



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 562/2025

In the matter between:

CATHY ANN BARNARD

APPELLANT

and

IAN KEITH BARNARD

RESPONDENT

Neutral citation: *Barnard v Barnard* (562/2025) [2026] ZASCA 115 (07 September 2026)

Coram: SCHIPPERS, MBATHA, HUGHES and NORMAN JJA and
MOLITSOANE AJA

Heard: 22 May 2026

Delivered: 07 September 2026

Summary: Civil procedure – condonation and reinstatement of a lapsed appeal – rule 33(4) separation of issues order – whether the trial court exceeded its powers by determining issues beyond those separated for adjudication – orders a nullity – appealable rather than rescindable – condonation and reinstatement refused.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Wepener and Crutchfield JJ and D’Amico AJ, sitting as court of appeal):

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

JUDGMENT

Norman JA (Schippers, Mbatha and Hughes JJA and Molitsoane AJA concurring)

Introduction

[1] The appellant seeks 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). Twala J, sitting as a court of first instance, refused to grant the respondent a postponement and proceeded to grant a decree of divorce incorporating a deed of settlement, concluded by the parties on 20 August 2019. Thereafter he refused leave to appeal.

[2] The respondent on petition was granted leave to appeal by this Court to the Full Court. The Full Court upheld the appeal by the respondent against the order of Twala J. The appellant applied for and was granted special leave to appeal to this Court against the orders of the Full Court in terms of s 16(1)(b) and s 17(3) of the Superior Courts Act No. 10 of 2013 (the Act).

[3] The appeal lapsed due to the appellant's failure to file the record timeously. This Court is asked to decide whether his default should be condoned and the appeal reinstated. The appellant furnished an explanation, and his counsel was directed to address the merits of the appeal so as to enable this Court to assess the appellant's prospects of success and to weigh that together with the factors relevant to condonation.¹

Factual matrix

[4] 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 (the MPA). During 2019, they agreed that their marriage had broken down irretrievably. In an effort to resolve all patrimonial disputes between them, they entered into a settlement agreement on 20 August 2019 and instituted divorce proceedings on 22 August 2019. Subsequently, the parties were embroiled in a series of court applications and appeals.

[5] Prior to the order of Twala J, the first order granting a decree of divorce incorporating a deed of settlement was made by the high court on an unopposed basis on 1 October 2019. The respondent succeeded in rescinding that order on an unopposed basis.

[6] In the rescission application, the respondent attacked the settlement agreement essentially on the grounds that it was drafted by the appellant's attorney, Ms Jennifer Scholtz of Jennifer Scholtz Attorneys (who purportedly acted for both parties); that he was induced to sign it based on a misrepresentation concerning the appellant's ill-health and that the agreement was necessary to

¹ *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development CO Ltd and Others* [2023] ZASCA 5; [2013] 2 ALL SA 251 (SCA); 2014 (5) SA 138 (CC).

obtain a divorce; and that it failed to make provision for the bulk of the parties' accrued assets. After the grant of the rescission order, the matter reverted to the trial roll and was subjected to normal case flow management procedures.

[7] On 30 August 2022, the matter served before Dippenaar J for judicial case management who certified the matter trial ready. Both parties were legally represented. They agreed that any rulings or directives made were to be regarded as having the status of orders of court. By agreement an order was issued in terms of rule 33(4) of the Uniform Rules of Court (the rule 33(4) order). The order reads in relevant part:

- '1. The issue as to whether the defendant is entitled to be granted an order that the agreement of settlement concluded between the plaintiff and the defendant on or about the 20th day of August 2019 ("the agreement of settlement issue") be separately decided from the issue relating to the plaintiff and the defendant's accrual claims (the accrual issue).
2. The agreement of settlement issue be heard and determined before the accrual issue is heard and determined.
3. The accrual issue is to be stayed until the agreement of settlement issue has been disposed of.'

[8] The settlement agreement issue was set down for trial on 29 May 2023 for a period of five (5) days. The parties had agreed in a pre-trial minute that in determining this issue, witnesses would be called to present *viva voce* evidence.

Application for postponement of the trial

[9] On 25 May 2023 the respondent requested the appellant to consent to a postponement of the trial which was set to commence on 29 May 2023. The reason for the request was that the respondent's counsel had informed his instructing attorneys that he was involved in another trial and that the respondent should engage another counsel.

[10] The request was refused. The appellant indicated that the trial would proceed. Consequently, the respondent applied for a postponement of the trial and tendered the wasted costs occasioned by the postponement.

