



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 237/2025

In the matter between:

LEBRA DEVELOPMENT (PTY) LTD

FIRST APPELLANT

HENDRIK CHRISTOFFEL BOTHA

SECOND APPELLANT

LISBETH JOHANNA LOUISA BOTHA

THIRD APPELLANT

GERHARDUS PETRUS VAN DER WESTHUIZEN

FOURTH APPELLANT

MAGDALENE JULYA GEYSER

FIFTH APPELLANT

and

BEN COETZEE BESTER

FIRST RESPONDENT

MARTHINUS MURRAY BESTER N O

SECOND RESPONDENT

JOHANNES BAREND BESTER N O

THIRD RESPONDENT

RIAAN BECKER N O

FOURTH RESPONDENT

BEN COETZEE BESTER N O

FIFTH RESPONDENT

Neutral citation: *Lebra Development (Pty) Ltd and Others v Bester and Others*
(237/2025) [2026] ZASCA 125 (29 September 2026)

Coram: NICHOLLS, MEYER, COPPIN AND DLODLO JJA AND

MPHAHLELE AJA

Heard: 31 August 2026

Delivered: 29 September 2026

Summary: Civil Procedure – Uniform Rules of Court – non-compliance – rule 49 – explanation for the entire period of the delay – lapse of appeal – approach of appellate court to the exercise of a discretion by the high court in deciding on condonation for non-compliance with the rules of court.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Van der Schyff J, Collis J and Le Grange AJ sitting as the court of appeal):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Nicholls JA (Meyer, Coppin and Dlodlo JJA and Mphahlele AJA concurring):

Introduction

[1] The appellants seek the reinstatement of a lapsed appeal to the full court of the Gauteng Division of the High Court, Pretoria (the full court) which dismissed the appellants' application for condonation and reinstatement with costs. The lapsed appeal is in respect of a judgment of the court of first instance (the high court) which granted relief pursuant to an application in terms of s 163 of the Companies Act 71 of 2008¹ (the Companies Act). The purported reason for the appeal to the full court having lapsed is a practice directive of the high court. The appellants contend that the practice directive is in conflict with the Uniform Rules of Court (the rules of court).

[2] The first appellant is Lebra Development (Pty) Ltd (Lebra) which is a property-owning company. The second appellant is Hendrik Christoffel Botha (Mr Botha), a director of Lebra and a trustee of the Canaan Family Trust. His wife, Lisbeth Johanna Louisa Botha, a trustee of the Canaan Family Trust, is the third appellant. The fourth

¹ Section 163 of the Companies Act provides:

'Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company

(1) A shareholder or a director of a company may apply to a court for relief if-

(a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;

...

and fifth appellants are Gerhardus Petrus van der Westhuizen (Mr Van der Westhuizen), a property developer, and Magdalena Julya Geyser (Ms Geyser), an attorney, who became directors of Lebra in August 2019.

[3] The first respondent is Ben Coetzee Bester (Mr Bester) who was a director of Lebra from 2007 until 2019, and is a trustee of the Bester Roodeplaat 44 Trust (the Bester Trust). The second to fifth respondents are the other trustees of the Bester Trust. Special leave to appeal the refusal of condonation and the reinstatement of the appeal to the full court was granted by this Court. For convenience, the appellants will collectively be referred to as Lebra and the respondents as Bester unless individually named.

[4] Mr Botha in his personal capacity holds 51 percent of the issued share capital of Lebra, the Canaan Family Trust 39 percent and the Bester Trust 10 percent. Mr Bester and various trustees of the Bester Trust brought an application in the high court against Lebra and Mr and Mrs Botha, as trustees of Canaan Family Trust, alleging oppressive and unfairly prejudicial conduct as envisaged in s 163 of the Companies Act (the s 163 application). It is the appeal against the outcome of this application for which the appellants seek re-instatement.

