a statute in which the procedure to be followed is laid down, this rule is applicable as far as provision is made for matters not regulated by the statute.

(18) Notwithstanding the provisions of this rule the judge president may, in consultation with the parties concerned, direct that a contemplated appeal be dealt with as an urgent matter and order that it be disposed of, and the appeal be prosecuted, at such time and in such manner as to him seems meet.

[Subrule (18) inserted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]
[Rule 49 substituted by GN R645 of 25 March 1983 and corrected by GN R841 of 22 April 1983.]

Commentary

General. This rule deals with civil appeals from a court constituted before a single judge of a division of the High Court, sitting as a court of first instance, to a full court of that division. Subrule (17) of this rule provides that in the case of appeals to the full court in terms of the provisions of a statute in which the procedure to be followed is laid down, this rule is applicable as far as provision is made for matters not regulated by the statute. Rule 50 deals with civil appeal from magistrates' courts to the High Court.

The rule deals only with the purely procedural aspect of the matter. Recourse must therefore be had to the provisions of the Superior Courts Act 10 of 2013 which deals with the substantive law in respect of:

(a) the system of appeals and appeals generally (s 16 of the Act);

(b) leave to appeal (s 17 of the Act); and

(c) suspension of a decision pending an application for leave to appeal or of an appeal (s 18 of the Act). [1]

RS 24, 2024, D1 Rule 49-5

See, in relation to the aforesaid, Volume 1 third edition, Part D.

Urgent appeals are dealt with in subrule (18) of this rule.

Peremption of appeal is dealt with in the *excursus* to s 16 of the Superior Courts Act 10 of 2013 s v 'Peremption of appeal' in Volume 1 third edition, Part D.

The powers of a full court exercising appeal jurisdiction are dealt with in s 19 of the Superior Courts Act 10 of 2013, as to which see Volume 1 third edition, Part D.

Subrule (1)*(a)*: 'When leave to appeal is required.' Leave to appeal is dealt with in s 17 of the Superior Courts Act 10 of 2013, as to which see Volume 1 third edition, Part D. A respondent who wishes to cross-appeal must obtain leave to appeal in accordance with the rules applicable for leave to appeal. [2]

'A statement of the grounds therefor.' See the notes to subrule (1)*(b)* s v 'The grounds therefor shall be furnished' below.

Subrule (1)*(b)*: 'When leave to appeal . . . has not been requested at the time of the judgment.' When leave to appeal has not been requested at the time of judgment, this subrule becomes applicable in terms of which application for leave to appeal is to be made in the prescribed manner.

'The grounds therefor shall be furnished.' The grounds of appeal must be clearly and succinctly set out in clear and unambiguous terms so as to enable the court and the respondent to be fully informed of the case the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal. [3] The subrule is peremptory in this regard. [4] See further the notes to subrule (4) s v 'The particular respect in which the variation . . . is sought' below.

First proviso: 'When the reasons . . . are given on a later date.' Litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, and, when a judgment is appealed, written reasons are indispensable. Failure to supply them will usually be a grave lapse of duty, a breach of a litigant's rights, and an impediment to the appeal process. [5]

RS 24, 2024, D1 Rule 49-6

This proviso, which was introduced in 1987, overcomes the dilemma which often confronted a prospective appellant when the court's reasons for judgment were given a considerable time after the order of the court. [6]

Second proviso: 'The court may.' Paragraph *(e)* of this subrule provides that the application for leave to appeal under this paragraph shall be heard by the judge who presided at the trial or, if he is not available, by another judge of that particular division of the High Court. It is clear that the provisions of paragraph *(e)* also apply to the application under this paragraph for an extension of the period within which an application for leave to appeal may be brought. [7]

RS 23, 2024, D1 Rule 49-6A

'Upon good cause shown.' See the notes to subrule (6)*(b)* s v 'Upon good cause shown' below. The factors there mentioned would, *mutatis mutandis*, apply to an application under this subrule for an extension of time, except that a consideration of the prospects of success of the proposed appeal does not necessarily enter into an application under this subrule. [8]

'Extend the . . . periods.' Both periods of 15 days provided for in this subrule may be extended by the court. It has been held that where an application for condonation for the late delivery of an application for leave to appeal is enrolled for hearing together with the application for leave to appeal, and is refused, such refusal does not constitute a refusal of leave to appeal. [9]

Subrule (1)*(d)*: 'The application mentioned . . . shall be set down on a date arranged by the registrar who shall give written notice thereof to the parties.' Applications for leave to appeal should be dealt with and disposed of expeditiously. In *Commissioner, South African Revenue Service v Sasol Chevron Holdings Limited* [10] the Supreme Court of Appeal raised a word of caution (*per* Petse DP):

> '[45] The application for leave to appeal was heard on 15 May 2020. And the judgment of the high court granting leave to appeal to this court was handed down on 26 October 2020 after undergoing a period of gestation of some five months. It is necessary to say something about this. An undesirable development appears to be taking root in some courts where applications for leave to appeal are invariably not dealt with and disposed of expeditiously. This is regrettable as delays in the disposition of applications for leave to appeal have a negative impact on the administration of justice. I mention this not to

censure the learned Judge a quo but purely to sound a word of caution, namely that if delays of this nature go unchecked, they have the potential to bring the administration of justice into disrepute.'

Subrule (1)*(e)*: 'Such application shall be heard by the judge who presided at the trial.' In terms of s 17(2)*(a)* of the Superior Courts Act 10 of 2013 leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same court or division. The provisions of s 17(2)*(a)* of the Act, which appear to be of wider import than this subrule, prevail.

Subrule (2): General. For a useful summary of the steps to be taken by an appellant who has been granted leave to appeal, see *Aymac CC v Widgerow*. [11]

'If leave to appeal . . . is granted.' Leave to appeal may be granted on all or some of the grounds relied on. If leave to appeal is granted on limited grounds only, a respondent is not precluded from relying on such other defences or answers as might be available to it. [12] A full

court of a division of the High Court, being the forum hearing the appeal, is not empowered to entertain grounds of appeal in respect of which leave to appeal was refused. [13]

Where an appeal or proposed appeal has become moot by the time leave to appeal is first sought, it will generally be appropriate to order the appellant or would-be appellant to pay costs, since the proposed appeal was stillborn from the outset. Different considerations apply where the appeal or proposed appeal becomes moot at a later time. The appellant or would-be appellant may consider that the appeal had good merits and that it should not be mulcted in costs for the period up to the date on which the appeal became moot. The other party may hold a different view. As a general rule, litigants and their legal representatives are under a duty, where an appeal or proposed appeal becomes moot during the pendency of appellate proceedings, to contribute to the efficient use of judicial resources by making sensible proposals so that an appellate court's intervention is not needed. If a reasonable proposal by one of the litigants is rejected by the other, this would play an important part in the appropriate costs order. Apart from taking a realistic view on prospects of success, litigants should take into account, among other factors, the extent of the costs already incurred; the additional costs that will be incurred if the appellate proceedings are not promptly terminated; the size of the appeal record; and the likely time it would take an appellate court to form a view on the merits of the moot appeal. There must be a proper sense of proportion when incurring costs and calling upon judicial resources. [14]

'To the full court.' In terms of s 1 of the Superior Courts Act 10 of 2013 'full court' means, in relation to any division of the High Court, a court consisting of three judges. [15]

'Within such longer period as may . . . be permitted.' It is not made clear by which court an application for an extension of time under this subrule is to be heard. Since the application may require the prospects of success of the proposed appeal to be canvassed, it would seem that the rule of practice would apply whereby applications for condonation of procedural shortcomings in appeals, being matters ancillary to the appeal on which the success of the appellant's right to proceed with the appeal or not depends, are to be heard by the court of appeal and not a single judge. If necessary, the application for condonation and reinstatement of the appeal could then incorporate an application under subrule (6)*(b)*. [16]

'Upon good cause shown.' See the notes to subrule (6)*(b)* s v 'Upon good cause shown' below.

Subrule (3): 'A notice of cross-appeal.' A cross-appeal is an appeal which is for convenience heard at the same time as the main appeal; it is 'simply an appeal which is conveniently tacked on to another appeal'. [17] In general, the rules applicable to appeals apply to cross-appeals. [18] A cross-appeal, like any other appeal, must be duly noted; a cross-appeal which has not been properly noted cannot be prosecuted. [19] A cross-appeal cannot be conditional upon the success of an appeal. [20] The limitations on the right to appeal apply equally to the right to cross-appeal. [21]

A respondent in an appeal should cross-appeal only if he desires a variation of the order appealed against. [22] The court of appeal may not alter a judgment against an appellant, i e to the appellant's prejudice, unless the respondent has noted a cross-appeal (with leave) against such judgment. [23] A respondent on appeal may support a judgment on any ground, including one not upheld by the court *a quo*, and need not note a cross-appeal for that purpose. [24]

'Upon good cause shown.' See the notes to subrule (6)*(b)* s v 'Upon good cause shown' below.

Subrule (4): 'Every notice of appeal and cross-appeal shall state.' Prior to its substitution in 2013 [25] subrule (4) read as follows:

'The notice of appeal shall state whether the whole or part only of the judgment or order is appealed against and if only part of such judgment or order is appealed against, it shall state which part and shall further specify the finding of fact and/or ruling of law appealed against and the grounds upon which the appeal is founded.'

In its substituted form the subrule mirrors rule 7(3)*(a)* and *(b)* of the Rules of the Supreme Court of Appeal, as to which see Volume 1 third edition, Part C1.

The subrule does not require that grounds of appeal be stated in the notice of appeal. [26] In *Leeuw v First National Bank Ltd* [27] the Supreme Court of Appeal, with reference to rule 7(3)*(a)* and *(b)* of the Rules of the Supreme Court of Appeal, unanimously stated: [28]

'In this court it is not required that grounds of appeal be stated in the notice of appeal. The nature of the proceedings is such that this court is entitled to make findings in relation to "any matter flowing fairly from the record."'

In *Wiese v Absa Bank Ltd* [29] the full court held [30] that the following notice of appeal against the *whole of the judgment* concerned complied with the provisions of the subrule in its substituted form:

'TAKE NOTICE that the Appellants hereby note their appeal to the full bench of the abovementioned Honourable Court against the whole of the judgment of His Lordship Blignault handed down on 13 May 2014.

TAKE NOTICE FURTHER that on 18 November 2014 the Supreme Court of Appeal granted leave to appeal to the full bench of the above Honourable Court as appears from a certified copy of the order attached hereto marked "A".

TAKE NOTICE FURTHER that the Appellants seek that the order of the Court a quo should be set aside and replaced with orders:

1. Rescinding the judgment granted by His Lordship Blignault on 13 May 2014.
2. Granting leave to the Appellants to defend the action instituted by the Respondents under the above case number.'

It is submitted that where only part of the judgment and/or order is appealed against the notice of appeal or cross-appeal

should state the particular respect(s) in which variation of the judgment and/or order is sought. Non-compliance with the subrule in this regard would constitute a waiver of the points not taken in the notice of appeal and it would seem that these points cannot be taken except if condonation and leave to amend the notice of appeal (on terms as to adjournment and costs) are granted by the appeal court. [31]

The Appellate Division/Supreme Court of Appeal has often permitted an appellant to rely on a new point of law on the basis that the court cannot be prevented from deciding an appeal on a point of law merely because the appellant had not relied thereon; otherwise the intolerable position would arise that the court of appeal would be bound by a mistake of law on the part of the appellant. [32] However, this approach only applies when the issue involved

is a pure question of law covered by the pleadings and turning on facts which had been fully canvassed. [33]

An invalid notice of appeal cannot be validated by the court of appeal allowing an amendment. [34] An invalid notice of appeal is no bar to a writ of execution. [35]

'What part of the judgment or order is appealed against.' An appeal can be noted only against the judgment itself (i e the substantive order [36]), not against the reasons for judgment; and a notice which purports to appeal against the reasons for judgment is bad. [37]

This subrule requires that the notices of appeal and cross-appeal must make it clear whether the whole or part only of the judgment or order is appealed against and, if part only, exactly what part. [38]

'The particular respect in which the variation . . . is sought.' This subrule requires a notice of appeal to state two things: *(a)* the part of the judgment or order appealed against; and *(b)* the particular respect in which the variation of the judgment or order is sought. In older cases it was held that the object of the requirement that the part of the judgment or order appealed

against must be set out is to avoid embarrassment or ambiguity and where the only issue involved is apparent on the record, strict compliance with the subrule may be waived. [39] In view of the second requirement of the subrule, viz that the particular respect in which the variation of the judgment or order is sought, must be stated, it would seem that compliance with the first is now essential. [40]

Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court of appeal is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality. [41] A party will, however, not be allowed to raise extraneous legal issues in argument on appeal that are dependent on fact-based determinations for which a case had not been made out in the founding papers. In such event, the appeal will be determined strictly in accordance with the case advanced in the founding papers. [42]

A legal concession can be withdrawn and an abandoned legal contention can be revived on appeal if no prejudice is caused thereby to the other party. [43] In *Alexkor Ltd v The Richtersveld Community* [44] it was held that an abandoned legal contention can be revived on appeal only if the contention is covered by the pleadings and the evidence and if its consideration involves no unfairness to the other party. The legal contention must, in other words, raise no new factual issues. [45]

A party will not be allowed on appeal to withdraw a concession amounting to the withdrawal of its opposition of the proceedings in the court a quo, and reinstate its opposition, if prejudice is caused thereby to the other party. [46]

A party is bound by factual concessions and may not present argument in conflict with facts which were common cause in the court *a quo* or in conflict with the parties' common understanding as to what exactly the issues were in the court *a quo*. [47]

Although it may be open to a party to raise a point of law which involves no unfairness to the other party and raises new factual issues, a point raised for the first time on appeal on factual considerations not fully explored in a court below, should not be allowed. [48] In other words, where an appellant seeks to build a case on a foundation not laid in the court *a quo*, he should be precluded from doing so. [49]

Where an objection is taken by a respondent in an appeal on the ground that the notice of appeal does not comply with the provisions of the subrule, the respondent must, if his objections will require the court to look into questions of fact extrinsic to the notice, file a notice of motion and serve a copy upon the appellant, claiming the striking off of the appeal with costs, and allowing the appellant time to reply. [50] If the ground of objection is a defect appearing *ex facie* the notice, i e where objection is taken to the form of the notice of appeal and relates to the contents of the notice as distinct from any extrinsic questions of fact, the respondent may raise his objections *in limine* at the hearing and have them dealt with summarily. [51]

Subrule (5): 'In the case of . . . the Witwatersrand Local Division.' Pursuant to the coming into operation of the Superior Courts Act 10 of 2013 on 23 August 2013, [52] the South Gauteng High Court, Johannesburg (formerly the Witwatersrand Local Division), became a local seat of the Gauteng Division of the High Court (formerly the Transvaal Provincial Division). [53]

Section 6(4) of the Superior Courts Act 10 of 2013 provides as follows:

> '(4) If a Division has one or more local seats —
>
> *(a)* the main seat of that Division has concurrent appeal jurisdiction over the area of jurisdiction of any local seat of that Division, and the Judge President of the Division may direct that an appeal against a decision of a single judge or of a Magistrates [*sic*] Court within that area of jurisdiction may be heard at the main seat of the Division.'