[11] The reasons for the postponement were that the case had been ongoing since 2019, the record was extensive and it was not possible for another counsel at short notice to prepare adequately for trial. Attempts were made by the respondent's legal representatives to secure services of another senior counsel, but without success. If the settlement agreement was left unchallenged, the respondent would forego over 80% of his life savings and would be left destitute. The respondent's attorney explained that although he had been involved in the matter since 2019, he lacked the necessary expertise, and it would be prejudicial to his client if he proceeded with the trial.

[12] Twala J refused the application for postponement and indicated that he would provide reasons later in the judgment. The respondent's counsel indicated that he did not have instructions to proceed with the trial and his client was not at court. Twala J stood the matter down until 14h00 for the respondent to attend court. At 14h00, the respondent was not in attendance and his attorney withdrew as the attorney of record. The court stood the matter down until 10h00 the following day, being 30 May 2023, for the respondent to attend. He failed to attend court. The appellant then gave evidence on the reasons for divorce and identified the signatures on the settlement agreement. No further evidence was adduced in relation to the settlement agreement. On 6 June 2023, Twala J made the following orders:

- '1. The application for the postponement of this case is dismissed with costs.
2. The plaintiff's claim is dismissed with costs. [second order]
3. The decree of divorce incorporating the settlement agreement of the 20th of August 2019 is granted with costs. [third order]'

[13] As mentioned above, the Full Court upheld the respondent's appeal with costs and set aside the orders made by Twala J. It is this decision of the Full Court that is the subject of the lapsed appeal. The appellant seeks an order setting aside the orders of the Full Court and for those to be substituted with an order dismissing the respondent's appeal against the orders of Twala J and directing him to pay all costs of the appeal. The respondent opposes both the condonation and the reinstatement of the appeal.

The findings of the Full Court

[14] The Full Court found that the high court had overstepped its powers in that it had to determine the enforceability of the settlement agreement but instead went beyond that and granted the decree of divorce; thus, rendering its order null and void. It was not necessary to determine whether the high court's refusal of the postponement was correct because the appellant was present when Twala J refused the postponement application.

[15] The Full Court held that the high court's order was appealable, because the decree of divorce incorporating the settlement agreement was a final order. It further held that by setting aside the orders of Twala J, the parties would revert to the position where the rule 33(4) order would be operative. In the result, the Full Court upheld the appeal with costs and set aside the orders of Twala J.

Before this Court

Appellant's submissions

[16] The appellant submitted that the Full Court misdirected itself by failing to determine whether Twala J had erred in refusing the postponement application. The second and third orders of Twala J amounted to default orders as they were made in the absence of the respondent and were thus not appealable, but

rescindable in terms of rule 42(1)(a). The findings that the trial court's order was contrary to the rule 33(4) order and that the second and third orders constituted nullities, were erroneous. The fact that the appellant had been granted leave to appeal does not dispose of the question of appealability of the Full Court's order.

Submissions by the respondent

[17] It was submitted on behalf of the respondent that the Full Court was correct. The trial court was not permitted to deal with issues contrary to the rule 33(4) order. It was not necessary for the Full Court to determine whether the decision to refuse the postponement was correct. The appealability of Twala J's order was raised for the first time from the bar before the Full Court, which the appellant's counsel had conceded. The trial court was seized with a separated issue before it, as contained in the rule 33(4) order and was not permitted to deal with issues contrary to the separated issue before it. The respondent was not absent as envisaged in rule 42, he was present and legally represented when the postponement application was refused. Finally, it was submitted that the appeal should be dismissed with costs.

Discussion

[18] The appellant's first hurdle is to show that this case meets the requirements for special leave to appeal. As this Court has held, 'reasonable prospects of success is a necessary but insufficient precondition for the granting of special leave. Something more, by way of special circumstances, is needed'.² These circumstances include that the appeal raises a substantial point of law or that the prospects of success are so strong that a refusal of leave would result in a denial of justice. As is shown below, the appellant has not met these requirements.

² *Cook v Morrison and Another* 2019 (5) SA 51 (SCA); [2019] ZASCA 8.

[19] Rule 33 of the Uniform Rules of Court provides:

‘33. Special cases and adjudication upon points of law

(1) the parties to any dispute may, after institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court.

...

(4) If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.’

[20] In this case the parties agreed on the issues to be determined and how they should be determined. This is apparent from the rule 33(4) order.

