



**THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

- (1) REPORTABLE: YES  
 (2) OF INTEREST TO OTHER JUDGES: YES  
 (3) REVISED.

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DATE

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SIGNATURE

**CASE NO 2014/26048**

**PANAYIOTOU, ANDREAS**

**APPLICANT**

**AND**

**SHOPRITE CHECKERS (PTY) LTD**

**FIRST RESPONDENT**

**GAUTENG LIQUOR BOARD**

**SECOND RESPONDENT**

**CHAIRPERSON, GAUTENG LIQUOR BOARD**

**THIRD RESPONDENT**

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**REASONS FOR JUDGMENT**

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## Headnote

Section 16, 17 and 18 of Superior Courts Act 10 of 2013 – what constitutes the lodging of a petition to the SCA that shall have the effect of suspending the operation of a judgment – once the prescribed one month from date of refusal of leave to appeal has lapsed, condonation is required to revive the appeal process – an application for condonation to serve a petition late does not have the effect of suspending the operation of a judgment

Applicant had unsuccessfully opposed a review of a liquor board decision which had refused a trade rival a liquor licence- court ordering liquor board to issue licence – applicant having been refused leave to appeal and wished to petition SCA – not doing so within prescribed period and thus seeking condonation – pending outcome of condonation application to SCA applicant sought an interdict to prevent rival from trading in terms of the licence issued to it

Held: no prima facie right to stop rival trading as operation of judgment not suspended – application dismissed

## SUTHERLAND J:

1. The applicant, the proprietor of a liquor store, brought an urgent application seeking interdictory relief against the first respondent (Shoprite) from operating a liquor store from its premises some 150 metres distant from his shop. I heard the matter on 10 December 2015 in the urgent court and dismissed the application with costs. The reasons for that order are now furnished.
2. The facts are few. The applicant was already trading when Shoprite arrived in the neighbourhood and applied to the second respondent (GLB) for a liquor licence. The applicant opposed the application and in due course the GLB refused it. Shoprite brought a review application which succeeded. The refusal was set aside and Legodi J ordered the GLB to issue a licence in accordance with the regulations. The applicant remained aggrieved, and instructed his attorney to apply for leave to appeal that decision. In due course the application for leave to appeal was refused. The applicant then instructed his attorney to file a petition to the Supreme Court of appeal to obtain leave to appeal.

3. Apparently, the applicant's attorney served a copy of such petition on Shoprite, about a week after the application for leave had been refused by Legodi J. However, no service of the petition was served on the GLB. More significantly, the petition was not served on the registrar of the Supreme Court of Appeal. During the period prescribed for service of a petition, on two occasions the attorneys of Shoprite wrote to the applicant's attorney asking for proof of service on the registrar of the Supreme Court of Appeal and to be given a case number. The requests were ignored. Axiomatically, the GLB were ignorant of the applicant's intentions.
4. The day after the period in which to serve a petition expired, the GLB issued Shoprite with a licence. After that Shoprite undertook the necessary preparatory steps to commence trading, including self-evidently, deploying staff, and buying stock. When the activity at the Shoprite store was noticed by the applicant, he tackled the attorney about why this was happening, as it was his understanding that pending the outcome of a petition, the review judgment, setting aside the GLB refusal of a licence was suspended. It was at this stage that he learned of the fact that no petition had been served.
5. Predictably, the applicant fired that attorney. He instructed a new attorney, who thereupon served a petition together with an application for condonation of the late filing of the petition. At the time of the hearing before me, the fate of that condonation application and the fate of the petition is awaited.
6. The applicant then brought the urgent application. The relief sought is an interim interdict against Shoprite from trading in liquor pending the determination of the petition and the

finalisation of the appeal process. Moreover, the court is asked to order the suspension of the liquor licence, pending the same eventualities.