Section 6(4) of the Act, as did s 6(2) of the now repealed Supreme Court Act 59 of 1959, confers concurrent jurisdiction on the local seat concerned over a specified territorial area, the whole of which falls under the area of jurisdiction of the High Court within which the said local seat is situated. In other words, and having regard to the provisions of ss 21(1) and 50(1) of the Superior Courts Act 10 of 2013 (as to which see Volume 1 third edition, Part D), the position under s 6(4) of the Act and s 6(2) of the repealed Act is the same. [54]

'Judge president.' This means the judge president of the Gauteng Division of the High Court, with its main seat in Pretoria. [55]

Subrule (6)*(a)*: 'Make written application to the registrar.' It is for the court, and not the registrar, to decide whether the application is in compliance with the rules. [56]

'For a date of hearing.' Rule 7(2) provides that the registrar shall not set down an appeal at the instance of an attorney unless such attorney has filed a power of attorney authorizing the attorney to appeal together with the application for a date of hearing. Unless the power of attorney is filed together with the application for a date of hearing, the appellant cannot be considered to have made written application in terms of this subrule [57] and the appeal shall in terms of this subrule be deemed to have lapsed. [58] If application for a date for the hearing of the appeal is not properly made, the appeal, if set down, should be struck off the roll. [59]

Rule 7(3) provides that an attorney instructing an advocate to appear in an appeal on behalf of any party other than a party who has caused the appeal to be set down shall, before the hearing of the appeal, file with the registrar a power of attorney authorizing the attorney so to act.

'The name and address of every other party to the appeal.' Failure to comply with this provision may eventually lead to the removal of the appeal from the roll at the commencement of the hearing thereof. [60]

Subrule (6)*(b)*: 'The court to which the appeal is made.' This subrule makes it clear that an application for the reinstatement of an appeal (or cross-appeal) which has lapsed shall be heard by the court to which the appeal is made. This is in conformity with the rule of practice whereby applications for condonation of procedural shortcomings in appeals are heard

by a court comprised of as many judges as would constitute the court of appeal. [61]

It has been held that a power of attorney is not required for the setting down of a reinstatement application. [62]

'Upon good cause shown.' The principle has been held to be firmly established that, in all cases of time limitation, whether statutory or in terms of the rules of court, the High Court has an inherent right to grant condonation where principles of justice and fair play demand it and where the reasons for non-compliance with the time limits have been explained to the satisfaction of the court. [63]

The courts have consistently refrained from attempting to frame any comprehensive definition of what constitutes good (or sufficient) cause for the granting of condonation of procedural shortcomings in appeals. Any attempt to do so would merely hamper the exercise of a discretion which has purposely been made very extensive and which it is highly desirable not to abridge. [64] The overriding consideration is that the matter rests in the judicial discretion of the court, to be exercised with regard to all the circumstances of the case. [65] In *United Plant Hire (Pty) Ltd v Hills* [66] the principles upon which the court exercises its discretion have been stated as follows:

> 'It is well 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 enquiry, relevant considerations may include the degree of non-compliance with the rules, the explanation therefor, 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.'

In *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* [67] the following is stated:

> 'This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends upon the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.'

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 help to compensate for prospects of success which are not strong. [68]

In *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* [69] the Constitutional Court held that an applicant for condonation must give a full explanation for the delay which must not only cover the entire period of the delay but must also be reasonable.

In *Unitrans Fuel and Chemical (Pty) Ltd v Dove-Co Carriers CC* [70] a full court directed that High Courts should in future require that *(a)* the entire period of the delay be thoroughly explained, regardless of the length of the delay; and *(b)* where the delay was occasioned by transcribers contracted to the Department of Justice failing to make records available timeously, that applicants must show (i) that they were not at fault, and (ii) what attempts were made at compelling the transcribers to provide the transcripts, including, but not limited

to, the bringing of an application to court compelling compliance. This measure is aimed at reducing the burden on judges in appeal courts having to wade through voluminous applications for condonation required to explain substantial delays. [71]

Relief will more readily be granted when there is some deficiency or irregularity in the noting or prosecution of the appeal than if no steps at all were taken in connection with the appeal. [72] In accordance with the principles enunciated in the cases referred to above, a lengthy delay may be condoned if weighed against other factors such as a lack of means and assured success on appeal by reason of a recent judgment of the Supreme Court of Appeal. [73]

A long delay will not be condoned if it is clear that the applicant had not 'throughout desired to prosecute his appeal'. [74] Where the applicant's election to abide the judgment was forced upon him by lack of means and was not the result of deliberate choice, extension of time was granted. [75]

An inordinate delay induces a reasonable belief that the order had become unassailable and after such a delay a litigant is entitled to assume that the losing party has accepted the finality of the order and does not intend to pursue the matter further. [76] Thus, to grant condonation after an inordinate delay and in the absence of a reasonable explanation, would undermine the principle of finality in litigation and cannot be in the interests of justice. [77]

The following factors have been considered by the court of appeal when deciding whether the applicant has shown reason which the court considers sufficient to justify it in granting indulgence:

***(a)* Negligence of the attorney.** Though the court is loath to penalize a blameless litigant on account of his attorney's negligence, [78] the Appellate Division has pointed out that: [79]

> 'There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. . . . The attorney, after all, is the

representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.'

It is undesirable to attempt to frame a comprehensive test as to the effect of an attorney's negligence on his client's prospects of obtaining relief or to lay down that a certain degree of negligence will debar the client and another degree will not. Since negligence on the part of the attorney is not an individually decisive factor but must be weighed against all the other factors operative in a particular case, [80] it is preferable to say that the court will consider all the circumstances of the particular case. [81]

By way of broad generalization it can be said that relief will be granted where the attorney's default was due to a bona fide error or misunderstanding. [82] Ignorance of the rules of court and of procedure is generally not a sufficient ground for relief, [83] and in those cases in which condonation was granted by reason of the applicant's sound prospects of success on appeal, practitioners have been warned that they are not entitled to proceed on the assumption that the court will in all cases condone failure to have proper regard to the rules. [84] Pressure of work is no ground for relief. [85] Though errors due to changes of staff, [86] or staff being away on leave, [87] may sometimes afford ground for relief, an attorney cannot escape responsibility for a default on the part of a professional assistant. [88] Obviously no relief will be granted if the default was not satisfactorily explained, [89] or not explained at all. [90]

In appropriate circumstances, the remissness of an attorney in noting and prosecuting an appeal may be penalized by an order of costs *de bonis propriis.* [91]

***(b)* Reasonable prospect of success on the merits.** It is well established that reasonable prospects of success is a factor that a court of appeal should consider in the exercise of its discretion whether or not to grant condonation for shortcomings in the appeal process and to reinstate a lapsed appeal. [92]

In *Immelman v Loubser* [93] it was stated:

'Redelike vooruitsigte op sukses by appèl is natuurlik ook 'n belangrike oorweging. Maar hoewel dit 'n belangrike oorweging is, is dit nie noodwendig in elke geval 'n deurslaggewende oorweging nie.'

Though the factor of reasonable prospect of success on the merits, taken by itself, is not conclusive, the court is bound to assess an applicant's prospects of success unless the cumulative effect of all the other factors relevant to the application is such as to render the application wholly and obviously unworthy of consideration. [94] The cumulative effect of a flagrant breach of the rules of court in more than one respect and the absence of an acceptable explanation may be such that an application for condonation will not be granted whatever the prospects of success. [95]

In some instances it has been held that although an appellant fell short of the other factors in respect of condonation and reinstatement of the appeal, condonation and reinstatement should be granted in the interests of justice because *(a)* the appeal held reasonable

prospects of success; [96] or *(b)* a court of appeal should not deprive itself of the opportunity that an appeal presents for the necessary setting aside of a clearly wrong judgment and order. [97]

It would appear as if the factor of reasonable prospect of success has recently become a factor which could carry the day despite an inauspicious dilatoriness and explanation. [98]

If it appears to the court that the applicant for condonation, i e the prospective appellant, has no prospect of success on appeal or that his prospects of such success are so remote as to be unappreciable, then the condonation applied for will be refused on that ground alone as there would, in such a case, be no point in granting an application for condonation. [99]

On the other hand, reasonable prospect of success on appeal is not a *sine qua non* for condonation; [100] it is sufficient if the appeal is prima facie arguable. [101] If, however, the applicant relies upon the ineptitude and remissness of his own attorney, and his explanation leaves much to be desired, condonation will be granted only if the prospects of success on appeal are strong. [102]

Where application is made for condonation of an appellant's failure to comply with the prescribed procedural requirements, the application should set forth briefly and succinctly such essential information as may enable the court to assess the appellant's prospects of success. [103] Discursiveness should, however, be discouraged in canvassing the prospects of success on the affidavits. [104] Failure to deal with the prospects of success in this way is not necessarily fatal in view of the modern practice to set down an application for condonation at the same time as the hearing of the appeal: the court of appeal will have before it the judgment of the court below, the heads of argument and indeed the full appeal record. [105]

***(c)* The importance of the case.** The appeal court will tend to grant relief where the case involves a substantial sum of money, or will decide an important legal issue, or is brought to clear an imputation of dishonesty. [106] The general importance of the issue may incline the court toward leniency in considering the applicant's explanation of the delay. [107] On the other hand, if the appeal is on a trumpery point, e g where the appeal is on costs only, or on a technicality which does not touch upon the merits, the court will not be inclined to grant relief. [108]

***(d)* Absence of prejudice.** If an applicant claims the indulgence of condonation it is for him to show that the respondent will not be adversely affected thereby to any substantial degree, and that, even if he were to be so affected, other considerations apply which would persuade the court to grant the indulgence sought. [109] The court will also take into consideration the degree of hardship which will be caused to the applicant if condonation is refused. [110]

***(e)* The respondent's interest in the finality of his judgment.** The late filing of a notice of appeal particularly affects the respondent's interest in the finality of his judgment [111] —the time for noting an appeal having lapsed, he is prima facie entitled to adjust his affairs on the footing that his judgment is safe. [112]

***(f)* Other factors.** The following are examples of further factors to which the courts may have regard when considering applications for leave to note or prosecute appeals out of time:

(i) The avoidance of unnecessary delay in the administration of justice. [113]

(ii) The convenience of the court. [114]

(iii) Absence of objection from the respondent [115] —though not irrelevant, this is not a decisive or overriding consideration. [116]

(iv) No substantial benefit to the applicant if the appeal is allowed and is won by him. [117]

(v) *Mala fides* on the part of the applicant, e g that he is merely trying to gain time, [118] or utilising the delay in order to get rid of his assets. [119]

(vi) Reprehensible conduct of the applicant. [120]

(vii) The length of the record, the copying, checking and indexing of which caused delay. [121]

(viii) The illness of the applicant. [122]

(ix) The death of the applicant and a delay in the appointment of the executors of his deceased estate. [123]

(x) Matters beyond the control of the applicant such as delay due to war, [124] or to the state of the roll, [125] or to the respondent himself, [126] or to the absconding of the appellant's attorney. [127]

(xi) The public interest, for example where the appellant is a public body which handles public (i e taxpayers') money and the issues in the appeal touch on matters of public interest. [128]

Condonation of the non-observance of the rules is by no means a mere formality. [129] It has been held that it is for the applicant to satisfy the court that there is sufficient cause for excusing him from compliance, [130] and the fact that the respondent has no objection, although not

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irrelevant, is by no means an overriding consideration. [131]

It is submitted that the following factors could be added to the factors referred to above:

(1) Whether there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. [132]

(2) Whether the decision sought on appeal will have any practical effect. [133]

Extension of time and condonation must, therefore, normally be sought by way of a substantive application on notice of motion to the other parties and supported by affidavits setting out the relevant facts. [134] The reason why the indulgence is sought should be set out, [135] and where the cause of the delay has been the mistake or default of a third party (e g the applicant's attorney) there should be an affidavit by such party. [136] The fullest disclosure should be made of all the facts relevant to the matter. [137]

An application for condonation should be lodged without delay as soon as it is realized that there has not been compliance with a rule of court. [138] Even where a prescribed period has not yet expired, but a party realizes that he will not be in a position within that period to comply with the relevant rule of court, he ought to apply for condonation as soon as practicable if the respondent does not consent to the extension of a prescribed period. [139]

In many cases the court of appeal considered it convenient to hear argument on the merits of the application and the appeal simultaneously. [140] It has been said that such a procedure is an indulgence and that it will not be adopted as a matter of course, [141] but in *South African Allied Workers' Union (in liquidation) v De Klerk NO* [142] the procedure is looked upon as current

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practice, at least in cases where the prospects of success are to be canvassed and all the material, [143] such as the judgment of the court *a quo*, the appeal record and the heads of argument, are before the court of appeal. [144] Where this procedure is adopted, it is desirable, if the application is successful, that a substantive order to that effect be made whatever the fate of the appeal itself. [145] This is of importance should the decision on appeal give rise to a further appeal. [146]

Costs. An extension of time or condonation is an indulgence, and the general rule is that the applicant must pay the costs of the application. [147] In addition, the applicant may be ordered to pay the respondent's costs of opposition. The court will in every case consider whether or not the opposition was justified, and upon the facts either refuse the costs of opposition, or make them costs in the cause or grant costs of opposition. [148] In general, the question as to whether the applicant should be ordered to pay the respondent's costs of opposition depends upon whether the respondent was reasonable in opposing the application. [149]

Subrule (7)*(a)*: 'At the same time as the application for a date of hearing.' Failure to file timeously a complete record on appeal may result in the appeal being struck off the roll [150] or may, in appropriate cases, be condoned. [151]

'The appellant shall file with the registrar . . . copies of the record.' It is for the court, and not the registrar, to decide whether the copies of the record on appeal comply with the rules. [152] It is practical, desirable and necessary that the attorney for an appellant must seek consent from the opposition for the omission from the appeal record of formal documents and everything which is unnecessary to decide on appeal. Failure to do so may create a risk of a special order as to costs. [153] In certain instances an order *de bonis propriis* is justified. [154]

The Appellate Division and Supreme Court of Appeal have on a number of occasions drawn attention to the unnecessary inclusion in appeal records of numerous and sometimes lengthy documents and have made appropriate orders relating to the needless costs occasioned thereby. In an appropriate case, the court of appeal may order that such unnecessary costs be paid *de bonis propriis* by the attorney concerned. For the relevant case law, see the notes to s 19*(d)* of the Superior Courts Act 10 of 2013 s v 'Deprivation of costs' in Volume 1 third edition, Part D.

