

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 069/2024

In the matter between:

SIMON LINDSAY DRAYCOTT	**APPLICANT**
and	
MAX HURBERT BEGA	**FIRST RESPONDENT**
SERGE PHILIPPE BEGA	**SECOND RESPONDENT**
PIERROT SERGE BEGA	**THIRD RESPONDENT**
ROSALYN MAY MAUD BEGA	**FOURTH RESPONDENT**
DOUGLAS CRAIG HALL	**FIFTH RESPONDENT**

Neutral citation: *Draycott v Bega* (069/2024) [2026] ZASCA 154 (18 November 2026)

Coram: KATHREE-SETILOANE JA and DLODLO and ZILWA AJJA

Heard: 15 September 2026

Delivered: 18 November 2026

Summary: Practice and Procedure – Condonation for non-compliance with the Supreme Court of Appeal Rules refused – no reasonable explanation for the delay –

and no prospects of success in application for reconsideration in terms of s 17(2)(*f*) of the Superior Courts Act 10 of 2013.

ORDER

On application for reconsideration: referred in terms of s 17(2)(*f*) of the Superior Courts Act 10 of 2013:

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

JUDGMENT

Kathree-Setiloane JA and Dlodlo AJA (Zilwa AJA concurring)

[1] On 15 May 2015, the applicant, Mr Simon Lindsay Draycott (the applicant) and the Atlas Commercial Property Trust (the Trust) concluded an agreement for the sale of Erf 547 for R350 000.00. On 14 July 2026, the applicant concluded a second agreement with the Trust for the sale of Erf 551 for R2 975 000.00. The Trust complied with the terms of the agreement and paid the purchase price, transfer costs and transfer duties for Erwen 547 and 551 (the properties). Their transfers were registered on 9 September 2016 and 12 September 2026, respectively.

[2] Some nine-months' later, during July 2017, it was discovered that the properties were owned by the eThekwini Municipality (the Municipality) and were transferred to the applicant and, thereafter, from the applicant to the Trust, without the Municipality's authority. On 31 July 2018, the Municipality applied for the transfer of the properties from the Municipality to the applicant, and from the

applicant to the Trust, to be set aside. On 6 September 2018, the transfers were set aside by the KwaZulu Natal Division of the High Court, Durban (the high court). On 10 October 2022, the Trust successfully sued the applicant in the high court for restitution of the combined purchase price of R3 325 000.00 paid for the two properties, as well as transfer costs, transfer duties and associated costs of R260 851.68 paid.

[3] In defending the claim, the applicant contended that he was not liable to repay the full purchase price because he was a victim of fraud perpetrated by Mr Malcolm Lutge (Mr Lutge) and Ms Sharmaine Chan (Ms Chan), whom he had met in 2009/2010 and 2013/2014, respectively. He testified that Mr Lutge, an attorney and conveyancer at LM Lutge Inc, had advised him that Ms Chan had a mandate from the Municipality to sell certain of its properties. He was also informed that Ms Chan had been instructed by the Municipality to act as conveyancing attorney for the transfer of Erf 547 to him. Mr Lutge, in turn, had been instructed to act as conveyancing attorney for the sale of Erf 547 and the sale and transfer of Erf 551. At the time, Mr Lutge was a director of LM Lutge Inc. Mr Lutge and MP Lutge Inc were the second and fourth defendants in the high court proceedings.

[4] The applicant testified that Mr Lutge had led him to believe that Ms Chan was an attorney and conveyancer, but she later proved to be neither. He said that Mr Lutge knew this but proceeded with the sale, nonetheless. Relying on Mr Lutge's representations, the applicant approached Mr Sheldon Johnson (Mr Johnson), who occasionally acted as the Trust's estate agent, and told him that he could obtain municipal properties for resale. Mr Johnson met with the first to fourth respondents and explained that the applicant would purchase properties from the Municipality and resell them to the Trust. After viewing several properties, the Trust decided to

purchase Erven 547 and 551. In July 2017, the first to third respondents met with the applicant and Mr Johnson to clarify how the transactions would work. The applicant explained to the trustees that the properties would first be transferred from the Municipality to him and then resold to the Trust. He described the transfers as occurring back-to-back or simultaneously.

[5] After the properties were transferred to the Trust, the applicant received commissions from Mr Lutge of R141 056.33 for Erf 547 and R988 609.54 for Erf 551. The first respondent, Mr Frans Hubert Bega, testified that, at the July 2017 meeting, the applicant had not disclosed to him and Mr Sheldon that Mr Lutge and Ms Chan would be involved in the sales or that he would receive commission from Mr Lutge.

[6] It is common cause that the sale agreements were tainted by fraud when concluded, as the applicant lacked valid title to the properties. At trial, he did not dispute the Trust's entitlement to restitution of the purchase price, transfer costs, transfer duties and associated costs. He disputed only his liability for the full amount and tendered to repay what he had received from the transactions. The high court (Mlaba AJ) rejected this contention because the applicant was the seller under the agreements and the Trust had discharged its obligations by paying the full purchase price to his conveyancers on his behalf and for his benefit.