Background

[5] The background facts in brief are as follows. During 2018 Lebra was involved in the sale of a property for R20 million in Roodepoort Eco Park. Mr Bester considered this to be a high risk transaction, and concerned that this was a significant portion of the value of the properties owned by the company, attempted to get information regarding the sale. Notwithstanding his requests, contends Mr Bester, the sale went ahead without a resolution by all the directors and without him having had sight of the agreement to purchase. All that materialised was a copy of the signed agreement after the sale had been concluded. Mr Bester became increasingly concerned, when despite numerous requests, he was not provided with access to the bank statements and other documentation. His other primary concerns were the extent of Mr Botha's remuneration and his relationship with USA authorities regarding an entity known as Global Trade House.

[6] Matters came to a head in August 2019 when Mr Bester refused to sign the financial statements of Lebra until certain information was supplied. Mr Bester was handed an unsigned and undated notice of his removal as a director.

[7] This resulted in Mr Bester launching the s 163 application in November 2019 in the high court. He sought various orders including: for Lebra to provide him with the outstanding information as listed in a schedule; to restrain Lebra from removing him as a director; to restrain Lebra from preventing him from fulfilling his duties as a director; and, that an independent chartered accountant be appointed to determine the value of Lebra. Finally, and of some significance, an order was sought for Lebra or the Canaan Trust to purchase the shares of the Bester Trust in Lebra.

[8] Mr Bester's complaints fall within three categories: mala fide attempts to remove him as a director of Lebra; exclusion from decision-making; and, the improper granting of loans to Mr and Mrs Botha. These are alleged to constitute oppressive and prejudicial conduct as contemplated in s 163.

[9] Mr Botha was of the view that the application was brought on the pretext of oppressive conduct and that what Mr Bester wanted, was the court to assist him to obtain legally incompetent relief to compel Lebra to purchase the Bester Trust's shareholding at an exorbitantly inflated price. He stated that the information sought was provided in a 'dropbox folder' and that he had allowed Mr Bester to inspect all the Lebra bank statements at a mutually convenient time. He said he and his wife had managed Lebra since its incorporation. On 1 November 2010, Lebra's board of directors (including Mr Bester) adopted a resolution authorising him to enter into any agreement and sign any contract on behalf of Lebra. This resolution has never been questioned nor revoked. Mr Botha states that no evidence has been provided that Lebra continues to provide financial assistance to him and his wife in contravention of s 45 of the Companies Act. Had this been the case, this would have been picked up by the chartered accountants when reviewing the Annual Financial Statements of Lebra.

[10] By the time the s 163 application was heard in the high court, Mr Bester was no longer a director, having been removed on 25 November 2019. The high court,

although it did not grant all the relief sought, found substantially in Bester's favour. It ordered that:

- '1. The applicants are to approach the South African Institute of Accountants ("SAICA") to nominate and appoint an independent chartered accountant ("chartered accountant") with a minimum of 10 years' experience, to conduct a forensic audit of the first respondent's² financial position for the financial year ending 2018 to the financial year ending 2020, in general and specifically pertaining to:
 - 1.1 allocation of the amount of R68, 000, 000.00 received by the first respondent in respect of the sale of Plot 181, Derdepoort;
 - 1.2 the authorisation of loans to directors and shareholders of the first respondent;
 - 1.3 the utilisation of funds and assets of the first respondent for the personal expenses of the second and third respondents.
2. The forensic audit shall be concluded within 6 months from date of this order and be furnished to all parties herein within 10 days from date of completion of the audit report.
3. The applicants on behalf of the Bester Roodeplaat 44 Trust are entitled to have insight to the source documents furnished to the appointed chartered accountant by the respondents, if necessary.
4. The aforesaid appointed chartered account[ant] shall, after the finalisation of the forensic audit, determine the fair value of the authorised and issued share capital of the first respondent to date of this order. Such valuation shall be finalised within 1 month after the conclusion of the forensic audit by the appointed chartered accountant.
5. The relief sought in prayers 2.3 and 2.4 ("the purchase of the shareholding") of the notice of motion is postponed *sine die*.
6. The first respondent is to bear the costs of the forensic audits.
7. The applicants are granted leave to approach this court, on duly supplemented papers, subsequent to the receipt of the documents, audit report, and the fair valuation for the relief sought for the purchase of the shareholding of the Bester Roodeplaat Trust 44.
8. The respondents shall file an affidavit...'