[21] Where parties reach an agreement to limit issues during trial, they are bound by the terms of such agreement. This was confirmed by the Appellate Division found in *F & I Advisors (Edms) Bpk en 'n Ander v Eerste Nasionale Bank van Suidelike Afrika Bpk*.³

[22] The grounds for rescission are circumscribed. Rule 42(1) provides, in relevant part:

‘Variation and rescission of orders

(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected rescind or vary;

(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

³ *F & I Advisors (Edms) Bpk en 'n Ander v Eerste Nasionale Bank van Suidelike Afrika Bpk* 1999 (1) SA 515 (A) at 524E-F.

(c) an order or judgment granted as the result of a mistake common to the parties.’

[23] In *Zuma*,⁴ the Constitutional Court considered the requirements for rescission in rule 42, namely an order granted in the absence of the affected party and an order erroneously sought or granted. The Court stated:

‘...[A]s I see it, the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from participating, physically or otherwise, may be entitled to rescission in the event that an error is committed. I accept this. I do not, however, accept that litigants can be allowed to butcher, of their own will, judicial process which in all other respects has been carried out with the utmost degree of regularity, only to then, ipso facto (by that same act), plead the “absent victim”. If everything turned on actual presence, it would be entirely too easy for litigants to render void every judgment and order ever to be granted, by merely electing absentia (absence).

.... [O]ur jurisprudence is clear: where a litigant, given notice of the case against them and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42(1)(a). And, it certainly cannot have the effect of turning the order granted in absentia, into one erroneously granted. I need say no more than this: Mr Zuma’s litigious tactics cannot render him “absent” in the sense envisaged by rule 42(1)(a).’ (Emphasis added and footnotes omitted.)

[24] In this case the respondent was represented when the application for a postponement was argued. After the refusal of the postponement, he absented himself and his legal representative withdrew. Most importantly, Twala J, stood the matter down twice affording him an opportunity to attend, but he did not. The first requirement for rescission as laid down in rule 42(1)(a) is therefore not satisfied.

⁴ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) paras 60 and 61 (*Zuma*).

[25] Concerning the second requirement – the order must have been granted erroneously – an applicant must show that ‘there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if aware of it, not to grant the judgment’.⁵ Twala J was aware of the rule 33(4) order, which was quoted in full at paragraph 3 of his judgment. Nevertheless, armed with the knowledge of its existence and its import, he proceeded to deal with the settlement issue in a manner not agreed to by the parties (by not hearing *viva voce* evidence). He proceeded with the divorce issue, which was not contained in the rule 33(4) order and was not before him for adjudication. He gave final and definitive orders. This is not a procedural error that can be rescinded under rule 42(1). It was a substantive error in law that is appealable. This means that the second requirement for rescission was not met.

[26] There is another reason that militates against the contention that the second and third orders made by Twala J are rescindable. It is that those orders were granted after evidence was led. After the leading of evidence Twala J was *functus officio* as the orders were final in effect. In *Chetty v Law Society, Transvaal*,⁶ the Appellate Division held:

‘...a distinction is drawn between the rescission of default judgments, which had been granted without going into the merits of the dispute between the parties, and the rescission of final and definitive judgments, whether by default or not, after evidence had been adduced on the merits of the dispute. In the case of a default judgment granted without going into the merits of the dispute between the parties, the court enjoyed the relatively wide powers of rescission *In the case of a final and definitive judgment, whether by default or not, granted after evidence had been adduced, the court was regarded as functus officio.*’ (Emphasis added.)

⁵ *Zuma* para 62.

⁶ *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 761.

[27] The orders of Twala J met the *Zweni* triad and are final in effect.⁷ A decree of divorce was issued and the proprietary consequences of the marriage were determined, let alone the disposal of a substantial portion of the relief claimed. Having found that the orders of Twala J were not rescindable but appealable, it follows that the contention by the appellant that a rescission was mandated is not only flawed but against established principles, as demonstrated above. The Full Court was correct in its approach and its findings in this regard.

[28] I now proceed to deal with the finding by the Full Court that the second and third orders were a nullity because Twala J acted contrary to the clear terms contained in the rule 33(4) order. The court's power to act contrary to the rule 33(4) order implicates its jurisdiction to deal with a matter not properly before it. It follows that it was incompetent for Twala J to issue the order that he did. His order was therefore a nullity.⁸

[29] Where a party takes advantage of the absence of his or her opponent and does not adhere to the agreement reached and made an order of court in terms of rule 33(4), his or her actions are not erroneous but deliberate. 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 becomes a nullity. Setting aside an order obtained in those circumstances with invalidity levels the playing fields, so that the party who took advantage of the absence of the other and acted contrary to the agreed order does not derive a benefit from his or her actions. Nullifying the order puts the parties back to the position they were before Twala J

⁷ *Zweni v Minister of Law and Order* [1992] ZASCA 197; 1993 (1) SA 523 (A) at 532J-533B.