The Supreme Court of Appeal has stressed that an agreed statement of facts which would replace the record of the trial proceedings and serve as the exclusive basis on which the appeal should be adjudicated, is a commendable course of action as it contributes to an expedited hearing of the matter taking place. [155]

The position in regard to a record of trial proceedings that was lost and was not reconstructed at the time of hearing of the appeal was dealt with in *Muravha v Minister of Police* [156] in an appeal concerning a challenge to the factual findings made by the trial court. In summary the position is as follows:

(a) in terms of s 34 of the Constitution an appellant is entitled to a fair trial;

(b) without the record in the case, it cannot be said that the appellant had a fair trial;

(c) steps have to be taken by the parties to reconstruct the record in line with the guidelines laid down by the Constitutional Court in *Schoombee v S* [157] For this purpose the appeal should, if necessary, be postponed *sine die*;

(d) counsel for the parties should be directed to immediately take the steps to have the record reconstructed and submit a report to the appellate court within a stated time;

(e) if the record is not capable of reconstruction notwithstanding the efforts in *(c)* and *(d)* above, the parties are to file a joint report to that effect;

(f) the appeal should then be re-enrolled;

(g) if the appellate court finds that the attempts to retrieve the record are unsatisfactory or that the record is not capable of reconstruction, the appeal should be upheld and the matter be remitted to the trial court to start *de novo* before another presiding officer. Costs of the trial should be reserved.

Subrule (7)*(b)*: 'Copies of the record to be served on the respondent.' See, in this regard, the notes to subrule (6)*(a)* s v 'The name and address of every other party to the appeal' above.

Subrule (7)*(d)*: 'The other party may approach the court for an order that the application has lapsed.' This subrule envisages an interlocutory application. The party approaching the court need not comply with rule 6(5)*(b)*.

Subrule (8)*(a)*: 'The copies referred to in subrule (7) shall.' It is the duty of an attorney charged with prosecuting an appeal on behalf of a client to see that a proper record of appeal is placed before the court and in order to discharge this duty the attorney must peruse the record and satisfy himself that it is complete and in compliance with the rules. [158]

Failure to comply with the provisions of this subrule may result in the appeal being struck off the roll. [159]

As to punitive costs when the record is not in order, see the notes to subrule (7)*(a)* s v 'The appellant shall file with the registrar . . . copies of the record' above.

Subrule (9): 'By consent of parties.' It has been held, under rule 50(8)*(b)* which deals with appeals from magistrates' courts, that it can justifiably be expected of an appellant's attorney, where he realizes that documents used in a trial are not necessary for the adjudication of an appeal, to take steps to obtain the consent of the respondent's attorney in terms of the subrule to omit such documents from the record on appeal. [160] The failure to do so can, in an appropriate case, lead to the costs of the preparation of such documents being disallowed as costs of appeal, and there is no reason why the appellant should be burdened by his attorney with the costs of the preparation of the documents. [161] See further the notes to subrule (7)*(a)* s v 'The appellant shall file with the registrar . . . copies of the record' above.

Subrule (10): 'May agree to submit such appeal . . . in the form of a special case.' An agreement under this subrule contains two elements, viz *(a)* an agreement as to the contents of the special case; and *(b)* an agreement that it is unnecessary to file a full record. [162]

Subrule (11). This subrule was repealed by GN R317 of 17 April 2015 (*GG* 38694 of 17 April 2015) with effect from 22 May 2015. The subrule dealt with, *inter alia*, the suspension of the operation and execution of an order pending the decision of an application for leave to appeal or appeal. The operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, and the suspension of such a decision, are now provided for in s 18 of the Superior Courts Act 10 of 2013, as to which see Volume 1 third edition, Part D.

Subrule (12): 'If the order referred to in subrule (11) is carried into execution by order of the court.' Subrule (11) was repealed by GN R317 of 17 April 2015 (*GG* 38694 of 17 April 2015) with effect from 22 May 2015. This subrule dealt with, *inter alia*, the suspension of the operation and execution of an order pending the decision of an application for leave to appeal or appeal. The operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, and the suspension of such a decision, are now provided for in s 18 of the Superior Courts Act 10 of 2013, as to which see Volume 1 third edition, Part D.

It is submitted that if a decision is put into operation as contemplated in s 18 of the Superior Courts Act 10 of 2013, the provisions of this subrule apply. [163]

'The party requesting such execution shall . . . enter into such security.' The subrule provides for security for the restitution of any sum obtained upon execution. [164]

Subrule (13): General. In *Shepherd v O'Niell* [165] it was held that there is much to be said for protecting a respondent in an appeal from an impecunious appellant who drags him from one court to another. On the other hand, to in effect bar access to a court of appeal because a deserving litigant is unable to put up security appears to be unfair and in conflict with the provisions of the Constitution of the Republic of South Africa, 1996. The court [166] held that the conflicting rights could be adequately safeguarded were the court to be vested with the power to determine, in the exercise of its discretion, whether a particular appellant should be compelled to put up security and in what amount. To the extent that the subrule did not embody such a power it was held [167] to be in conflict with the Constitution of the Republic of South Africa, 1996 and to that extent invalid. However, in terms of s 172(1)*(b)*(ii) of the Constitution the court [168] suspended the declaration of invalidity for a period of three months from 30 August 1999 to enable the Rules Board for Courts of Law to effect the necessary amendment. The subrule was consequently amended on 29 October 1999 to empower the court that grants leave to appeal to release the appellant wholly or partially from putting up security. [169]

Subrule (13)*(a)*: 'The court in granting leave to appeal or subsequently on application to it.' In terms of this subrule it is the court that grants leave to appeal that can release the appellant, either wholly or partially, from putting up security, either when granting such leave or on application once leave to appeal has been granted. [170] It has been held that if the Supreme Court of Appeal granted an appellant leave to appeal, it is only that court that can release the appellant from the obligation to provide security for the costs of appeal, and the court hearing the appeal (if it is not the Supreme Court of Appeal but a full court) does not have jurisdiction to do so. [171]

Rule 49(13) in its amended form has been found not to be unconstitutional or *ultra vires* the statutory powers of the Rules Board for Courts of Law. [172]

'Before lodging copies of the record.' Until such time as an order for the release of the obligation to file security is granted, the respondent is obliged to provide security *before* lodging copies of the record with the registrar. If security is not lodged, the lodging of the record constitutes an irregular step within the meaning of rule 30. [173]

'The appellant shall, before lodging copies of the record on appeal with the registrar.' The provisions of this subrule are peremptory. [174]

'Enter into good and sufficient security.' If security is not furnished in terms of this subrule the appeal may be struck off the roll though, in appropriate cases, condonation may be granted. [175]

Subrule (13)*(b)*: 'The registrar shall fix the amount and the appellant shall enter into security.' In the event of the registrar not yet having fixed the amount of security, the appropriate course for the respondent is to approach the registrar and press for an early determination of the amount of security to be provided. In the unlikely event of the registrar, notwithstanding such an approach, unreasonably failing to discharge his duty in terms of this subrule, the respondent would be entitled to approach the court for an order directing the registrar to discharge the function provided in terms of the subrule. [176]

'Such percentage thereof as the court has determined.' This means the percentage that has been determined by the court that granted leave to appeal as contemplated in paragraph *(a)* of this subrule.

Subrule (15): 'Shall deliver a concise and succinct statement.' The provisions of this subrule are peremptory and where heads of argument are not filed timeously the appeal may be struck off the roll. [177] The court may, however, in terms of rule 27(3), on good cause shown condone non-compliance. [178] 'Good cause' includes a reasonable and acceptable explanation for the failure to comply with the subrule, a fair prospect of success in the appeal and a reasonable and acceptable explanation for the delay, if any, in applying for condonation. [179]

The award of costs in applications for condonation of failure to comply with the subrule is considered in *Guardian National Insurance Co Ltd v Engelbrecht*. [180]

'Of the main points (without elaboration) which he intends to argue on appeal.' Heads of argument are important for the proper administration of justice. In *S v Ntuli*, [181] referred to with approval in *Feni v Gxothiwe*, [182] Marcus AJ stated: [183]

> 'Heads of argument serve a critical purpose. They ought to articulate the best argument available to the appellant. They ought to engage fairly with the evidence and to advance submissions in relation thereto. They ought to deal with the case law. Where this is not done and the work is left to the Judges, justice cannot be seen to be done. Accordingly, it is essential that those who have the privilege of appearing in the Superior Courts do their duty scrupulously in this regard.'

The purpose of heads of argument is to identify the dispute and to set out the argument to be delivered so as to assist the court and the opponent in the preparation of the case and during argument in court. The court will always try to assist legal representatives by granting time for further argument where necessary. Where the dispute is identified, however, the practice which allows the applicant's legal representative first to listen to the argument of the respondent's legal representative before he replies thereto by means of (further) heads of argument is objectionable. [184]

Superfluous matter, such as lengthy quotations from the evidence, from the judgment of the court *a quo* and from authorities on which reliance is placed, should be eliminated or at least kept within reasonable bounds. [185] Excessive prolixity may be penalized by way of an appropriate order as to costs. [186]

In *Tunica Trading 59 (Pty) Limited v Commissioner, South African Revenue Service* [187] the respondent submitted a judgment to the court after the hearing of the appeal and after judgment was reserved. The appellant did not take kindly to this approach as the respondent

neither requested the court's permission to do so, nor notified the appellant of its intention to do so. In its judgment the full court [188] referred to *Moto Health Care Medical Scheme v HMI Healthcare Corporation (Pty) Ltd* [189] where the Supreme Court of Appeal strongly deprecated this practice and granted punitive costs against a party who behaved in this way.

Heads of argument are not evidence. They should contain argument based on the pleadings and evidence/affidavits in opposed applications. It is irregular to raise a potential defence for the first time in heads of argument, especially where the facts have not been fully canvassed. [190]

On the drafting of heads of argument, see Harms 'Heads of argument in courts of appeal' 2009 (December) *Advocate* 20–22.

See also the notes to rule 10(1)*(a)* of the Rules of the Supreme Court of Appeal s v 'Main heads of argument' in Volume 1 third edition, Part C1.

Subrule (16): 'The Trade Marks Act, 1963.' The Trade Marks Act 62 of 1963 was repealed by the Trade Marks Act 194 of 1993. The noting of an appeal against a decision or order of the Registrar of Trade Marks is provided for in s 53(4) of Act 194 of 1993. The 'agent' for purposes of this subrule is now the agent referred to in s 8 of Act 194 of 1993.

Subrule (18): 'A contemplated appeal be dealt with as an urgent matter.' This subrule, inserted in 1987, seems to be an attempt to meet the need for some provision for urgent appeals adverted to in *Ritch v Orthopaedic Buildings (Pty) Ltd*. [191]

1 Section 18 of the Superior Courts Act 10 of 2013 does not prescribe a procedure for an appeal against an order in terms of s 18(3) of the Act putting into operation an order of court pending a potential appeal. In *Jai Hind EMCC CC t/a Emmarentia Convenience Centre v Engen Petroleum Ltd South Africa* 2023 (2) SA 252 (GJ) the full court laid down the following procedure:
'[26] In our view, it is plain that to prosecute an appeal under the conditions prescribed by s 18(4)(iii), i e as a matter of extreme urgency, the provisions of rule 49 are inapplicable. Rule 49 is about setting time periods for the obvious steps to be taken, of which, as one example, 60 days is prescribed to file a record. The procedure in rule 49(6)–(10) is incompatible with urgency.
[27] Extreme urgency means just that. The rationale is imbedded in the premise of s 18, i e the immediate implementation of an order to ensure its efficacy and, concomitantly, the need to resolve any dispute about whether that should happen extremely quickly.
[29] The default procedure when s 18(4) is invoked must be to approach the head of court at once. In the Gauteng Division, because of the use of a digital platform for all civil cases, it is very simple to expedite a s 18(4) appeal with genuine "extreme urgency" in any case where oral evidence was not received, of which this case is an example. A record for the appeal can be produced by doing no more than adding an additional index to the Caselines file of all the documentation relevant for the appeal, and excluding what is irrelevant. That can be done on the same day the notice of appeal is filed. No compiling and printing and copying of a record are needed. All that remains to make the matter ripe to be heard is the filing of heads of argument, if needed. A further ad hoc directive, after a meeting with the Deputy Judge President to set a date, completes the process. It is conceivable that a hearing can take place within no more than 20–25 court days, at most. This judgment does not address the appropriate procedure where a record of orally received evidence might be required. What can however be noted is that, even in a case where oral evidence is adduced, it is not axiomatic that such evidence is required for an effective adjudication of the issues raised by s 18(3). Even when that oral evidence is relevant, it is not self-evident that the whole record is required, or indeed required at all, if the initial judgment traverses it in appropriate detail. The s 18 controversy might well be capable of adjudication with no record at all, as has been recognised by the SCA; see *Knoop v Gupta* supra, per Wallis JA, in paras 49 and 50.]
[30] What is appropriate is that a directive be issued by the Judge President to cater for the absence of rules. Until that occurs, the procedure

to follow is as follows:
(a) File a notice of appeal and appeal index in the same digital file as soon as reasonably possible after the s 18(3) order was made.
(b) Simultaneously approach the Deputy Judge President for directions about heads of argument and a date for a hearing.'

2 See, for example, *Goodrich v Botha* 1954 (2) SA 540 (A) at 544; *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 606H–608A; *National Union of Metalworkers of South Africa v Henred Fruehauf Trailers (Pty) Ltd* 1995 (4) SA 456 (A) at 475E–G. See further the notes to s 17(1)*(a)* of the Act s v 'An appeal' in Volume 1 third edition, Part D.

3 *Songono v Minister of Law and Order* 1996 (4) SA 384 (E) at 385I–J; *Hing v Road Accident Fund* 2014 (3) SA 350 (WCC) at 353J. In *Xayimpi v Chairman Judge White Commission (formerly known as Browde Commission)* [2006] 2 All SA 442 (E) an application for leave to appeal was dismissed due to non-compliance with this subrule (the applicants simply having attached an affidavit of some 45 pages instead of setting out the grounds of appeal clearly and succinctly).