[11] In short, the high court ordered that a chartered accountant be appointed to conduct a forensic audit into Bester's complaints and to determine a fair value of the authorised and issued share capital up to the date of the order. It did not order that Lebra purchase any of the shares belonging to the Bester Trust, as sought in the notice of motion. Instead, the prayers relating to the purchase of the shares were postponed

² The first respondent was Lebra.

sine die.

Chronology

[12] The above judgment and order were handed down by the high court, per Kooverjie J on 24 March 2022. On 14 April 2022, Lebra applied to the high court for leave to appeal which was granted on 3 June 2022. Lebra timeously filed a notice of appeal on 1 July 2022, but failed to apply to the Registrar of the high court (the Registrar) for a date for the hearing of the appeal, thus allowing the appeal to lapse. In order to reinstate a lapsed appeal, a party must obtain condonation for its failure to comply with the rules of court.

[13] Rule 49(6)(a) of the rules of court provides:

‘Civil appeals from the High Court

...

6(a) Within 60 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 10 days after the expiry of the said period of 60 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.’

[14] On 23 September 2022, Lebra filed an appeal record and uploaded it on CaseLines. Rule 49(7)³ requires an appellant, at the same time as it applies for an

³ Rule 49(7)(a) of the Uniform Rules of Court provides that:

‘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.’

appeal date, to file three copies of the record, indexed and paginated, with the Registrar and two with the respondents. Lebra did not apply for a date for the hearing of the appeal as required by rule 49(6)(a) and did not comply with rule 49(7). The appeal lapsed on 26 September 2022.

[15] On 10 October 2022, the Registrar uploaded a note on CaseLines which reads: 'Kindly upload HEADS, PRACTICE NOTE, COSTS OR SECURITY and APPLICATION FOR APPEAL DATE as soon as possible'. Still Lebra did not apply for an appeal date, nor does it appear to have done anything else to further the appeal process.

[16] On 2 February 2023, Bester's attorneys notified Lebra's attorneys that the Registrar's request had not been complied with. The letter went on to state that they 'were now in the process of obtaining advice from Council (*sic*) as to how to proceed with this matter as our client's rights are severely prejudiced in this matter'. Once again it was met with deafening silence from Lebra. In the answering affidavit, Lebra's response is that the Registrar's request was in contravention of the rules of court which did not require heads of argument to be delivered before the Registrar allocates a date for the appeal.⁴

[17] Only after Mr Bester applied for the costs of the lapsed appeal in terms of the proviso under rule 49(6)(a) on 7 June 2023, did Lebra apply for a hearing date. This was slightly more than a year after leave to appeal had been granted by the high court. On 15 June 2023, Lebra applied for condonation and the reinstatement of the lapsed appeal.

Reinstatement and condonation application

[18] The deponent to the founding affidavit in the condonation application is Ms Geyser, the fifth appellant and a practising attorney. She laid the blame for the delay

⁴ Rule 49(15) of the Uniform Rules of Court provides:

'Not later than 15 days before the appeal is heard the appellant shall deliver a concise and succinct statement of the main points (without elaboration) which he intends to argue on appeal, as well as a list of the authorities to be tendered in support of each point, and not later than 10 days before the appeal is heard the respondent shall deliver a similar statement. Three additional copies shall in each case be filed with the registrar.'

in prosecuting the appeal squarely at the door of Lebra's erstwhile attorney, Mr Fouche. His services have since been terminated.⁵ According to Ms Geyser, the reason Mr Fouche had not applied for a trial date was a practice directive issued by Judges Potterill and Tolmay in April 2018 (the practice directive). Ms Geyser stated that Mr Fouche did not believe that the rules of court were applicable to the appeal because they had been superseded by the practice directive.

[19] It should be noted that the practice directive had been issued more than four years prior to Lebra filing its notice of appeal. It is not available on the judiciary's website and it is unclear what its source was and for how long it was operational or whether it was operational at the relevant time. The practice directive, which purports to facilitate the proper placement of appeals on the roll as expeditiously as possible with proper time allocations, in relevant part, reads as follows:

'ALL CIVIL APPEALS: NEW PROCEDURE

1. Once an appeal has been timeously noted, the registrar shall not accept any appeal matter [as contemplated in Rule 49(2), 6(a) and 7(a) or Rule 50 6(a) and 7(a)], unless the appellant or attorney of the appellant simultaneously submits to the registrar:
 - 1.1 A complete record, indexed and paginated;
 - 1.2 The appellant's heads of argument and practice note.