7. The premise of the application is that the applicant has, at least, a prima facie right based on the pending petition. The harm is said to be the loss of trade; apparently since Shoprite began to trade his turnover has dropped by 70% and his business is facing insolvency.
8. The application must fail because the very premise upon which it is founded is misconceived; ie, as a matter of fact and of law, there is no present petition filed with the registrar of the Supreme Court of Appeal, as required in terms of section 18(5) of the Superior Courts Act 10 of 2013.
9. Section 18, the provisions of which bear on the conditions necessary for a judgment of the High court to be suspended pending a petition to the Supreme Court of appeal for leave to appeal, states:
  - ‘(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
  - (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
  - (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
  - (4) If a court orders otherwise, as contemplated in subsection (1)-
    - (i) the court must immediately record its reasons for doing so;
    - (ii) the aggrieved party has an automatic right of appeal to the next highest court;
    - (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.

10. Section 17(2) provides:

‘(2) (a) 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.

*(b) If leave to appeal in terms of paragraph (a) is refused, it may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after such refusal, or such longer period as may on good cause be allowed, and the Supreme Court of Appeal may vary any order as to costs made by the judge or judges concerned in refusing leave.*

(c) An application referred to in paragraph (b) must be considered by two judges of the Supreme Court of Appeal designated by the President of the Supreme Court of Appeal and, in the case of a difference of opinion, also by the President of the Supreme Court of Appeal or any other judge of the Supreme Court of Appeal likewise designated.

(d) The judges considering an application referred to in paragraph (b) may dispose of the application without the hearing of oral argument, but may, if they are of the opinion that the circumstances so require, order that it be argued before them at a time and place appointed, and may, whether or not they have so ordered, grant or refuse the application or refer it to the court for consideration.

(e) Where an application has been referred to the court in terms of paragraph (d), the court may thereupon grant or refuse it.

(f) The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.’

11. The question arises as to what are the minimum requirements to satisfy section 18(5) read with section 17(2). Is it necessary that the petition itself be served, or is sufficient that a condonation application be served in which it is sought that a petition be filed out of the prescribed time period?

12. It has been argued that Section 18(5) is prescriptive and that the text emphasises that the application for leave to appeal is lodged with the registrar' in terms of the rules'.

Accordingly, it is argued, until (and only if) condonation is granted can the petition be 'lodged'. All that is before the Supreme Court of appeal at present is an application for condonation, whose fate is uncertain. In support of this proposition reference was made to several authorities.

13. The failure to serve notices of appeal or court records within the prescribed periods is commonplace. The result of such failures are that the appeals lapse and require condonation to revive them. In *Schmidt v Theron & another* 1991 (3) SA 126 (C), at 129H – 130 it was held:

‘Rhodie denied that his application for condonation was activated by the present application. He added that he had acted in utmost good faith throughout, that it was never his intention to cause any delay in the pursuance of the appeal and that the first and second respondents were totally blameless and he personally and unequivocally accepted full responsibility for all that had taken place.

I think it is quite clear from a number of authorities that a failure to comply with the provisions of Rules 5 and 6 of the Appellate Division Rules causes an appeal to lapse. See *Vivier v Winter*; *Bowkett v Winter* 1942 AD 25 and 26, *Bezuidenhout v Dippenaar* 1943 AD 190, *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (2) SA 697 (D) at 699H, *Moraliswani v Mamili* 1989 (4) SA 1 (A) at 8B - C. Indeed Rule of Court 5(4) specifically provides - and I quote from Rule 5(4)bis (b): 'If an appellant has failed to lodge the record within the period prescribed and has not within that period applied to the respondent or his attorney for consent to an extension thereof, and given notice to the Registrar that he has so applied, he shall be deemed to have withdrawn his appeal.'

The appeal having so lapsed, an application for condonation in terms of Appellate Division Rule 13 is required if an appellant who has failed to comply with the Rules wishes to revive or reinstate it. As stated by Kumleben J in the *United Plant Hire* case supra at 699H, in reference to the two cases to which I have also referred, viz *Vivier v Winter* and *Bezuidenhout v Dippenaar*: 'Thus, in these two cases it was held:

(a) that, although not expressly so stated in the former Rules, an appeal lapses on failure to comply with the requirements of either the former Rules relating to the lodging of copies of the record or security for the costs of an appeal;

(b) that an appellant may nevertheless apply for condonation in terms of the former Rule 12 even after an appeal has lapsed (strictly speaking in such a case it may be more accurate for an appellant to apply for condonation of non-compliance with a particular Rule and for enrolment or reinstatement of the appeal).'