4 *Songono v Minister of Law and Order* 1996 (4) SA 384 (E) at 395J–386A.

5 *Strategic Liquor Services v Mvumbi NO and Others* 2010 (2) SA 92 (CC) at 96G–97A; and see *Botes v Nedbank Ltd* 1983 (3) SA 27 (A) at 27H–28A; *Commissioner, South African Revenue Service v Sprigg Investment 117 CC t/a Global Investment* 2011 (4) SA 551 (SCA) at 561A–E. On the other hand, the procedure of requesting reasons should not be applied on senseless bases as held by FMM Reid J in *Strydom v Coomans* 2024 (4) SA 302 (NWM):
'[5] I will be acting in dereliction of my judicial duties to not elaborate and make a stance on the following. It is concerning that an attorneys' firm requests reasons for a judgment where a written judgment, which includes the reasons for the judgment and order, has already been handed down. To my mind this indicates that the attorney did either one of the following:
[5.1] He/she did not bother to read the judgment; or
[5.2] in the event that only the order was received without the judgment, the attorney did not enquire from the registrar of the court or the judge's secretary whether a written judgment has been handed down in order to obtain same.
[6] The request for reasons where reasons have been provided in a written judgment indicates that the request is nothing but a "knee-jerk" reaction by the attorney, without applying his/her mind to the matter. When an officer of court acts in legal processes without applying their mind, it not only fails to serve the interests of justice, but also actually and factually prejudices his/her own client.
[7] The actual prejudice suffered by the court and by the litigant, which prejudice is caused by his/her own attorney, is, inter alia, two-pronged:
[7.1] The litigation process becomes protracted and time is wasted in finalisation of the proceedings. The attorney is waiting for the court to provide reasons and the court's administrative resources are used in obtaining the court file. All of this takes time. The court then, having already provided reasons, has to peruse the court documents only to find that reasons have been provided.
[7.2] In all probability the litigant will be invoiced by the attorney for the drafting of the request for reasons and the perusal of the reasons so granted.
[8] It has been noticed by this court that a dubious practice is developing in this division where attorneys request reasons on senseless bases, for example, where a matter has been removed from the unopposed motion roll on request of both parties or by notice of removal; where matters are postponed by agreement between the parties; or where written judgments have been provided, setting out the reasons for the judgment. In my view this amounts to nothing other than mindless or frivolous litigation and, to be blunt, hints at a fee-generating practice.
[9] In addition to the injustice alluded to above, the action of an attorney, asking reasons where reasons have been provided, adds to the ever increasing workload of the judiciary. The principle that judicial time is valuable and should not be wasted has been set out succinctly by the Supreme Court of Appeal in *S v Kruger* 2014 (1) SACR 647 (SCA) para 3, which reads as follows:
"The time of this court is valuable and should be used to hear appeals that are truly deserving of its attention. It is in the interests of the administration of justice that the test set out above should be scrupulously followed."
[10] The court cannot and should never be inactive in the face of an injustice being committed, even if the injustice is committed by an attorney against his/her own client. As expressed a century ago by Lord Chief Justice Heward in *R v Sussex Justices, Ex parte McCarthy* [1923] All ER Rep 233 (KB):
"Justice should not only be done, but should manifestly and undoubtedly be seen to be done."
[11] In this instance the court will act in the interests of justice by setting a measure in place that would prevent an attorney from mindlessly, thoughtlessly or frivolously conducting litigation for its own gain. This measure would be to make an order that the attorney would not be entitled to any fee for either the drafting and filing of the request for reasons or the perusal of the reasons given. It is grossly unfair to expect a layperson to pay his/her attorney for frivolous, thoughtless and/or mindless processes conducted by his/her attorney. It follows that this measure is only to be resorted to in the clearest of cases, such as this.'

6 See, for example, *Lipschitz NO v Saambou-Nasionale Bouvereniging* 1979 (1) SA 527 (T).

7 See *Lipschitz NO v Saambou-Nasionale Bouvereniging* 1979 (1) SA 527 (T) (the case was decided before the substitution of rule 49 in 1983).

8 *Lipschitz NO v Saambou-Nasionale Bouvereniging* 1979 (1) SA 527 (T) at 529D; but see *High School Ermelo v The Head of the Department* [2008] 1 All SA 139 (T) at 141*d*; *MEC for Co-operative Governance and Traditional Affairs v Umkhanyakude District Municipality* (unreported, KZP case no 7718/22P dated 2 December 2022) at paragraphs [12] and [15]; *Macberth Attorneys Incorporated v South African Forestry Company SOC Ltd* (unreported, GP case no 29177/2020 22 March 2023) at paragraph [7].

9 *National Union of Metalworkers of South Africa v Jumbo Products* CC 1996 (4) SA 735 (A). In *Corvine Investments CC v Advtech (Pty) Ltd t/a Property Division* (unreported, GJ case no 2145/2020 dated 30 November 2023) the court, although finding that it was bound by the decision in *Jumbo*, expressed the following view:
'[10] . . . On a proper consideration of the provisions of section 17(2)*(b)* of the Superior Courts Act, it seems to me, where an application for condonation has been brought for the late delivery of an application for leave to appeal, and the application (for condonation) has been argued together with the merits of the application for leave to appeal, and condonation has been refused, this constitutes the refusal of leave to appeal by the court *a quo* as contemplated by the provisions of section 17(2)*(b)* of the Superior Courts Act. I cannot see that it would be permissible for the Court *a quo* to go on to decide an application for leave to appeal itself after refusing condonation, or "in the same breath" as doing so. If condonation is refused, there is no basis thereafter for the Court to either grant or refuse the application for leave to appeal. In my view this must nevertheless constitute the refusal of leave to appeal within the ambit of section 17(2)*(a)*.'

10 Unreported, SCA case no 1044/2020 dated 22 April 2022. See also *Benson v Standard Bank of South Africa* (unreported, GJ case no 2011/17143 dated 17 May 2022).

11 2009 (6) SA 433 (W) at 436H–437E.

12 *Atkinson v Rare Earth Extraction Co Ltd* 2002 (2) SA 547 (C) at 562C–E.

13 *Harlech-Jones Treasure Architects CC v University of Fort Hare* 2002 (5) SA 32 (E) at 52A; *Queenstown Girls High School v MEC, Department of Education, Eastern Cape* 2009 (5) SA 183 (Ck) at 186I–187A.

14 *John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (in Liquidation)* 2018 (4) SA 433 (SCA) at 436G–437B.

15 A court consisting of two judges is a 'full bench' (*MEC for Co-Operative Governance v Mogalakwena Municipality* 2017 (2) SA 464 (GP) at 470C–D).

16 *Montsamai v Read* 1961 (1) SA 173 (O) at 174; *Meyer v Dowson & Dobson Ltd* 1967 (4) SA 628 (T) at 628F; *De Sousa v Cappy's Stall* 1975 (4) SA 959 (T) at 961; *Lipschitz NO v Saambou-Nasionale Bouvereniging* 1979 (1) SA 527 (T) at 529C. In *SA Soutwerke (Pty) Ltd v Camel Rock Trading 520 CC* (unreported, GP case no A124/2022 dated 26 September 2023) the appellant applied for, amongst others things, condonation for the late delivery of its notice of appeal and the reinstatement of its appeal. The application was enrolled before the full court which was constituted to hear the appeal. After delivery of the appellant's condonation application, the respondent brought an application for an order that the appeal had lapsed. This was met by a counter-application to stay the respondent's application pending the determination of the appellant's condonation application by the full court. The respondent then sought a directive from the Deputy Judge President to the effect that its application and the counter-application could, as a matter of preference in the light of the imminent appeal, be enrolled before a single judge as court of first instance. The request was declined and it was directed that those applications also be heard by the full court of appeal. Eventually, the appellant's condonation application was dismissed and the appeal was not reinstated. A costs order was made in favour of the respondent in respect of its application for a declarator up to the date of the delivery of the appellant's counter-application.

17 *Goodrich v Botha* 1954 (2) SA 540 (A) at 544; *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA) at 444F–G; and see *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 607; *Competition Commission v Bank of America Merrill Lynch International Ltd* 2020 (4) SA 105 (CAC) at paragraphs [74]–[76].

18 *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA) at 444G.

19 *Nepken v Michaelson* 1908 TS 954.

20 *Blou v Lampert & Chipkin NNO* 1970 (2) SA 185 (T) at 198D.

21 *Nepken v Michaelson* 1908 TS 954; *Soobiah v Phipson* (1917) 38 NLR 103; *Bloch v Cohen* 1933 TPD 100; *Goodrich v Botha* 1954 (2) SA 540 (A); *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 607; *Bank Windhoek Bpk v Rajie* 1994 (1) SA 115 (A) at 151C–G.

22 *Municipal Council of Bulawayo v Bulawayo Waterworks Co Ltd* 1915 AD 611 at 624 and 631–2.

23 *Von Steinaecker v Kneisel* (1898) 19 NLR 153; *Kriel v McDonald* 1930 SWA 53; *Partridge Ltd v Buttar* 1953 (2) SA 415 (N); *Giliomee v*

Cilliers 1958 (3) SA 97 (A) at 100; *Kakamas Bestuursraad v Louw* 1960 (2) SA 202 (A) at 223; *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 608H; *Bay Passenger Transport Ltd v Franzen* 1975 (1) SA 269 (A) at 278C; *Standard Bank of SA Ltd v Stama (Pty) Ltd* 1975 (1) SA 730 (A) at 745E; *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) at 560H; *SAR & H v Sceuble* 1976 (3) SA 791 (A) at 794C; *Naboomspruit Munisipaliteit v Malati Park (Edms) Bpk* 1982 (2) SA 127 (T) at 138B–E; *Bayly v Knowles* 2010 (4) SA 548 (SCA) at 557G–H; *O'Shea NO v Van Zyl and Others NNO* 2012 (1) SA 90 (SCA) at 103F–G; *Gent v Du Plessis* (unreported, SCA case no 1029/2019 dated 24 December 2020) at paragraphs [15]–[16]. See, however, *Du Plessis NO v Goldco Supplies (Pty) Ltd* 2009 (6) SA 617 (SCA) where the Supreme Court of Appeal varied ('altered') the order which had been applied for and obtained by the respondent (as applicant) in the court *a quo* despite the absence of a cross-appeal and the dismissal of the appeal. For an analysis of this case, see M H Wessels 'How an unsuccessful appeal can have a lucrative result' 2012 (April) *Advocate* 55.

24 *Putumani v Mamoojee* (1908) 29 NLR 1; *Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk* 1970 (3) SA 367 (A) at 395H–396A; *Wilkens Nel Argitekte v Stephenson* 1987 (2) SA 628 (O) at 631G.

25 By GN R472 of 12 July 2013.

26 Cases relating to grounds of appeal under subrule (4) prior to its substitution should therefore be treated with caution.

27 2010 (3) SA 410 (SCA).

28 At 414C–D, referring to *Thompson v South African Broadcasting Corporation* 2001 (3) SA 746 (SCA) at paragraph 7 where it was held (at 749H) that:
'The Court is entitled to base its judgment and to make findings in relation to any matter flowing fairly from the record, the judgment, the heads of argument or the oral argument itself.'
See also *OB v LBDS* 2021 (6) SA 215 (WCC) (a decision of the full court) at paragraphs [20]–[21].

29 [2017] 2 All SA 322 (WCC). See also *Limpopo Province Voluntary Group Scheme Board v Mahubane* (unreported, LP case no HCAA14/2019 dated 28 January 2021) at paragraphs [28]–[35]

30 At paragraphs [3]–[18].

31 There should in the normal course be a formal application for amendment, on notice of motion with supporting affidavits showing cause for relief, but the appeal court may in its discretion allow an amendment at the hearing, without requiring an affidavit to be filed, if there has been adequate notice (*Cullinan v Union Government (Minister of Lands)* 1922 CPD 33; *Ex parte Davies and Kamann: In re Universal Motor Garage v Davies and Kamann* 1922 OPD 85 at 87; *Van Rensburg v Fouriesburg Hotel (Edms) Bpk* 1980 (2) SA 26 (O) at 29G–H).

32 See, for example, *Cole v Government of the Union of South Africa* 1910 AD 263 at 272–3; *Morobane v Bateman* 1918 AD 460 at 464; *Van Rensburg v Van Rensburg* 1963 (1) SA 505 (A) at 510A–B; *Argus Printing and Publishing Co Ltd v Die Perskorporasie van SA Bpk* 1975 (4) SA 814 (A) at 822D; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23F; *De Beers Holdings (Pty) Ltd v Commissioner for Inland Revenue* 1986 (1) SA 8 (A) at 33E–G; *Quartermark Investments (Pty) Ltd v Mkhwanazi* 2014 (3) SA 96 (SCA) at 103A–D (where it is, *inter alia*, pointed out that if a court of appeal ignores a new point of law it may 'amount to the confirmation by it of a decision clearly wrong' which, in turn, would 'infringe upon the principle of legality'). See also *Baront Investments (Pty) Ltd v West Dune Properties 296 (Pty) Ltd* 2014 (6) SA 286 (KZP) at 309G–310D and *Minister of Justice and Constitutional Development v Southern African Litigation Centre* 2016 (3) SA 317 (SCA) at 330C–F; *Mokweni v Plaatjies* (unreported, WCC case no A178/2022 dated 26 October 2023 — a decision of the full court) at paragraphs [17]–[42].

33 *Workmen's Compensation Commissioner v Crawford* 1987 (1) SA 296 (A) at 307G–I; *Shraga v Chalk* 1994 (3) SA 145 (N) at 150G–151E; *Navidas (Pty) Ltd v Essop; Metha v Essop* 1994 (4) SA 141 (A) at 148G–149C. See also *BP Southern Africa (Pty) Ltd v Secretary for Customs and Excise* 1985 (1) SA 725 (A) at 733G–H; *Riddles v Standard Bank of South Africa Ltd* 2009 (3) SA 463 (T) at 470H. For an exceptional case, see *Classic Crown Properties 55 CC v Standard Bank of South Africa Limited* (unreported, GP case no A314/2021 dated 5 October 2023 — a decision of the full court).