The registrar shall thereupon allocate a case number and issue an acknowledgment of receipt thereof.
 2. The appellant or the appellant's attorneys shall:
 - 2.1 Thereupon serve on the respondent or the respondent's attorney of record, the record and the appellant's heads of argument, practice note and a copy of the registrar's acknowledgment, and further state that the respondent's heads of argument and practice note must be filed with the registrar not later than 30 court days from the date of that service; and
 - 2.2 File a copy of such service with the registrar within 5 days from the date of such service.
 - 3 ...
 4. The Deputy Judge President may direct, in any particular matter, that the parties deliver heads of argument otherwise than as provided for in paragraph 1 and 2 above, either of his/her own accord or on receipt of a written request from one or both the parties.
-'

⁵ A notice of withdrawal as attorney of record by Mr Fouche was filed on 12 June 2023.

[20] Ms Geyser states that on 24 October 2022, Mr Fouche confirmed that an amount of R50 000 was held in his trust account as security for the costs of the appeal. Having taken these steps, Mr Fouche assured her that the appeal was properly prosecuted and that once he had received the heads of argument, he would apply for a date for the hearing of the appeal. According to Ms Geyser he informed her that the allocation of an appeal date is no longer regulated by the rules of court but by the practice directive. We are not provided with a date when this information was relayed but we can only assume it must have been between 24 October 2022 and 8 June 2023 on which date Ms Geyser states that much to Lebra's 'shock and surprise' it received the Bester application for costs as the appeal had lapsed. Mr Fouche apparently continued with his unshakeable belief that he was obliged to comply with the practice directive rather than the rules of court.

[21] Ms Geyser then contacted counsel who did not share the view of Mr Fouche and advised that the practice directive was subordinate to the rules. On informing her co-directors of this, they decided to obtain a second opinion from senior counsel, who confirmed the supremacy of the rules of court. The mandate of Mr Fouche was terminated and the present attorneys instructed.

[22] Ms Geyser states that there is no mala fides on the part of Lebra, they were merely acting on the advice of Mr Fouche. She further states that Lebra's prospects of success on appeal are good and if the appeal is not re-instated their prejudice is 'severe'.

[23] In the heads of argument for Lebra it was submitted that the practice directive was *ultra vires*. This argument was jettisoned before this Court and emphasis was placed on the merits of the appeal and the prospects of success. It was argued that the lack of compliance was not flagrant and that the failure to timeously apply for a date of the appeal was the only shortcoming. This was very minor breach, and what happened after the appeal had lapsed is irrelevant, so it is contended.

Condonation

[24] The principles governing condonation are well settled. Condonation is an indulgence and a party seeking condonation bears the onus of establishing good

cause. In *Melane v Santam Insurance Co Ltd*.⁶ Holmes JA explained that condonation involves the exercise of a judicial discretion upon a consideration of all the relevant facts. The factors ordinarily taken into account include the degree of lateness, the explanation therefor, the prospects of success, the importance of the case and the prejudice suffered by the litigants. None of these considerations is individually decisive. Rather, they are interrelated and must be weighed together in determining where the interests of justice lie.⁷

[25] The Constitutional Court has repeatedly affirmed that the overarching enquiry is whether granting condonation would serve the interests of justice.⁸ That assessment is context-specific and requires the court to balance competing considerations, including the need to determine disputes on their merits, the importance of compliance with procedural rules, the efficient administration of justice and the finality of litigation. The interests-of-justice enquiry does not diminish the significance of procedural compliance. Rather, it requires the court to determine whether departure from the rules is justified in the particular circumstances of the case.

[26] If the non-compliance is time related, it is essential that the applicant furnish a detailed, accurate and satisfactory explanation accounting for the entire period of the delay. As this Court stated in *Uitenhage Transitional Local Council v South African Revenue Service*⁹ (*Uitenhage*), condonation is not to be merely for the asking. It was emphasised in *Uitenhage* that the date, duration and extent of any obstacle on which reliance is placed, must be spelled out.¹⁰ This means that there must be a full, accurate and satisfactory explanation for the entire period of the delay.¹¹ The explanation must

⁶ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532.