⁸ *The Master of the High Court (North Gauteng High Court, Pretoria) v Motale NO and Others* [2011] ZASCA 238; 2012 (3) SA 325 (SCA) para 14.

made his order. That does not offend the interests of justice; instead it entrenches them.

[30] It follows that the respondent has not met the requirements for the grant of special leave. The prospects of success are remote and the Full Court's order placed the parties in a position where the validity of the settlement agreement, which it is alleged, was induced by fraud, can be decided. This cannot result in the denial of justice.

[31] Having had the benefit of all the facts and the legal principles relied upon by both parties the next question is whether condonation should be granted. And if so, whether the appeal should be reinstated.

Condonation and reinstatement of the appeal

[32] The explanation given for the appellant's delay in filing the record was that it was lodged on 19 August 2025, but the Registrar of this Court returned it because it was not properly bound, indexed or paginated. After this had been done, the Registrar directed that the certificate from the Registrar of the high court needed to be signed and the record was returned. The certificate was signed only on 12 September 2025, whilst the record ought to have been filed on 5 September 2025. On 11 September 2025, the respondent's attorneys notified the appellant's attorneys that the appeal had lapsed. The appellant's attorneys wrote to the Registrar indicating that they would request a maximum extension of three weeks within which to lodge the record of appeal.

[33] The condonation application was delivered on 30 September 2025. The respondent opposed the application on the following grounds: the appellant had sought condonation twice before seeking an extension to file her application for

special leave; the delays were prejudicial to him in time and monetary terms; he had incurred considerable legal expenses preparing for the appeal; there are no prospects of success on appeal; and the application should be dismissed with costs.

[34] The delay was for a period of about three weeks from 5 September 2025. The record had been delivered but was rejected due to the lack of proper pagination, indexing, the manner in which it was bound and the unsigned certificate by the Registrar of the high court. The appellant's heads of argument were delivered simultaneously with the record. The explanation for the delay lacks details and I shall deal with the adequacy thereof below.

[35] 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. There is no explanation why the appellant needed three weeks to file the record when on her own version by 1 September 2025 she had forwarded the record (referred to as re-numbered and re-indexed papers) to the correspondent. After filing the certificate from the high court registrar on 2 September 2025, she made no further enquiries from the correspondent between 2 to 10 September 2025, even though the appellant was aware that the record had to be filed by 5 September 2025. 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. In this regard she failed to heed the caution in *Commissioner for Inland Revenue v Burger*,⁹ that a party should, whenever it realises that it has not complied with a rule of court, apply for condonation without delay.

⁹ *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449G-H.

[36] The respondent opposed the reinstatement of the appeal for the following reasons. He seeks finality in the matter. The matter will be better served by referring it back to the trial court for a fair and expeditious hearing. The application for condonation is a delaying tactic as there are no prospects of success on appeal.

[37] In response, the appellant, in a replying affidavit deposed to by her instructing attorney, simply denied those allegations and stated that she had shown good cause for condonation and reinstatement of the appeal. The reply to the respondent's allegations were met with a bare denial. The respondent's allegations address a crucial requirement for consideration by this Court, namely the prospects of success. It is no answer simply to say that the appellant has shown good cause.

[38] The effect of the order of the Full Court was to place the parties back in the position where the rule 33(4) order is operative. There can be no prejudice to any party, since the challenge to the settlement agreement will be fully ventilated and the matter brought to finality.

[39] Having considered the factors to be considered in an application of this nature, including the appellant's manner of dealing with the application, the failure to address the allegations made by the respondent on prospects of success, which allegations called for an explanation, the prejudice suffered by the respondent, and the prospects of success on appeal, the appellant has failed to justify condonation and reinstatement of the appeal. In *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*,¹⁰ the Constitutional Court stated that 'the principle of finality in litigation is intended

¹⁰ *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC).

to allow parties to get on with their lives'. This principle is apt where the parties are eager to finalise the divorce proceedings and their accrual claims.

[40] I find that no case has been made out to justify condonation and reinstatement of the appeal. The appellant failed to show that it would be in the interests of justice to do so.

[41] In the result the following order is made:

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

T V NORMAN
JUDGE OF APPEAL

Appearances

For the appellant: S P Pincus SC

Instructed by: Howard S Woolf Attorney, Johannesburg
A P Pretorius & Vennote, Bloemfontein

For the respondent: S J Martin

Instructed by: Anthony Berlowitz Attorneys, Johannesburg
Lovius Block Attorneys, Bloemfontein.