34 *Weiner v Arcus* 1940 TPD 174; *Els v Maree* 1952 (3) SA 758 (O); *Van Aswegen v De Swardt Motors (Edms) Bpk* 1958 (1) SA 579 (O); *Bornman v Christiana Furnishers* 1958 (4) SA 405 (T); *Vilakazi v Vilakazi* 1959 (1) SA 205 (T); *Harvey v Brown* 1964 (3) SA 381 (E); *Ex parte Simoes: In re Hasewinkel v Simoes* 1970 (2) SA 302 (T); *Tzouras v SA Wimpy (Pty) Ltd* 1978 (3) SA 204 (W) at 205.

35 *Tzouras v SA Wimpy (Pty) Ltd* 1978 (3) SA 204 (W).

36 It is well established that an appeal lies against an order and not the reasoning (*Macsteel Tube and Pipe, a division of Macsteel Service Centres SA (Pty) Ltd v Vowles Properties (Pty) Ltd* (unreported, SCA case no 680/2020 dated 17 December 2021) at paragraph [11]). In general, an order is the operative part of a judgment (*SA Eagle Versekeringsmaatskappy Bpk v Harford* 1992 (2) SA 786 (A) at 792C–D; *Carter v Haworth* 2009 (5) SA 446 (SCA) at 450D–E; *Department: Transport, Province of Kwazulu-Natal v Ramsaran* (unreported, SCA case no 1274/2017 dated 23 May 2019) at paragraph [7]; *Elan Boulevard (Pty) Ltd v Fnyn Investments (Pty) Ltd* 2019 (3) SA 441 (SCA) at 448A).

37 See, for example, *Molteno Bros v SA Railways* 1936 AD 408; *Western Johannesburg Rent Board v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355; *Attorney-General (Tvl) v Raphaely* 1958 (1) SA 309 (A); *Haviland Estates (Pty) Ltd v McMaster* 1969 (2) SA 312 (A); *Holland v Deysel* 1970 (1) SA 90 (A) at 93D; *Lipschitz NO v Saambou-Nasionale Bouvereniging* 1979 (1) SA 527 (T) at 529H; *Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A) at 715D; *SA Eagle Versekeringsmaatskappy Bpk v Harford* 1992 (2) SA 786 (A) at 792C; *SOS Kinderdorf International v Effie Lentin Architects* 1993 (2) SA 481 (Nm) at 493B; *South African Reserve Bank v Khumalo* 2010 (5) SA 449 (SCA) at paragraph [4]; *Tecmed Africa (Pty) Ltd v Minister of Health* [2012] 4 All SA 149 (SCA) at paragraphs [16] and [17]; *Absa Bank Ltd v Van Rensburg* 2014 (4) SA 626 (SCA) at 632F–G; *Absa Bank Ltd v Mkhize* 2014 (5) SA 16 (SCA) at 37A; *Atholl Developments (Pty) Ltd v Valuation Appeal Board for the City of Johannesburg* (unreported, SCA case no 209/2014 dated 30 March 2015) at paragraphs [4] and [8]–[13]; *Serengeti Rise Industries (Pty) Ltd v Aboobaker NO* 2017 (6) SA 581 (SCA) at 585G–H. See also *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* 2013 (5) SA 183 (SCA) at 198I–J; *Baliso v FirstRand Bank Ltd t/a Wesbank* 2017 (1) SA 292 (CC) at 296E where *South African Reserve Bank v Khumalo* 2010 (5) SA 449 (SCA) is referred to with approval; *Department: Transport, Province of Kwazulu-Natal v Ramsaran* (unreported, SCA case no 1274/2017 dated 23 May 2019) at paragraph [7].

38 Earlier decisions reflected a general tendency that a court of appeal will accept a notice which does not state whether the whole or part of the judgment is appealed against, but it will do so only where it is quite clear that it is the whole of the judgment that is appealed against, or where the notice clearly shows that part only of the judgment is being attacked (*Otavi Minen und Eisenbahn Gesellschaft v Neuhaeuser* 1922 SWA 88; *Dawes v Moore* 1930 EDL 166; *Hubert Davies & Spencer Ltd v Highveld Supply Stores* 1931 TPD 301; *De Jager v Diner* 1957 (3) SA 567 (A); *Makings v Makings* 1958 (1) SA 338 (A); *Harvey v Brown* 1964 (3) SA 381 (E) at 383A–384A; *Haviland Estates (Pty) Ltd v McMaster* 1969 (2) SA 312 (A) at 335E; *Holland v Deysel* 1970 (1) SA 90 (A)). In the light of the clear provisions of the subrule the earlier decisions should be treated with caution.

39 *De Jager v Diner* 1957 (3) SA 567 (A) at 573D; *Makings v Makings* 1958 (1) SA 338 (A) at 341D–F.

40 This paragraph (as it appeared in Volume 1 second edition, Part C1) was cited with approval by the full court in *Wiese v Absa Bank Limited* [2017] 2 All SA 322 (WCC) at paragraph [12].

41 *Cusa v Tao Ying Metal Industries* 2009 (2) SA 204 (CC) at 225A–C; *Cuninghame v First Ready Development 249 (Association Incorporated under section 21)* 2010 (5) SA 325 (SCA) at 337G–I; *Nedbank Ltd v Mendelow and Another NNO* 2013 (6) SA 130 (SCA) at 136F–137C; *Baront Investments (Pty) Ltd v West Dune Properties 296 (Pty) Ltd* 2014 (6) SA 286 (KZP) at 309G–310D; *Kouga Local Municipality v St Francis Bay (Ward 12) Concerned Residents Association* 2024 (4) SA 70 (SCA) at paragraph [17].

42 *Kouga Local Municipality v St Francis Bay (Ward 12) Concerned Residents Association* 2024 (4) SA 70 (SCA) at paragraphs [17]–[18].

43 *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 22G–24G; *De Beers Holdings (Pty) Ltd v Commissioner for Inland Revenue* 1986 (1) SA 8 (A) at 33E–G; *Bank of Lisbon and South Africa Ltd v The Master* 1987 (1) SA 276 (A) at 288D–F; *Telkom Suid-Afrika Bpk v Richardson* 1995 (4) SA 183 (A) at 195B–D; *Rudolph v Commissioner for Inland Revenue* 1997 (4) SA 391 (SCA) at 395B–E; *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) at paragraph [43]; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd* 2014 (5) SA 138 (CC) at 155D–E; *Lascad Technology (Pty) Limited v ABSA Bank Limited* (unreported, GJ case no 2018/40614 dated 21 February 2022) at paragraph [7].

44 2004 (5) SA 460 (CC) at 476H–477C.

45 *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) at 477C.

46 *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd* 2014 (5) SA 138 (CC) at 155B–156H.

47 *AJ Shepherd (Edms) Bpk v Santam Versekeringsmaatskappy Bpk* 1985 (1) SA 399 (A) at 413D–415G. See also *Jurgens Eiendomsagente v Share* 1990 (4) SA 664 (A); *Kerksay Investments (Pty) Ltd v Randburg Town Council* 1997 (1) SA 511 (T); *Filta-Matix (Pty) Ltd v Freudenberg* 1998 (1) SA 606 (SCA); *F&I Advisors (Edms) Bpk v Eerste Nasionale Bank van Suidelike Afrika Bpk* 1999 (1) SA 515 (SCA) and *National Union of Metalworkers of South Africa v Driveline* 2000 (4) SA 645 (LAC). In *Saayman v Road Accident Fund* 2011 (1) SA 106 (SCA) it was held (at 114B–D) that concessions are made by counsel in the course of a trial for a variety of reasons, without the contemplation that he is thereby committing his client and without any intention to limit the issues. The statement in question may, for example, be used as an assumption on which to found an argument, or be made in a bona fide spirit of fairness, intending to convey to the court counsel's candid view of the way the court should proceed. In the absence of formality the context must necessarily be decisive of whether an admission has been made. It was also held (at 110B–D) that a mere concession made by counsel in the course of addressing the court does not amount to an unequivocal admission, and is not intended to be a formal admission. Consequently, such a concession may be withdrawn at any time, particularly where such a withdrawal will not cause the other party any prejudice. The term 'formal admission' was

held (at 113I–114A) to mean 'a statement against interest which has the effect of binding the party on whose behalf it is made' and which 'also requires at least an intention, explicit or inferred, and unequivocal, to remove a fact that depends on proof from the field of contention'. See also *Imvula Quality Protection (Pty) Ltd v Loureiro* 2013 (3) SA 407 (SCA) at 423F–G.

48 *Naude v Fraser* 1998 (4) SA 539 (SCA) at 558A–E; *Ras and Others NNO v Van der Meulen* 2011 (4) SA 17 (SCA) at 22C.

49 *Administrator, Transvaal v Theletsane* 1991 (2) SA 192 (A) at 195F–196E and 200G; *Ras and Others NNO v Van der Meulen* 2011 (4) SA 17 (SCA) at 22B–C.

50 *Wassenaar v Robertson* 1945 TPD 10 at 13; *Pieterse v Swartbooi* 1955 (3) SA 471 (O).

51 See *Wassenaar v Robertson* 1945 TPD 10 at 13; *Pieterse v Swartbooi* 1955 (3) SA 471 (O); *Burger v De Vos* 1967 (3) SA 63 (O). See also *Doll v Block & Hobohm* 1933 SWA 8; *Henckert v Starke* 1945 SWA 26.

52 GN R36 of 2013, published in *GG* 36774 of 22 August 2013.

53 Section 50(1)*(l)* of the Superior Courts Act 10 of 2013, as to which see Volume 1 third edition, Part D.

54 *Thembani Wholesalers (Pty) Ltd v September* 2014 (5) SA 51 (ECG) at 52B–56E (the court in this case consisted of three judges and was specially constituted in terms of the provisions of s 14(1)*(a)* of the Superior Courts Act 10 of 2013). In *Murray NO v African Global Holdings (Pty) Ltd* 2020 (2) SA 93 (SCA) it was held (at paragraph [16]) that the Superior Courts Act 10 of 2013 abolished local divisions and constituted the High Court in its present nine divisions, corresponding to the nine provinces, with main seats in all of them and local seats in some. The local seats are not separate courts and it is no longer appropriate to refer to them as local divisions (at paragraph [18]). See also *Advent Oil (Pty) Ltd v Vuletjeni Trading and Projects (Pty) Ltd* (unreported, MM case no 4262/2019 dated 21 June 2021) at paragraphs [11] and [25]–[27]; Malcolm Wallis 'What's in a name? A note on nomenclature' (2020) 137 *SALJ* 25.

55 See s 6 of the Superior Courts Act 10 of 2013 in Volume 1 third edition, Part D.

56 *Fedco Cape (Pty) Ltd v Meyer* 1988 (4) SA 207 (E).

57 *Corlett Drive Estate Ltd v Boland Bank Ltd* 1978 (4) SA 420 (C) at 425D–F; *Aymac CC v Widgerow* 2009 (6) SA 433 (W) at 440G–H.

58 *Corlett Drive Estate Ltd v Boland Bank Ltd* 1978 (4) SA 420 (C) at 425D–F.

59 *Aymac CC v Widgerow* 2009 (6) SA 433 (W) at 440H–441I and the authorities there referred to.

60 In *Amantusi (Hanxa) Royal Family v The Premier of the Eastern Cape Province* (unreported, ECM case no CA 08/2020 dated 15 July 2020) non-compliance with this requirement (and the one provided for in subrule (7)*(b)*) resulted in the following order (at paragraph [21]): 'In the circumstances the following order issues:

(a) The appeal is removed from the roll;

(b) The appellants' attorney who signed the certificate of correctness shall:

(i) explain on affidavit and seek condonation for non-compliance with sub-rules (6)*(a)* and (7)*(b)* of rule 49; and

(ii) proffer reasons for excluding reference to the delivery addresses and failure to serve on the third and fourth respondents the notices referred to in paragraphs [9], [11], [12], [13] and [14] of this judgment;

(c) The appeal record shall be served on the third and fourth respondents with proof of service being filed of record;

(d) A notice of application for a date for the hearing of the appeal shall be served on all the respondents with proof of service being filed of record;

(e) The registrar shall assign a date for the hearing of the appeal once the orders in paragraphs *(b)*, *(c)* and *(d)* hereof, have been complied with.'

61 *Montsamai v Read* 1961 (1) SA 173 (O) at 174B–E; *Meyer v Dowson & Dobson Ltd* 1967 (4) SA 628 (T) at 628F; *De Sousa v Cappy's Stall* 1975 (4) SA 959 (T) at 961C–F; *Lipschitz NO v Saambou-Nasionale Bouvereniging* 1979 (1) SA 527 (T) at 529C–E; *Aymac CC v Widgerow* 2009 (6) SA 433 (W) at 441D–F; *PAF v SCF* 2022 (6) SA 162 (SCA) at paragraphs [13]–[23]; but see *Corbett Drive Estate Ltd v Boland Bank Ltd* 1978 (4) SA 420 (CPD) and *Barkhuizen-Barbosa NO v Phelemba* (unreported, MM case no A35/2020 dated 1 February 2024), in both of which an application in terms of rule 49(6)*(b)* was heard by a single judge.

62 *Aymac CC v Widgerow* 2009 (6) SA 433 (W) at 441C.

63 *SA Shipping Co Ltd v Liquidators Promotors Ltd* 1918 CPD 606; *SWA Munisipale Personeel Vereniging v Minister of Labour* 1978 (1) SA 1027 (SWA) at 1038B; *Yunnan Engineering CC v Chater* 2006 (5) SA 571 (T) at 578H–J. For a review of the cases, see *Moluele v Deschalets NO* 1950 (2) SA 670 (T). See also *Aymac CC v Widgerow* 2009 (6) SA 433 (W) at 441A.

64 *Cairn's Executors v Gaarn* 1912 AD 181 at 186; *Rose v Alpha Secretaries Ltd* 1947 (4) SA 511 (A) at 517; *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 682D–G.