⁷ *Ibid* at 531B-D; see also *Mulaudzi v Old Mutual Life Assurance* [2017] ZASCA 88; [2017] 3 All SA 520 (SCA); 2017 (6) SA 90 (SCA) para 26; *Miles Plant Hire (Pty) Ltd v Commissioner for the South African Revenue Service* 2015 JDR 1023 (SCA) para 12; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] ZASCA 5; [2013] 2 All SA 251 (SCA) paras 11-15 (*Dengetenge Holdings*).

⁸ *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) (*Van Wyk*) para 20; also see *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC) para 22; 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) (*Grootboom*) para 22; *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others; Natural Justice and Another v Minister of Mineral Resources and Energy and Others* [2026] ZACC 33.

⁹ *Uitenhage Transitional Local Council v South African Revenue Service* [2003] 4 All SA 37 (SCA); 2004 (1) SA 292 (SCA); 66 SATC 265 (*Uitenhage*).

¹⁰ *Ibid* para 6.

¹¹ *Van Wyk* para 22.

enable the court to understand clearly how the default occurred, why it continued and where responsibility lies. A satisfactory explanation for the initial default will not ordinarily suffice if subsequent periods of inactivity remain unexplained. Vague excuses or unexplained gaps will cause the application to fail.

[27] A detailed explanation for the entire period of the delay is lacking in this matter. This Court and the full court are not privy to what informed Mr Fouche's understanding that the practice directive trumped the rules of court, especially since the practice directive had been published more than four years prior. How had he conducted appeals in the past - had he always ignored the 60-day deadline? Why did he not respond to the CaseLines note? If he truly believed that it was not incumbent on him to apply for a trial date until the heads of argument had been filed, did he make any attempt to file the heads of argument? Did he believe a date of hearing could be postponed indefinitely depending on when he chose to file the heads of argument? Similarly what action, if any, was taken on receipt of the letter of Mr Bester attorneys?

[28] Further, Mr Fouche should have explained why he, as an attorney, believed that a practice directive would supersede the rules of court, and the basis of this belief. He should have informed the court why he disagreed with the views of his counsel, and when he got to accept that practice directives were subsidiary to the rules of court, if indeed he ever did. He should have set out all his dealings with Lebra and what he communicated to them.

[29] The full court cannot be faulted for finding that it was insufficient for Mr Fouche to merely provide a confirmatory affidavit when the entire reason for the lapsing of the appeal is attributed to him. Citing this Court in *Drift Supersand (Pty) Ltd v Mogale City Local Municipality and Another*¹² the full court stated that a confirmatory affidavit may be acceptable when non-contentious or formal evidence is placed before court, but where the evidence is crucial, it is expected that the witness depose to events in question under oath, in more detail.

[30] The explanation advanced in the present matter rests predominantly, if not

¹² *Drift Supersand (Pty) Ltd v Mogale City Local Municipality and Another* [2017] ZASCA 118; [2017] 4 All SA 624 (SCA) para 31.

entirely, upon the conduct of Mr Fouche. Although courts are generally reluctant to visit the mistakes of a legal representative upon an innocent litigant, that principle is not without limits. In *Saloojee and Another, NNO v Minister of Community Development*,¹³ the Appellate Division recognised that there comes a point beyond which a litigant cannot escape the consequences of his or her attorney's lack of diligence.¹⁴ This Court has held that it should not be assumed that where non-compliance is due entirely to the attorney's neglect, condonation will be granted.¹⁵

[31] Whether attorney error constitutes good cause depends upon all the circumstances, including the reasonableness of the attorney's conduct, the litigant's own involvement in the litigation and the steps taken once the procedural default became apparent.¹⁶ It is not insignificant that Ms Geyser, who is a practising attorney herself, was active on CaseLines and fully aware of the status of the matter.