[7] The high court (Mlaba J) accordingly held that the applicant was liable to repay the Trust the full purchase price and conveyancing costs for both properties. The court further held that 'the [applicant] is free to sue the second defendant [Mr Lutge] and/or [Ms Chan]. In any event, the matter as regards the second

defendant [Mr Lutge] and the other two defendants has been adjourned *sine die* and the trial court at a later stage will deal with those matters'.

[8] The high court refused the applicant leave to appeal against its judgment and order. He then petitioned this Court for leave to appeal, which Goosen JA and Chetty AJA refused on 16 November 2023. He subsequently applied to the President of this Court under s 17(2)(*f*) of the Superior Courts Act for reconsideration of the decision refusing special leave to appeal.

[9] On 6 March 2024, the then Acting Deputy President of this Court referred the decision refusing leave to appeal to this Court for reconsideration and, if necessary, variation. She also referred the application for leave to appeal for oral argument under s 17(2)(*d*) of the Superior Courts Act and directed the parties to be prepared to address the Court on the merits of the appeal if called upon to do so.

Application for Condonation

[10] The application for reconsideration was heard by this Court on 20 August 2025. Under rule 10 of the Supreme Court of Appeal Rules (the rules), the applicant was required to file his heads of argument, practice note and list of authorities by 16 August 2024. On that date, he asked the Registrar for a 10-day extension, which was refused. He filed his heads of argument on 29 August 2024. Although the Registrar had informed him that the appeal had lapsed and that applications for reinstatement and condonation were required to revive it, he applied only for reinstatement. His failure to seek condonation led this Court to strike the matter from the roll with costs against him.

[11] On 12 December 2025, almost four months later, the applicant applied for condonation. He attributes the late filing of his heads of argument, practice note and list of authorities to his advocate and his correspondent attorneys in Bloemfontein, Symington De Kok Attorneys (Symingtons). His advocate provided his attorney with the practice note and heads of argument on 20 August 2024, four days after the deadline. These documents were sent to Symingtons on 22 August 2024.

[12] Symingtons requested additional documents and corrections to the list of authorities. These requests were addressed between 23 and 28 August 2024. On 28 August 2024, a courier collected the documents and delivered them to Symingtons, which filed them in this Court the next day without an application for condonation.

[13] The applicant apologised to the Court for failing to seek condonation. He attributed the omission to his legal representatives, whom, he explained, had overlooked the application while attending to the documents. He also explained that his attorney had undergone knee replacement surgery on 10 September 2024 and had been unable to work until the end of November. According to the applicant, the attorney could draft the condonation application with counsel only after returning to work.

[14] An application for condonation must be filed promptly once a litigant becomes aware that it is required.[1] The applicant's attorneys were alerted to this requirement in mid-August 2024, when the Registrar advised that failure to file the heads of argument by 16 August 2024 required applications for both condonation

[1] *SA Express Ltd v Bagport (Pty) Ltd* [2020] ZASCA 13; 2020 (5) SA 404 (SCA) para 14.

and reinstatement to accompany them, as the appeal had lapsed. On 27 August 2024, two days before the heads of argument were filed, Symingtons also informed the applicant's attorney that it had received only a reinstatement application, not an application for condonation. It asked 'whether to serve and file the documents or await amended documents'.

[15] Condonation is not a formality: both the late filing of the heads of argument and the delay in seeking condonation require a proper explanation. Despite the express notices referred to above, and this Court's order striking the matter from the roll for failure to seek condonation, the applicant has not reasonably explained the delay in seeking it.

[16] The applicant's explanation for the late filing of the heads of argument, practice note and list of authorities is likewise cursory. Neither explanation is substantiated by confirmatory affidavits from the applicant's attorney, counsel or correspondent attorneys. I therefore cannot conclude that the applicant has reasonably explained either delay.

Prospects of Success in the Reconsideration of the Petition

[17] Notwithstanding his poor explanation for the delay, I will consider the applicant's prospects of success in the reconsideration of his application for leave to appeal the judgment and order of the high court.

[18] In *Motsoeneng v South African Broadcasting Corporation Soc Ltd and Others* (*Motsoeneng*),[2] this Court held that a court reconsidering a refusal of leave to appeal

[2] *Motsoeneng v South African Broadcasting Corporation Soc Ltd and Others* [2024] ZASCA 80; 2025 (4) SA 122 (SCA) para 14.

must first determine whether exceptional circumstances warrant reconsideration. In *Bidvest Protea Coin Security (Pty) Ltd v Mabena* (*Bidvest*),[3] this Court reaffirmed that the court receiving the referral must ultimately determine whether the jurisdictional fact necessary to exercise that power exists. A subsequent minority judgment of the Constitutional Court in *Godloza and Another v S*, as well as a handful of decisions from this Court,[4] have disagreed with *Motsoeneng* and *Bidvest*.[5] Although these judgments are persuasive, this three-judge panel remains bound by *Motsoeneng* and *Bidvest*.

