



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 07 September 2026

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Barnard v Barnard (562/2025) [2026] ZASCA 115 (07 September 2026)

Today the Supreme Court of Appeal (SCA) handed down judgment in which the appellant's application for condonation and reinstatement of the appeal was dismissed with costs.

In this matter, the appellant sought to reinstate an appeal against an order of Wepener and Crutchfield JJ and D'Amico AJ, sitting on appeal as the Full Court of the Gauteng Division of the High Court, Johannesburg (the Full Court).

The facts briefly are as follows. The parties were married on 17 May 1996 out of community of property with the application of the accrual system in terms of the Matrimonial Property Act 88 of 1984. In 2019, the parties agreed that their marriage had broken down irretrievably. In an attempt to resolve their patrimonial disputes, they concluded a settlement agreement on 20 August 2019 and instituted divorce proceedings two days later. It is these divorce proceedings which subsequently became the subject of a series of applications and appeals.

An initial decree of divorce incorporating the settlement agreement was granted by the high court on an unopposed basis on 1 October 2019. The respondent subsequently succeeded in having that order rescinded. Following the rescission of the divorce order, the matter returned to the trial roll.

On 30 August 2022, the matter came before Dippenaar J for judicial case management. By agreement, an order was issued in terms of Rule 33(4) of the Uniform Rules of Court. The order directed that the issue concerning whether the settlement agreement concluded on 20 August 2019 was enforceable should be determined separately from the parties' accrual claims. The settlement agreement issue was to be heard and determined first, while the accrual issue was stayed until the settlement issue had been disposed of.

The settlement agreement issue was subsequently set down for trial on 29 May 2023. However, on 25 May 2023, a few days before the trial was due to commence, the respondent requested the appellant to consent to a postponement of the trial. The appellant refused to consent to the postponement, prompting the respondent to apply for a postponement of the trial and tender the wasted costs occasioned by the postponement.

Twala J refused the postponement application. The matter then proceeded, and the appellant gave evidence regarding the reasons for the divorce and identified the signatures on the settlement agreement. No further evidence concerning the settlement agreement was led. On 6 June 2023, Twala J dismissed the postponement application with costs, dismissed the plaintiff's claim with costs, and granted a decree of divorce incorporating the settlement agreement, also with costs.

The respondent then appealed to the Full Court. The Full Court upheld the appeal and set aside Twala J's orders. It is this decision of the Full Court that is the subject of the lapsed appeal before this Court. The Full Court found that the trial court had exceeded its powers because it was required, in terms of the Rule 33(4) order, to determine the enforceability of the settlement agreement separately, but instead proceeded to grant a decree of divorce. The Full Court regarded the order as a nullity. It further held that the orders were appealable because the decree of divorce constituted a final order. According to the Full Court, setting aside Twala J's orders restored the parties to the position in which the Rule 33(4) order remained operative.

The appellant thereafter obtained special leave to appeal to this Court, but the appeal subsequently lapsed because she failed to file the record within the prescribed period. She accordingly approached this Court for condonation and reinstatement of the appeal.

In a unanimous judgment, this Court, per Norman JA, held that the appellant had first to establish that the matter met the requirements for special leave to appeal. Reasonable prospects of success, although necessary, were insufficient on their own; there also had to be special circumstances, such as the raising of a substantial point of law or prospects of success so strong that refusal of leave would result in a denial of justice. This Court found that the appellant had not met these requirements.

Central to this Court's reasoning was the Rule 33(4) order. This Court explained that where parties reach an agreement to limit issues during trial, they are bound by the terms of such agreement. In the present matter, the parties had expressly agreed that the settlement agreement issue would be determined separately and before the accrual issue. Twala J was therefore required to confine the adjudication to the issue identified in the Rule 33(4) order. This Court also rejected the appellant's reliance on Rule 42(1)(a) and held that the requirements for rescission under Rule 42(1)(a) were not satisfied.

Furthermore, in rejecting the contention that the second and third orders made by Twala J were rescindable, this Court also relied on the principle of *functus officio*. The orders made by Twala J had followed the leading of evidence and were final in effect. Once a final judgment has been granted after evidence has been adduced on the merits, the court becomes *functus officio* and cannot simply rescind its order under Rule 42. The orders were therefore final in effect and appealable rather than rescindable.

Importantly, this Court agreed with the Full Court that Twala J's orders were nullities because he had acted contrary to the Rule 33(4) order. This Court explained that the issue implicated the trial court's jurisdiction to deal with matters that were not properly before it. If a court, despite the existence of the Rule 33(4) order, proceeds to deal with the matter contrary to the agreed order between the parties, it does not commit an error, but it exceeds its powers and acts outside its jurisdiction. Its order thus becomes a nullity.

This Court held that the effect of nullifying the orders was to level the playing field, so that the party who took advantage of the absence of the other and acted contrary to the agreed order could not derive a benefit from his or her actions. Ultimately, this Court found the respondent has not met the requirements for the grant of special leave and further found that the prospects of success were remote and that the Full Court's order placed the parties in a position where the validity of the settlement agreement can be decided.

This Court then considered the appellant's application for condonation and reinstatement of the lapsed appeal. The record ought to have been filed by 5 September 2025, and the delay was for a period of about three weeks from 5 September 2025.

This Court held that it is trite that when dealing with condonation, a party in default must provide some acceptable explanation not only about the delay in the filing of the record but also the delay in seeking condonation. After filing the certificate from the high court Registrar on 2 September 2025, the appellant made no further enquiries to the correspondent between 2 and 10 September 2025, even though she was aware that the record had to be filed by 5 September 2025. Additionally, having been alerted to the lapsing of the appeal, instead of seeking condonation immediately, she did so only on 30 September 2025. There is no explanation at all for the delay from 5 to 30 September 2025. This Court stressed the principle expressed in *Commissioner for Inland Revenue v Burger* that a party who becomes aware of non-compliance with a court rule should apply for condonation without delay.

The respondent also opposed reinstatement on the basis that he was entitled to finality of his matter, that the application for condonation was a delaying tactic, as there were no prospects of success on appeal. This Court found that the appellant's response to these allegations consisted merely of bare denials and failed to address the crucial issue of her prospects of success.

Ultimately, the SCA found that no case has been made out to justify condonation and reinstatement of the appeal and that the appellant failed to show that it would be in the interests of justice to do so. The Full Court's order had placed the parties back in the position contemplated by the Rule 33(4) order, allowing the validity of the settlement agreement to be properly ventilated before the trial court. There can therefore be no prejudice to any party. The SCA accordingly dismissed the application for condonation and reinstatement of the appeal with costs.

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