65 *Liquidators, Myburgh, Krohne & Co Ltd v Standard Bank of SA Ltd* 1924 AD 226; *Fortman v SAR & H* (2) 1947 (3) SA 505 (N); *Pendock v Attorney-General, Natal* 1958 (3) SA 875 (N) at 880D; *Palmer v Goldberg* 1961 (3) SA 692 (N); *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A); *Belo v Commissioner of Child Welfare, Johannesburg: Belo v Chapelle* [2002] 3 All SA 286 (W) at 290*f–g*; *Shaik v Pillay* 2008 (3) SA 59 (N) at 61E–F; *PAF v SCF* 2022 (6) SA 162 (SCA) at paragraph [21]; *Mosselbaai Boeredienste (Pty) Ltd v OKB Motors CC* (unreported, SCA case no 1216/21 dated 9 June 2023) at paragraph [11]. If it appears that a court has not exercised its discretion judicially, or that it has been influenced by wrong principles or a misdirection on the facts, or that it has reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and circumstances, its decision granting or refusing condonation may be set aside on appeal (cf *Prinsloo v Saaiman* 1984 (2) SA 56 (O) at 61G–62A; *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) at 314I–315A; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at 14A–C; *Baron Camilo Agasim-Pereira of Fulwood v Wertheim Becker Incorporated* [2006] 4 All SA 43 (E) at 50*i*–51*a*; *PAF v SCF* 2022 (6) SA 162 (SCA) at paragraph [22]. In these cases it is stressed that an appeal court is not entitled to set aside the decision of a trial court granting or refusing a postponement in the exercise of its discretion merely on the ground that if the members of the court of appeal had been sitting as a trial court, they would have exercised their discretion differently. It is submitted that the same principle applies to the granting or refusing of an application for condonation.) See also *Van Den Steen NO v Khewija Engineering and Construction Proprietary Limited* (unreported, GJ case no 2021/12760 dated 10 October 2022) at paragraph [55].

66 1976 (1) SA 717 (A) at 720E–G. See also *Palmer v Goldberg* 1961 (3) SA 692 (N); *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A); *Michaels v Wells NO* 1967 (1) SA 46 (C); *Federated Employers Fire & General Insurance Co Ltd v McKenzie* 1969 (3) SA 360 (A); *Kgobane v Minister of Justice* 1969 (3) SA 365 (A); *Corlett Drive Estate Ltd v Boland Bank Ltd* 1978 (4) SA 420 (C); *Hall v Van Tonder* 1980 (1) SA 908 (C); *Kanderssen (Pty) Ltd v Bowman NO* 1980 (3) SA 1142 (T); *H B Farming Estate (Pty) Ltd v Legal and General Assurance Society Ltd* 1981 (3) SA 129 (T); *Vereniging van Bo-grondse Mynamptenare van SA v President of the Industrial Court* 1983 (1) SA 1143 (T); *Feldman v Feldman* 1986 (1) SA 449 (T); *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie* 1986 (2) SA 57 (A); *Hook v Resnekov* 1988 (4) SA 762 (C) at 736G–J; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131E–F; *Moraliswani v Mamili* 1989 (4) SA 1 (A) at 10E; *Blumenthal v Thomson NO* 1994 (2) SA 118 (A) at 121I–122B; *Napier v Tsaperas* 1995 (2) SA 665 (A) at 671C–D; *National Union of Metalworkers of South Africa v Jumbo Products CC* 1996 (4) SA 735 (A) at 741E–I; *Darries v Sheriff, Magistrate's Court Wynberg* 1998 (3) SA 34 (SCA) at 41C–D; *Byron v Duke Inc* 2002 (5) SA 483 (SCA) at 487H–J; *Gumede v Road Accident Fund* 2007 (6) SA 304 (C) at 307D–G; *Shaik v Pillay* 2008 (3) SA 59 (N) at 61F–G; *Aymac CC v Widgerow* 2009 (6) SA 433 (W) at 450I–451C; *Commissioner for the South African Revenue Service v Van der Merwe* 2016 (1) SA 599 (SCA) at paragraphs [11]–[12], [17] and [19]; *Kleynhans v Overstrand Municipality* (unreported, WCC case no A231/2016 dated 13 March 2017) at paragraphs [4]–[7]; *Limpopo Province Voluntary Group Scheme Board v Mahubane* (unreported, LP case no HCAA14/2019 dated 28 January 2021) at paragraphs [16]–[27]; *Nkola v PG Bison Ltd t/a PG Bison Epping* (unreported, ECG case no CA237/2019 dated 28 January 2021) at paragraphs [5]–[11]; *Naidoo v Hesslewood* (unreported, GP case no A243/2018 dated 17 November 2021) at paragraph [3]; *PAF v SCF* 2022 (6) SA 162 (SCA) at paragraph [15].

67 2008 (2) SA 472 (CC) at 477A–B. See also, for example, *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd* [2013] 2 All SA 251 (SCA) at paragraphs [11] and [15]; *Ferris v FirstRand Bank Ltd* 2014 (3) SA 39 (CC) at 43G–44A and the cases there referred to; *Attorneys Fidelity Fund Board of Control v Love* (unreported, SCA case no 170/2021 dated 14 April 2021) at paragraph [11]; *PAF v SCF* 2022 (6) SA 162 (SCA) at paragraph [21]; *Percy Mosuetsa v Derrick Mosuetsa* (unreported, SCA case no 746/2022 dated 1 December 2023) at paragraph [3]. In the latter case the Supreme Court of Appeal added that in the interests of justice and for the sake of finality it was appropriate to reinstate the appeal (at paragraph [4]).

68 *United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A) at 720E–H and the cases there referred to; *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie* 1986 (2) SA 57 (A) at 76A–B.

69 2008 (2) SA 472 (CC) at 477E. See also *Unitrans Fuel and Chemical (Pty) Ltd v Dove-Co Carriers CC* 2010 (5) SA 340 (GSJ) at 341G–H.

70 2010 (5) SA 340 (GSJ) at 344F–G and 345A–B.

71 *Unitrans Fuel and Chemical (Pty) Ltd v Dove-Co Carriers CC* 2010 (5) SA 340 (GSJ) at 343J–344A.

72 *Fortman v SAR & H (2)* 1947 (3) SA 505 (N) at 509; *Palmer v Goldberg* 1961 (3) SA 692 (N) at 701H.

73 See *Michaels v Wells NO* 1967 (1) SA 46 (C).

74 *Cairn's Executors v Gaarn* 1912 AD 181; *Murison v Murison* (1922) 43 NLR 98; *Hibbins v Durban Borough Council* 1927 AD 549; *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532H; *Edwards v Rowe* 1966 (2) SA 709 (RA). Similarly, where the real cause of the delay was the applicant's inability to make up his or her mind (*Levenberg v Denholm* 1930 (2) PH L13 (C); *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at 477E–G).

75 *Michaels v Wells NO* 1967 (1) SA 46 (C).

76 *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at 479H–480A.

77 *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at 480A–B.

78 *Reinecke v Incorporated General Insurances Ltd* 1974 (2) SA 84 (A) at 92F; *Shaik v Pillay* 2008 (3) SA 59 (N) at 61I.

79 *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141C–E. This statement has frequently been approved and followed, not only in the case of appeals to the Supreme Court of Appeal, but also in the case of appeals to a full court from a single judge and of appeals from a magistrate's court to the High Court. See, for example, *Louw v Louw* 1965 (3) SA 852 (E); *De Kuszaba-Dabrowski v Steel NO* 1966 (2) SA 277 (RA); *Moaki v Reckitt & Colman (Africa) Ltd* 1968 (3) SA 98 (A) at 101G–H; *Kgobane v Minister of Justice* 1969 (3) SA 365 (A) at 369–70; *Immelman v Loubser* 1974 (3) SA 816 (A) at 824A; *Anti-Corrosion Engineering (Pty) Ltd v Sanlam* 1975 (1) SA 897 (C); *Robot Paints, Hardware & Timber Co (Pty) Ltd v SA Industrial Equipment (Pty) Ltd* 1975 (4) SA 829 (T); *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 685A–G; *Hall v Van Tonder* 1980 (1) SA 908 (C); *Kanderssen (Pty) Ltd v Bowman NO* 1980 (3) SA 1142 (T) at 1144A; *P E Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799F; *H B Farming Estate (Pty) Ltd v Legal and General Assurance Society Ltd* 1981 (3) SA 129 (T) at 133D; *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* 1985 (4) SA 773 (A) at 787G–H; *Moraliswani v Mamili* 1989 (4) SA 1 (A) at 10C; *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281F; *Tshivhase Royal Council v Tshivhase* 1992 (4) SA 852 (A) at 859E–F; *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A) at 357F–H; *Theron v AA Life Assurance Association Ltd* 1995 (4) SA 361 (A) at 365B; *Shaik v Pillay* 2008 (3) SA 59 (N) at 61I–62C; *Aymac CC v Widgerow* 2009 (6) SA 433 (W) at 451D–H; *PAF v SCF* 2022 (6) SA 162 (SCA) at paragraphs [13]–[20].

80 *United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A) at 720F–H.

81 *Thlobelo v Kehiloe (2)* 1932 OPD 24 at 28; *Rose v Alpha Secretaries Ltd* 1947 (4) SA 511 (A) at 518–19; *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 448; *Regal v African Superslate (Pty) Ltd* 1962 (3) SA 18 (A) at 23.

82 See, for example, *Connell v Kluge* 1920 CPD 601; *Ntobe v Dwanya* 1921 EDL 305; *Goosen v McCullough* 1923 EDL 344; *Barnard v Delport* 1928 TPD 558; *Serongoane v Finestone* 1928 CPD 426; *Viljoen v Rosmarin* 1930 TPD 873; *Jojo v Botha* 1949 (3) SA 417 (E).

83 *Saperstein v Edelstein* 1908 TS 320; *Benson v Omaruru Farm Vereinigung* 1920 SWA 33; *Union and Rhodesia Wholesale v Muir* 1928 EDL 38; *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A); *Louw v Louw* 1965 (3) SA 852 (E); *Kgobane v Minister of Justice* 1969 (3) SA 365 (A); *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 684H–685E; *P E Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799B–H; *H B Farming Estate (Pty) Ltd v Legal and General Assurance Society Ltd* 1981 (3) SA 129 (T) at 132D–134D; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131I–J; *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281G; *Blumenthal v Thomson NO* 1994 (2) SA 118 (A) at 121D; *Aymac CC v Widgerow* 2009 (6) SA 433 (W) at 451I–452B.

84 *Moaki v Reckitt & Colman (Africa) Ltd* 1968 (3) SA 98 (A) at 101; *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd* 1974 (1) SA 414 (NC) at 422; *Reinecke v Incorporated General Insurances Ltd* 1974 (2) SA 84 (A) at 92; *P E Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 798H–799H.

85 *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 140; *Kgobane v Minister of Justice* 1969 (3) SA 365 (A) at 369; *United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A) at 721; *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 685; *Hall v Van Tonder* 1980 (1) SA 908 (C).

86 *Sher & Co v Frenkel & Co* 1927 TPD 9. See also *Visagie v Bonthuys* 1930 CPD 299.

87 *Van Marseveen v Union Government* 1918 AD 60.

88 See, for example, *Machumela v Santam Insurance Co Ltd* 1977 (1) SA 660 (A).

89 *Monomiat v Degam* 1933 TPD 428; *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A); *P E Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 798H–799H; *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281H.

90 *Tommy v Maharaj* 1947 (1) SA 178 (N); *Nankan v H Lewis & Co (Natal) Ltd* 1959 (1) SA 157 (N); *P E Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799.

91 *Reinecke v Incorporated General Insurances Ltd* 1974 (2) SA 84 (A) at 100H; *Immelman v Loubser* 1974 (3) SA 816 (A) at 825A–C; *Machumela v Santam Insurance Co Ltd* 1977 (1) SA 660 (A) at 664B–D; and see *De Kuszaba-Dabrowski v Steel NO* 1966 (2) SA 277 (RA) at 281G; *Moaki v Reckitt & Colman (Africa) Ltd* 1968 (3) SA 98 (A) at 101H; *S v Kondoni* 1982 (2) SA 528 (ZS) at 532E; *Napier v Tsaperas* 1995 (2) SA 665 (A) at 671E–672A; *Aymac CC v Widgerow* 2009 (6) SA 433 (W) at 452I–J.

92 Reasonable prospects of success should be distinguished from strong prospects of success which is required in applications for special leave to appeal to the Supreme Court of Appeal. It is well established that strong prospects of success can often overcome a poor explanation for any delays in such applications. Differently stated, strong prospects of success may trump an unsatisfactory explanation for the delay (*Mosselbaai Boeredienste (Pty) Ltd v OKB Motors CC* (unreported, SCA case no 1216/21 dated 9 June 2023) at paragraph [11]).

93 1974 (3) SA 816 (A) at 824B–C. See further *Bantu Methodist Church v Barclays Bank* 1935 TPD 372; *Massey Harris Co (SA) Ltd v Eksteen* 1937 OPD 29; *Penrice v Dickinson* 1945 AD 6; *De Villiers v De Villiers* 1947 (1) SA 635 (A); *Fortman v SAR & H (2)* 1947 (3) SA 505 (N); *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A); *United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A); *Hall v Van Tonder* 1980 (1) SA 908 (C); *P E Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A); *Regering van die Republiek van Bophuthatswana v Van Zyl* 1981 (1) SA 484 (NC); *H B Farming Estate (Pty) Ltd v Legal and General Assurance Society Ltd* 1981 (3) SA 129 (T); *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* 1985 (4) SA 773 (A); *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A); *South African Allied Workers' Union (in liquidation) v De Klerk NO* 1992 (3) SA 1 (A); *Louw v WP Koöperatief Bpk* 1994 (3) SA 434 (A); *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A) at 357H–I; *Squid Packers (Pty) Ltd v Ollemans* [2003] 1 All SA 98 (SCA) at 109*a–b*; *Kouga Municipality v De Beer* 2008 (5) SA 503 (E) at 509H–510A; *Koster v Industrial Zone Limited* (unreported, GJ case no A5066/2021 dated 13 December 2022) at paragraph 12.

94 *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* 1985 (4) SA 773 (A) at 789C–D. See also *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 687A; *Multilateralemotorvoertuigongelukkefonds v Pretorius* 1994 (1) SA 814 (O) at 817E; *LTA Construction Ltd v Minister of Public Works and Land Affairs* 1994 (1) SA 153 (A) at 156H.

95 *P E Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799C–E; *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 687A; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131H; *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281J–282A; *Tshivhase Royal Council v Tshivhase* 1992 (4) SA 852 (A) at 859E–F; *LTA Construction Ltd v Minister of Public Works and Land Affairs* 1994 (1) SA 153 (A) at 157F; *Blumenthal v Thomson NO* 1994 (2) SA 118 (A) at 121I–J (where it is stressed that this applies even where the blame lies solely with the attorney); *Shaik v Pillay* 2008 (3) SA 59 (N) at 62E.

96 *Mabusela v Booi* (unreported, ECMk case no CA149/2021) dated 2 May 2023 — a decision of the full court) at paragraph [22].

97 *Sidimela v Marage* (unreported, GP case no A461/2017 dated 8 March 2023 — a decision of the full court) at paragraphs [2]–[3].