[19] In *Liesching and Others v The State*,[6] the Constitutional Court held that exceptional circumstances under s 17(2)*(f)* of the Superior Courts Act exist where a refusal to reconsider would create a probability of grave individual injustice or risk bringing the administration of justice into disrepute. The legislature adopted this formulation in the amendment to s 17(2)*(f)*, which took effect on 3 April 2024. The previous wording of s 17(2)*(f)* of the Superior Court Act applies because this matter was referred for reconsideration in March 2024.

[20] The applicant must demonstrate exceptional circumstances warranting reconsideration of the refusal of leave to appeal against the high court's judgment and order. His sole ground under s 17(2)(*f*) is that 'exceptional circumstances arise from the fact that an order granted by Steyn J has simply been ignored and breached'. The applicant explained that the trial had been set down before Steyn J on

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[3] *Bidvest Protea Coin Security (Pty) Ltd v Mabena (Bidvest)* [2025] ZASCA 23; 2025 (3) SA 362 (SCA) para 13.
[4] *S v Lorenzi* 2025 JDR 2015 (SCA); (1171/2023) [2025] ZASCA 58 (minority). *Schoeman v Director of Public Prosecutions* 2025 (2) SACR 561 (SCA) (minority). *4 Seasons Logistics CC v Kgotse* 2026 JDR 0646 (SCA). *Matsi and Another v South African Legal Practice Council (Gauteng Province)* (184/2024) [2026] ZASCA 12 (6 February 2026).
[5] *S v Godloza and Another* 2026 (1) SACR 113 (CC) [2025] ZACC 24.
[6] *S v Liesching and Others* [2018] ZACC 25; 2019 (4) SA 219 (CC); 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC) (*Liesching*) par 138.

16 May 2022. Shortly before the trial commenced, Mr Lutge, the second defendant, died, and no executor had been appointed by the time of the hearing. The question was whether the trial should proceed against the applicant alone or be adjourned to allow all parties to be represented.

[21] According to the applicant, Steyn J made clear that the claims could not be separated because the claim against Mr Lutge was 'completely intertwined' with the claim against him. Steyn J accordingly found that 'it would be in the interest of justice that the matter be adjourned in its entirety'.

[22] The applicant contended that the earlier order prevented the Trustees from proceeding against him alone. He alleged that, despite that order, the Trustees applied to separate the claims against him from those against the other two defendants before the trial commenced and then proceeded against him alone. The applicant maintains that this left numerous questions unanswered about the alleged fraudulent activities of the other two defendants and liability for repayment of the purchase price of the two properties.

[23] The applicant's contention is not entirely correct. Two applications were before Steyn J on 16 May 2022: an application by the Trustees for default judgment under rule 39(1) of the Uniform Rules of Court against the other defendants and an application by the applicant for an adjournment of the trial. The order merely adjourned the trial to 10–13 October 2022. No application for separation under rule 33(4) was before Steyn J, and she did not prohibit the Trust from proceeding against the applicant alone. This is clear from her judgment. One factor supporting the adjournment was that the applicant had instructed his attorney only on the morning the trial was due to commence.

[24] At the commencement of the trial before Mlaba J on 10 October 2022, the applicant sought an adjournment to obtain further documentation. That application was refused. At the close of the Trust's case, the applicant again sought an adjournment, contending that further documents and 'expert analysis' were needed to assist the court. That application was also refused.

[25] Despite the importance he attached to Steyn J's purported directions concerning the Trust proceeding with its claim against him alone, the applicant first raised the issue in his application for leave to appeal before Mlaba J in the high court. Mlaba J considered this ground when refusing leave to appeal. However, the applicant did not include this ground in his subsequent petition to this Court for leave to appeal. He nevertheless relied on it in his application under s 17(2)(*f*) for reconsideration of the refusal of leave to appeal.

[26] If the issue was central to the outcome of the case, the applicant should have raised it at trial and pursued it through the applications for leave to appeal. Although he raised it in his petition to the high court, he did not do so in the trial and in his petition to this Court. As this Court has held, 'the purpose of a s 17(2)*(f)* application is not to provide another opportunity to raise appeal grounds that have already been considered, nor to present the same grounds disguised as new ones. Nor is it its purpose to introduce issues that are merely afterthoughts, that should have been raised before the high court, the full court, or in the application for special leave to appeal to this Court'.[7]

[7] *S v Lekeka* 2025 JDR 5156 (SCA); [2025] ZASCA 182 para 21.

[27] Since the applicant is unable to meet the heightened threshold to demonstrate exceptional circumstances, his application for reconsideration, in terms of s 17(2)(*f*) of the Superior Courts Act, of the refusal by two judges of this Court to grant him leave to appeal, has no prospects of success. Consequently, his application for condonation and reinstatement of the application for reconsideration by this Court falls to be dismissed with costs.

[28] In the result, the following order is made:

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

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F KATHREE-SETILOANE

JUDGE OF APPEAL

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D V DLODLO

ACTING JUDGE OFAPPEAL

Appearances

For applicant:	I T Dutton
Instructed by:	Sanjay Lorick & Partners, Durban
	Honey Attorneys, Bloemfontein
For respondents:	J A Ploos van Amstel
Instructed by:	M/S Johan Oberholzer & Co, Durban
	Green Attorneys, Bloemfontein.