[32] In any event, and as argued on behalf of Mr Bester, the practice directive is not in conflict with the rules of court. Rule 49(15) provides that heads of argument have to be delivered '*not later than 15 days before the appeal is heard...*' (Emphasis added.) Therefore, even on Lebra's own version, they could have complied with both the rule and the practice directive by filing their heads of argument within the 60 days provided for in rule 49(6)(a). Instead, Mr Fouche remained supine, apparently content in the belief that he could file the heads of argument on any future date, and only thereafter apply for a trial date. Even if there were some uncertainty, the practice directive quoted above, makes provision to approach the deputy judge president who may direct that the heads of argument are delivered otherwise than provided for, *mero motu* or on written request of one of the parties. Once again an explanation is called for as to what actions, if anything, were taken by Mr Fouche in this regard.

[33] Prospects of success is an important consideration and strong prospects may eclipse an unsatisfactory explanation.¹⁷ As this Court held in *MEC for Health, Eastern*

¹³ *Saloojee and Another, NNO v Minister of Community Development* 1965 (2) SA 135 (A) (*Saloojee*).

¹⁴ *Ibid* at 141C.

¹⁵ *Darries v Sheriff, Magistrate's Court, Wynberg, And Another* 1998 (3) SA 34 (SCA) at 41.

¹⁶ See *Van Wyk* fn 7 above; *Grootboom* fn 7 above; *Uitenhage* fn 9 above; and *Saloojee* fn 12 above.

¹⁷ *Mosselbaai v OKB Motors CC* [2023] ZASCA 91 para 11.

*Cape v YN obo EN*¹⁸ where the degree of non-compliance is flagrant, condonation may be refused irrespective of the prospects of success and without the need to consider them.¹⁹ The touchstone is interests of justice.

[34] The interests of justice would be an important consideration if the prejudice suffered by Lebra is as severe as they contend. The order granted by the high court is not the order originally sought in the notice of motion which compelled Lebra to purchase the Bester shareholding of 10 percent. Lebra states that the prejudice it will suffer is 'patent' and 'not only must a forensic audit be conducted at Lebra's expense in circumstances where no justification exists for such an order, but individuals that owe no fiduciary duties are entitled to access Lebra's private and confidential commercial information'. I am unconvinced that access of forensic accountants to confidential material is severely prejudicial. All accountants are governed by a strict code of ethics regulated by their professional body which prohibits them from divulging confidential information. The prejudice suffered by Lebra, in my view, is not such that it requires this Court to overlook the flagrant disregard for the rules in the interests of justice.

[35] Finally, and dispositive of the matter, is the question of discretion. The grant or refusal of condonation (and thus reinstatement) involves the exercise of a judicial discretion which the court exercises upon a consideration of all the relevant facts. This is a true discretion and an appellate court should not interfere simply because it would have come to a different conclusion.²⁰ Interference on appeal is warranted only where the court below acted upon a wrong principle, materially misdirected itself on the facts or the law, failed to take relevant considerations into account, considered irrelevant matters, or reached a conclusion that cannot reasonably be supported on the material before it.²¹ If the impugned decision lies within the range of permissible decisions, an appeal court may not interfere merely because it favours a different outcome.²² The

¹⁸ *Member of the Executive Council for Health Eastern Cape Province v YN obo EN* 2023 JDR (SCA); *Dengetenge Holdings* fn 6 above para 15.

¹⁹ *Ibid* para 14.

²⁰ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) paras 87-88.

²¹ *Ibid* para 88.

²² *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) para 111.

enquiry before this Court is therefore not whether condonation ought to have been granted, but whether the full court's refusal to reinstate the appeal discloses a material misdirection justifying appellate intervention.

[36] In my view the full court did not materially misdirect itself. It came to its conclusion on a proper consideration of the facts before it and the applicable law. Therefore, the appeal must fail.

[37] I make the following order:

The appeal is dismissed with costs, including the costs of two counsel.

C E HEATON NICHOLLS
JUDGE OF APPEAL

Appearances:

For the appellants:

Instructed by:

A Subel SC with JL Mýburgh
Snyman De Jager Attorneys, Pretoria
JG Kriek and Cloete Attorneys,
Bloemfontein

For the respondents:

Instructed by:

J Sullivan with A Van Dyk
Van Dyk Steenkamp Attorneys Inc.,
Pretoria
Symington de Kok Attorneys,
Bloemfontein.