98 See, for example, *Koster v Industrial Zone Limited* (unreported, GJ case no A5066/2021 dated 13 December 2022 — a decision of the full court) at paragraph 12; *C v R* (unreported, GJ case no A5002/2022 dated 15 December 2022 — a decision of the full court) at paragraph [10]; *SA Soutwerke (Pty) Ltd v Camel Rock Trading 520 CC* (unreported, GP case no A124/2022 dated 26 September 2023 — a decision of the full court) at paragraph [46].

99 *Penrice v Dickinson* 1945 AD 6; *De Villiers v De Villiers* 1947 (1) SA 635 (A); *Meintjies v H D Combrinck (Edms) Bpk* 1961 (1) SA 262 (A); *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A); *Glazer v Glazer NO* 1963 (4) SA 694 (A); *Federated Employers Fire & General Insurance Co Ltd v McKenzie* 1969 (3) SA 360 (A); *Pienaar v G North & Son (Pty) Ltd* 1979 (4) SA 522 (O); *S v Tsedi* 1984 (1) SA 565 (A); *Louw v WP Koöperatief Bpk* 1994 (3) SA 434 (A).

100 *De Villiers v De Villiers* 1947 (1) SA 635 (A) at 637; *Mofokeng v Prokureur-Generaal, OVS* 1958 (4) SA 519 (O) at 521E–F; *Meintjies v H D Combrinck (Edms) Bpk* 1961 (1) SA 262 (A) at 265A–C; *Pilane v Northern Cape Tractors (Pty) Ltd* 1971 (3) SA 619 (NC) at 620C.

101 *Van der Merwe v Steenkamp* 1925 OPD 179 at 181; *Fortman v SAR & H (2)* 1947 (3) SA 505 (N); *Fourie v Saayman* 1950 (3) SA 724 (O) at 725E; *Mofokeng v Prokureur-Generaal, OVS* 1958 (4) SA 519 (O) at 521E–F.

102 *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141H; *De Kuszaba-Dabrowski v Steel NO* 1966 (2) SA 277 (RA) at 280E; *S v Yusuf* 1968 (2) SA 52 (A) at 57A; *Kgobane v Minister of Justice* 1969 (3) SA 365 (A) at 370; *S v Brink* 1973 (2) SA 571 (A) at 576F; *United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A) at 722C; *Kanderssen (Pty) Ltd v Bowman NO* 1980 (3) SA 1142 (T) at 1146A–C.

103 *Moluele v Deschalets NO* 1950 (2) SA 670 (T) at 677; *Meintjies v H D Combrinck (Edms) Bpk* 1961 (1) SA 262 (A) at 265C; *Breytenbach v De Villiers NO* 1961 (2) SA 542 (T) at 544H; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131E; *Moraliswani v Mamili* 1989 (4) SA 1 (A) at 10E; *South African Allied Workers' Union (in liquidation) v De Klerk NO* 1992 (3) SA 1 (A) at 3H.

104 *Meintjies v H D Combrinck (Edms) Bpk* 1961 (1) SA 262 (A) at 265E; *South African Allied Workers' Union (in liquidation) v De Klerk NO* 1992 (3) SA 1 (A) at 4C–D.

105 *South African Allied Workers' Union (in liquidation) v De Klerk NO* 1992 (3) SA 1 (A) at 4B.

106 *Africa v Rhenish Mission Society* (1904) 21 SC 650; *Cape Town Municipality v Paine* 1922 AD 568; *Franckenburg v Employers' Assurance Corp Ltd* 1925 CPD 239; *Van der Merwe v Wellington Licensing Board* 1931 AD 1; *Burger v Muller* 1932 CPD 172; *Massey Harris Co (SA) Ltd v Eksteen* 1937 OPD 29; *Transvaal & Orange Free State Chamber of Mines v General Electric Co* 1965 (4) SA 349 (T); *Federated*

Employers Fire & General Insurance Co Ltd v McKenzie 1969 (3) SA 360 (A); *Hall v Van Tonder* 1980 (1) SA 908 (C) at 916D; *Association of Amusement and Novelty Machine Operators v Minister of Justice* 1980 (2) SA 636 (A) at 655D; *H B Farming Estate (Pty) Ltd v Legal and General Assurance Society Ltd* 1981 (3) SA 129 (T) at 134D; *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* 1985 (4) SA 773 (A) at 790B. See also *Reynecke v Wetsgenootskap van die Kaap die Goeie Hoop* 1994 (1) SA 359 (A) in which the court took into consideration the fact that the standing of a professional man was in issue.

107 *Glazer v Glazer NO* 1963 (4) SA 694 (A) at 702H.

108 *Susser v The General Produce Supply Co* 1929 TPD 771; *Hopley & Bonner (Pty) Ltd v Stephen McQueen* 1931 CPD 263; *Monomiat v Degam* 1933 TPD 428; *Terblanche v Torlage* 1934 NPD 147; *Abromowitz v Jacquet (3)* 1950 (3) SA 378 (W); *Kanderssen (Pty) Ltd v Bowman NO* 1980 (3) SA 1142 (T) at 1150E.

109 *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality (2)* 1971 (4) SA 532 (C) at 536C–G. See also *Nafte v Dembo & Lipson* 1920 TPD 52; *Van der Merwe v Wellington Licensing Board* 1931 AD 1; *Fortman v SAR & H (2)* 1947 (3) SA 505 (N) at 512; *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 142B–143E; *H B Farming Estate (Pty) Ltd v Legal and General Assurance Society Ltd* 1981 (3) SA 129 (T) at 134G; *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* 1985 (4) SA 773 (A) at 790C.

110 *Moluele v Deschalets NO* 1950 (2) SA 670 (T) at 677; *Transvaal & Orange Free State Chamber of Mines v General Electric Co* 1965 (4) SA 349 (T); *Palmer v Goldberg* 1961 (3) SA 692 (N) at 699E–700A.

111 See *Cairn's Executors v Gaarn* 1912 AD 181 at 193; *Napier v Tsaperas* 1995 (2) SA 665 (A) at 671C.

112 *Federated Employers Fire & General Insurance Co Ltd v McKenzie* 1969 (3) SA 360 (A) at 363A. See also *Meintjies v H D Combrinck (Edms) Bpk* 1961 (1) SA 262 (A) at 264A; *Kgobane v Minister of Justice* 1969 (3) SA 365 (A) at 369E; *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 686F–687A; *Hall v Van Tonder* 1980 (1) SA 908 (C) at 916C; *H B Farming Estate (Pty) Ltd v Legal and General Assurance Society Ltd* 1981 (3) SA 129 (T) at 134B; *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281I; *Beira v Raphaely-Weiner* 1997 (4) SA 332 (SCA) at 337D; *Minister of Land Affairs and Agriculture v D&F Wevell Trust* 2008 (2) SA 184 (SCA) at 199B–E; *Aymac CC v Widgerow* 2009 (6) SA 433 (W) at 452B–E.

113 *Palmer v Goldberg* 1961 (3) SA 692 (N) at 699D; *Reinecke v Incorporated General Insurances Ltd* 1974 (2) SA 84 (A) at 92G; *United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A) at 720F; *H B Farming Estate (Pty) Ltd v Legal and General Assurance Society Ltd* 1981 (3) SA 129 (T) at 134B; *Napier v Tsaperas* 1995 (2) SA 665 (A) at 671C.

114 *Federated Employers Fire & General Insurance Co Ltd v McKenzie* 1969 (3) SA 360 (A) at 362G; *H B Farming Estate (Pty) Ltd v Legal and General Assurance Society Ltd* 1981 (3) SA 129 (T) at 134B; *Napier v Tsaperas* 1995 (2) SA 665 (A) at 671C.

115 See, for example, *Hurwitz v Rhodesia Railways Ltd* 1911 AD 698; *Steytler's Buildings Ltd v Miller* 1912 AD 5; *Loewenstein v Robinson* 1913 AD 67; *Drace v Patronas* 1913 AD 68.

116 *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 138E; *Estate Woolf v Johns* 1968 (4) SA 492 (A) at 497C–E; *P E Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 797E–G.

117 *Hassim v Ismail* 1947 (4) SA 632 (T).

118 *Van der Merwe v Steenkamp* 1925 OPD 179.

119 *Kapotes v Grobbelaar* 1927 AD 389.

120 *Kempel v Von Mallinckrodt* 1934 SWA 100.

121 See *Kanderssen (Pty) Ltd v Bowman NO* 1980 (3) SA 1142 (T) at 1145A–1146A and *P E Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 797H–798H. See also *Unitrans Fuel and Chemical (Pty) Ltd v Dove-Co Carriers CC* 2010 (5) SA 340 (GSJ) at 343A–345B.

122 *Havenga v Venter* 1918 CPD 588; *SA Shipping Co Ltd v Liquidators Promotors Ltd* 1918 CPD 606; and see *Nondwebu v Nell & Botha* (1901) 22 NLR 345.

123 *Koster v Industrial Zone Limited* (unreported, GJ case no A5066/2021 dated 13 December 2022) at paragraph 12.

124 *R v Jacobs* (1900) 21 NLR 48.

125 *Stanton's Executors v Brown* (1894) 15 NLR 333; *Dawjee v Coakes* (1895) 16 NLR 112.

126 *Weiner Bros v Patterson* 1918 TPD 302.

127 *Theys v De Wet* 1921 TPD 287, doubting *Saperstein v Edelstein* 1908 TS 320. See also *Sampson v Union & Rhodesia Wholesale Ltd* 1929 AD 181.

128 *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A) at 347I; *Alpha Bank Bpk v Registrateur van Banke* 1996 (1) SA 330 (A) at 339C–D.

129 *Reeders v Jacobsz* 1942 AD 395 at 396; *Meintjies v H D Combrinck (Edms) Bpk* 1961 (1) SA 262 (A) at 264A; *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 138E; *Estate Woolf v Johns* 1968 (4) SA 492 (A) at 497B–F; *Immelman v Loubser* 1974 (3) SA 816 (A) at 820E–H; *Fanapi v East Cape Administration Board* 1983 (2) SA 688 (E) at 689H; *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) at 297H–J; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd* [2013] 2 All SA 251 (SCA) at paragraphs [12]–[13]. In *Reeders v Jacobsz* 1942 AD 395 it was said that the granting of an application for condonation is 'not a mere matter of course . . . the power of the court to grant relief should be exercised with proper judicial discretion and upon sufficient and satisfactory grounds being shown'.

130 *Reeders v Jacobsz* 1942 AD 395 at 396; *Rose v Alpha Secretaries Ltd* 1947 (4) SA 511 (A) at 518; *Meintjies v H D Combrinck (Edms) Bpk* 1961 (1) SA 262 (A) at 264A; *Glazer v Glazer NO* 1963 (4) SA 694 (A) at 702H; *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 138E; *Estate Woolf v Johns* 1968 (4) SA 492 (A) at 497B–F; *Immelman v Loubser* 1974 (3) SA 816 (A) at 820E–H; *P E Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 797E–H; *Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd* 1999 (1) SA 624 (W) at 635E–F; *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) at 297H–J; *Shaik v Pillay* 2008 (3) SA 59 (N) at 61H; *PAF v SCF* 2022 (6) SA 162 (SCA) at paragraph [21].

131 *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 138E; *Estate Woolf v Johns* 1968 (4) SA 492 (A) at 497C–F; *P E Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 797E–G.

132 Cf s 17(1)*(a)*(i) of the Superior Courts Act 10 of 2013 in Volume 1 third edition, Part D.

133 Cf s 16(2)*(a)* of the Superior Courts Act 10 of 2013 in Volume 1 third edition, Part D.

134 See, for example, *Craig v Park* 1914 TPD 96; *Lange v Nowitz* 1929 OPD 207; *Joliffe v Turner* 1935 NPD 718; *Kahn v Radyn* 1949 (4) SA 552 (C); *Nankan v H Lewis & Co (Natal) Ltd* 1959 (1) SA 157 (N); *Neuman (Pvt) Ltd v Marks* 1960 (2) SA 170 (SR); *Boland Konstruksie Maatskappy (Edms) Bpk v Petlen Properties (Edms) Bpk* 1974 (4) SA 291 (C).

135 *Reed v Freer* 1920 CPD 250; *Benson v Omaruru Farm Vereinigung* 1920 SWA 33.

136 *Parker, Wood & Co v Badman* 1925 TPD 637; *Union & Rhodesia Wholesale Ltd v Muir* 1928 EDL 38. See the remarks of Hoexter JA in *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* 1985 (4) SA 773 (A) at 789I–790C.

137 *Massey Harris Co (SA) Ltd v Eksteen* 1937 OPD 29.

138 *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449G–H; *Meintjies v H D Combrinck (Edms) Bpk* 1961 (1) SA 262 (A) at 264B; *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 138H; *Pilane v Northern Cape Tractors (Pty) Ltd* 1971 (3) SA 619 (NC) at 621C–F; *P E Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 800B; *De Beer v Western Bank Ltd* 1981 (4) SA 255 (A) at 257A; *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* 1985 (4) SA 773 (A) at 788G–789A; *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie* 1986 (2) SA 57 (A) at 75H; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 129G; *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281D; *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A) at 357D; *Napier v Tsaperas* 1995 (2) SA 665 (A) at 671B; *Theron v AA Life Assurance Association Ltd* 1995 (4) SA 361 (A) at 365D; *Beira v Raphaely-Weiner* 1997 (4) SA 332 (SCA) at 337D; *Shaik v Pillay* 2008 (3) SA 59 (N) at 62D; *Obiang v Van Rensburg* [2023] 2 All SA 211 (WCC) at paragraph [8].

139 *De Beer v Western Bank Ltd* 1981 (4) SA 255 (A) at 257A.

140 See, for example, *Federated Employers Fire & General Insurance Co Ltd v McKenzie* 1969 (3) SA 360 (A) at 364A; *Pilane v Northern Cape Tractors (Pty) Ltd* 1971 (3) SA 619 (NC) at 621; *Reinecke v Incorporated General Insurances Ltd* 1974 (2) SA 84 (A) at 93A; *Robot Paints, Hardware & Timber Co (Pty) Ltd v SA Industrial Equipment (Pty) Ltd* 1975 (4) SA 829 (T) at 832E; *Hall v Van Tonder* 1980 (1) SA 908 (C) at 913C–D; *Van Deventer v Louw* 1980 (4) SA 105 (O) at 107D; *Rennie NO v Gordon* 1988 (1) SA 1 (A) at 20B–C; *Guardian National Insurance Co Ltd v Engelbrecht* 1989 (4) SA 908 (T) at 912G.

141 *Federated Employers Fire & General Insurance Co Ltd v McKenzie* 1969 (3) SA 360 (A) at 364B.

142 1992 (3) SA 1 (A) at 4B.