I emphasise the word 'reinstatement'. And in the *Moraliswani v Mamili* case supra Grosskopf JA, referring to the cases that I have cited above, and adding to them also the cases of *Waikiwi Shipping Co Ltd v Thomas Barlow & Sons (Natal) Ltd* 1981 (1) SA 1040 (A) at 1049B - C and *S v Adonis* 1982 (4) SA 901 (A) at 907F - G which both deal with the related subject of an appellant's failure to file the record in time, said:

'Indeed there is strong authority for the proposition that failure to comply with Rule 6 causes an appeal to lapse and that condonation by this Court is needed to revive it.'

I emphasise again the words 'needed to revive'.

The position therefore is that in the present case the appeal has lapsed. No condonation in terms of the Appellate Division Rule 13 has been granted and accordingly the order made by this Court on 22 October 1990 is no longer suspended in terms of Supreme Court Rule 49(11). (See *Herf v Germani* 1978 (1) SA 440 (T) at 449G.) Appellant is therefore entitled to the order sought in prayer 1(a) and (b) of the notice of motion. It is the type of order envisaged by the Appellate Division in *Vivier v Winter* (supra at 26).'

14. Prior to the enactment of the Superior Courts Act and in particular, sections 16 - 18, Rule 49 (11) of the Uniform rules of court regulated this matter. Rule 49 (11) was deleted from the Rules on 17 April 2015 (GN 317). Addressing the provisions of that rule, it was held in *Modderklip Squatters v Modderklip Boerdery (Pty) Ltd; President of RSA v Modderklip Boerdery (Pty) Ltd* 2004 (5) SA 40 (SCA) at [46]:

'The [argument] was based on Uniform Rule 49(11), which provides that, where an appeal has been noted or an application for leave to appeal made, the operation and execution of the order is suspended. In this case, as will appear soon in more detail, the 'Modder East Squatters' lodged their application for leave to appeal together with an application for condonation some 18 months after the order had issued. The right to apply for leave to appeal, by then, had lapsed. Rule 49(11) presupposes a valid application for leave to appeal to effect the suspension of an order. In this case, there was none.'

15. The inherent logic of the position is unassailable. It can be tested by asking what were to happen if many months or years were to pass before an application for condonation is lodged. It is untenable that upon the service of a condonation application the judgment

would then be suspended. Accordingly, the application fails for want of even a prima facie right that the judgment of Legodi J be suspended.

16. Moreover, the circumstances that prevail at this time include the fact that the GLB has issued a licence. Shoprite is entitled to exercise its rights in terms thereof. It seems as if the GLB waited until it was certain no petition could be lodged before complying itself with the court order. That exercise of public power has resulted in the conferment of rights. Until that order is set aside it stands. (*Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004(6) SA 222 (SCA).)
17. There are other considerations bearing on the balance of convenience which in any event defeat the application. Shoprite has taken further steps, legitimately, to gear up for business. To be told to cease suddenly, and wait until a condonation application is disposed of, which may be many months' hence, is plainly inequitable and disproportionately disruptive. The applicant's position is that he shall have to compete with Shoprite. No consideration of public policy can be invoked to construe that to be a harm deserving of protection in the context of these circumstances.
18. It was for these reasons that the order made was that the application be dismissed with costs.

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Roland Sutherland  
Judge of the High Court,  
Gauteng Local Division, Johannesburg

Hearing and order: 10 December 2015

Reasons filed: 17 December 2015

For the applicant:

Adv S Rose,

Instructed by Polson & Ross

For the First Respondent:

Adv R B Engela,

Instructed by Werksmans Attorneys.