143 In *Regering van die Republiek van Bophuthatswana v Van Zyl* 1981 (1) SA 484 (NC) the court granted condonation but declined (at 489D) to hear the appeal on the merits in order to enable the magistrate to furnish his findings of fact and rulings of law in terms of magistrates' courts rule 51(8).

144 In *Theron v Van der Merwe* 1980 (3) SA 462 (C) it was held that where, in an application for condonation, the merits of the appeal are investigated for the purposes of the application, the rules of the Cape Provincial Division relating to the filing of heads of argument in appeal

cases will have to be complied with. As to the filing of heads of argument in civil appeals in the Western Cape Division of the High Court, Cape Town, see paragraph 46 of the Consolidated Practice Notes of that division which are reproduced in the Volume 3, Part N1.

145 See, for example, the order made in *Van Deventer v Louw* 1980 (4) SA 105 (O), and by the Appellate Division in *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* 1985 (4) SA 773 (A).

146 *Jonathan v Haggie Rand Wire Ltd* 1978 (2) SA 34 (N).

147 *Wessels v Bosman* 1918 TPD 351; *Sher & Co v Frenkel & Co* 1927 TPD 9; *Sampson v Union & Rhodesia Wholesale Ltd (In Liquidation)* 1929 AD 468 at 483–4; *Palmer v Goldberg* 1961 (3) SA 692 (N) at 702A; *Michaels v Wells NO* 1967 (1) SA 46 (C) at 53D–F; *Robot Paints, Hardware & Timber Co (Pty) Ltd v SA Industrial Equipment (Pty) Ltd* 1975 (4) SA 829 (T) at 834B; *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* 1985 (4) SA 773 (A) at 809C. See also *Guardian National Insurance Co Ltd v Engelbrecht* 1989 (4) SA 908 (T) at 912H–913H.

148 *Sampson v Union & Rhodesia Wholesale Ltd (In Liquidation)* 1929 AD 468 at 484.

149 *Regal v African Superslate (Pty) Ltd* 1962 (3) SA 18 (A) at 25E; *Michaels v Wells NO* 1967 (1) SA 46 (C) at 53D–F; *Van Deventer v Louw* 1980 (4) SA 105 (O) at 107D; *Regering van die Republiek van Bophuthatswana v Van Zyl* 1981 (1) SA 484 (NC) at 489E; *President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk* 1989 (1) SA 208 (A) at 214J–215A; *Purchase v De Huizemark Alberton (Pty) Ltd t/a Bob Percival Estates* 1994 (1) SA 281 (W) at 287E–F.

150 See *Van der Riet v Rheeder* 1965 (3) SA 712 (O); *Dinath v Breedt* 1966 (3) SA 712 (T); *Boland Konstruksie Maatskappy (Edms) Bpk v Petlen Properties (Edms) Bpk* 1974 (4) SA 291 (C); *Kanderssen (Pty) Ltd v Bowman NO* 1979 (4) SA 296 (T).

151 *Kanderssen (Pty) Ltd v Bowman NO* 1980 (3) SA 1142 (T).

152 *Fedco Cape (Pty) Ltd v Meyer* 1988 (4) SA 207 (E).

153 *Muller v De Wet NO* 2001 (2) SA 489 (W) at 501H–J. See also, in general, the warning of the Constitutional Court to practitioners in *Kham v Electoral Commission* 2016 (2) SA 338 (CC) at 350B–352E.

154 *Salviati & Santorini (Pty) Ltd v Primesite Outdoor Advertising (Pty) Ltd* 2001 (3) SA 766 (SCA) at 775A–C.

155 *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 2003 (1) 204 (T) at 210H–I.

156 2024 (4) SA 84 (SCA).

157 2017 (5) BCLR 572 (CC). The Constitutional Court held the guidelines to be as follows (footnotes omitted):
'*Reconstruction of a trial record*
[19] It is long established in our criminal jurisprudence that an accused's right to a fair trial encompasses the right to appeal. An adequate record of trial court proceedings is a key component of this right. When a record "is inadequate for a proper consideration of an appeal, it will, as a rule, lead to the conviction and sentence being set aside".
[20] If a trial record goes missing, the presiding court may seek to reconstruct the record. The reconstruction itself is "part and parcel of the fair trial process". Courts have identified different procedures for a proper reconstruction, but have all stressed the importance of engaging both the accused and the State in the process. Practical methodology has differed. Some courts have required the presiding judicial officer to invite the parties to reconstruct a record in open court. Others have required the clerk of the court to reconstruct a record based on affidavits from parties and witnesses present at trial and then obtain a confirmatory affidavit from the accused. This would reflect the accused's position on the reconstructed record. In addition, a report from the presiding judicial officer is often required.
[21] The obligation to conduct a reconstruction does not fall entirely on the court. The convicted accused shares the duty. When a trial record is inadequate, "both the State and the appellant have a duty to try and reconstruct the record". While the trial court is required to furnish a copy of the record, the appellant or his/her legal representative "carries the final responsibility to ensure that the appeal record is in order". At the same time, a reviewing court is obliged to ensure that an accused is guaranteed the right to a fair trial, including an adequate record on appeal, particularly where an irregularity is apparent.'

158 *Rennie NO v Gordon* 1988 (1) SA 1 (A) at 20D. See also, for example, *Hing v Road Accident Fund* 2014 (3) SA 350 (WCC) at 382D–383A.

159 *Van der Riet v Rheeder* 1965 (3) SA 712 (O); *Dinath v Breedt* 1966 (3) SA 712 (T); *Boland Konstruksie Maatskappy (Edms) Bpk v Petlen Properties (Edms) Bpk* 1974 (4) SA 291 (C); *Kanderssen (Pty) Ltd v Bowman NO* 1979 (4) SA 296 (T). See also *Jeebhai v Minister of Home Affairs* 2009 (4) SA 662 (SCA) at 666D–667F; but see the minority judgment at 667H–669D.

160 *Badenhorst v Alum Konstruksie* 1986 (2) SA 225 (T) at 229B.

161 *Badenhorst v Alum Konstruksie* 1986 (2) SA 225 (T) at 229B–C.

162 See *Ex parte Simoes: In re Hasewinkel v Simoes* 1970 (2) SA 302 (T).

163 See *Incubeta Holdings (Pty) Ltd v Ellis* 2014 (3) SA 189 (GJ) at 194J–195I where (at 196G) the reference to 'security under rule 48(12) is available' was, obviously, intended to be a reference to this subrule.

164 *Airy v Cross-Border Road Transport Agency* 2001 (1) SA 737 (T) at 743F–G.

165 2000 (2) SA 1066 (N) 1073C.

166 *Shepherd v O'Niell* 2000 (2) SA 1066 (N) at 1073C–D.

167 *Shepherd v O'Niell* 2000 (2) SA 1066 (N) at 1073D.

168 *Shepherd v O'Niell* 2000 (2) SA 1066 (N) at 1074E–F.

169 GN R1299 of 29 October 1999. In *Mokhutamane Kenneth Maake and Others v Chemfit Finechemical (Pty) Ltd* (unreported, LP case no 5772/2016 dated 22 November 2018) it was held that rule 49(12), (13) and (14) were left extant when rule 49(11) was repealed during 2015. *Sed quaere*.

170 This position was affirmed in *TR Eagle Air (Pty) Ltd v RW Thompson* (unreported, GP case no A206/2018 dated 13 November 2020) at paragraph [18]; but see the *obiter dictum* in *Malomini Strategists (Pty) Ltd v Amanda In re: Amanda v Companies and Intellectual Property Commission (CIPC)* (unreported GP case nos A292/2021; 49110/2021 dated 15 September 2022) at paragraph [24].

171 *Strouthos v Shear* 2003 (4) SA 137 (T) at 140H.

172 *Freedom Stationary* [*sic*] *(Pty) Ltd v Palm Stationary* [*sic*] *Manufacturers (Pty) Ltd and Mveli Data Matrix Solutions (Pty) Ltd (Joint Venture)* (unreported, MM case no 1023/2021 dated 15 September 2021) at paragraphs [33]–[48], not following *FirstRand Bank Ltd v Van der Merwe* (unreported ECG case no 959/2002 dated 7 October 2002) (which was apparently not ultimately decided by a full court as envisaged in the order that was made). In *Jeanru Konstruksie (Pty) Ltd v Botes* 2023 (6) SA 305 (GP) the applicant contended that rule 49(13) was *ultra vires* the statutory powers of the Rules Board for Courts of Law and invalid. Following the *Freedom Stationary* [*sic*] decision (at paragraphs [17]–[19], [21] and [27]–[28]), it was held (at paragraph [29]) that rule 49(13) was not promulgated outside the powers of the Rules Board. The source for furnishing security for costs on appeal is the common-law authority of the High Court to regulate its own process, which is now provided for in s 173 of the Constitution (at paragraph [29]). In *Dr Maureen Allem Inc v Baard* 2022 (3) SA 207 (GJ) the respondent applied in terms of rule 30A for an order compelling the appellant to furnish security for costs. The appellant, amongst other things, contended that rule 49(13) was unconstitutional. Although the court carefully considered the appellant's contentions (at paragraphs [32]–[58]), it ultimately determined the case without making any findings in regard to the alleged unconstitutionality of rule 49(13) (at paragraph [59]). The court concluded that under circumstances where the Supreme Court of Appeal, in granting leave to appeal in a matter, did not set a requirement that the appellant provide security and the respondent considered that it would be appropriate for security to be provided (as was the case before the court), it would be for the respondent to approach the Supreme Court of Appeal for an order to such an effect. Put differently, it would only be once the respondent in an appeal brought an application and obtained an order that it could then invoke rule 30A for want of compliance with the obligation created under that provision (at paragraph [67]). That did not transpire in the case before the court. The rule 30A application was accordingly dismissed with costs (at paragraph [[84]).

173 *Strouthos v Shear* 2003 (4) SA 137 (T) at 140H at 140F–G; *Jyoti Structures Africa (Pty) Ltd v KRB Electrical Engineers/Masana Mavuthani Electrical and Plumbing Services (Pty) Ltd t/a KRB Masana* 2011 (3) SA 231 (GSJ), applied in *Eagle Creek Investments 472 (Pty) Ltd v Focus Connection (Pty) Ltd* (unreported, GJ case no 5007/2018 dated 19 October 2018) at paragraph [12]; but see *Dr Maureen Allem Inc v Baard* 2022 (3) SA 207 (GJ) at paragraphs [63]–[67]; and see the notes to rule 30 s v 'An irregular step has been taken' above.

174 *Strouthos v Shear* 2003 (4) SA 137 (T) at 140F–G; *Kama v Kama* (unreported, ECPE case no 1357/2005 dated 6 September 2007); *Jyoti Structures Africa (Pty) Ltd v KRB Electrical Engineers/Masana Mavuthani Electrical and Plumbing Services (Pty) Ltd t/a KRB Masana* 2011 (3) SA 231 (GSJ) at paragraph [7]; *Carpe Diem Explorations (Pty) Ltd v Kasimira Trading 82 (Pty) Ltd* (unreported, GP case no A601/14 dated 14 December 2016) at paragraph [12]; *TR Eagle Air (Pty) Ltd v RW Thompson* (unreported, GP case no A206/2018 dated 13 November 2020) at paragraph [18].

175 *Boland Konstruksie Maatskappy (Edms) Bpk v Petlen Properties (Edms) Bpk* 1974 (4) SA 291 (C).; *TR Eagle Air (Pty) Ltd v RW Thompson* (unreported, GP case no A206/2018 dated 13 November 2020) at paragraph [19]. In *Collatz v Alexander Forbes Financial Services (Pty) Ltd* (unreported, GJ case nos A5067/2020; 43327/2012 dated 10 February 2022) the full court was not prepared to strike the appeal from the roll despite the appellants' failure to provide security, reasoning, *inter alia*, that whatever financial prejudice the respondents may suffer, or potentially suffer, because of the appellants' failure to furnish security, has already been incurred or suffered under circumstances where the respondents have prepared on all aspects for the appeal, filed heads of argument dealing with the merits of the appeal, and have incurred the costs of counsel to argue the appeal. It would therefore truly be a pyrrhic victory for the respondents if the appeal were to be

struck from the roll, despite their already incurring such costs and without the merits of the appeal being determined (at paragraph [26]).

176 *Janse van Rensburg v Obiang* (unreported, WCC case no A338/2018 dated 10 May 2019) at paragraph [33].

177 *Louw v Louw* 1965 (3) SA 750 (E); *S v Zondo* 1966 (2) SA 521 (T); *Boland Konstruksie Maatskappy (Edms) Bpk v Petlen Properties (Edms) Bpk* 1974 (4) SA 291 (C); *AC Buildings Services CC v P B & A Personnel Consultants (Pty) Ltd* 1992 (2) SA 55 (T).

178 *Louw v Louw* 1965 (3) SA 852 (E); *General Accident Insurance Co South Africa Ltd v Zampelli* 1988 (4) SA 407 (C) at 410C. See also *Guardian National Insurance Co Ltd v Engelbrecht* 1989 (4) SA 908 (T).

179 *General Accident Insurance Co South Africa Ltd v Zampelli* 1988 (4) SA 407 (C) at 411D.

180 1989 (4) SA 908 (T).

181 2003 (4) SA 258 (W).

182 2014 (1) SA 594 (ECG) at 596C–D, referred to with approval in *Feni v Gxothiwe* 2014 (1) SA 594 (ECG) at 596C–D and *Geza v Standard Trust Limited* (unreported, ECGq case no 3534/2021 dated 14 March 2023) at paragraph [31].

183 At 265B–D.

184 *Kriel v Terblanche NO* 2002 (6) SA 132 (NC) at 149C–G.

185 *Van der Westhuizen NO v United Democratic Front* 1989 (2) SA 242 (A) at 252B–D.

186 See, for example, the order in *Van der Westhuizen NO v United Democratic Front* 1989 (2) SA 242 (A) at 252H. Rule 67A(2)*(c)* provides that in considering all relevant factors when awarding costs, the court may have regard to unnecessary or prolix drafting.

187 Unreported, WCC case no A145/2021 dated 21 April 2022 (an appeal heard by a full court).

188 At paragraph [83] footnote 13.

189 2019 JDR 0985 (SCA) at paragraph [38].

190 *Janse van Rensburg v Obiang* 2023 (3) SA 591 (WCC) at paragraphs [22]–[24]). See also *Montle and Neo Transport Service v Engen Petroleum Limited* (unreported, WCC case no 20420/2022 dated 18 August 2023) at paragraphs 41–45.

191 1979 (4) SA 19 (T) at 26F.