Reportable:	Y
Circulate to Judges:	Y
Circulate to Magistrates:	Y
Circulate to Regional Magistrates:	Y

IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: CIV APP FB12/2022

COURT A QUO CASE NO: 3352/2019

In the matter between:

NGAKA MODIRI MOLEMA
DISTRICT MUNICIPALITY **Appellant**

and

QUANTIBUILD (PROPRIETARY) LIMITED **Respondent**

CORAM: HENDRICKS JP et PETERSEN J et DIBETSO-BODIBE AJ

DATE OF HEARING	**:**	**23 FEBRUARY 2024**
DATE OF JUDGMENT	**:**	**12 APRIL 2024**
FOR THE APPELLANT	**:**	**ADV. LAUBSCHER**
FOR THE RESPONDENT	**:**	**ADV. SWANEPOEL SC**
		WITH ADV. BOONZAAIER

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be 10h00AM on 10 April 2024.

ORDER

Resultantly, the following order is made:

(i) The application by the respondent to declare the appeal lapsed, is granted.

(ii) Condonation is granted to the appellant for the late filing of the power of attorney, security for costs and the corrected record of appeal.

(iii) The conditional application for reinstatement of the appeal is granted.

(iv) The appeal is upheld.

(v) The order of the court a quo (per Acting Judge Makoti) is set aside and replaced with the following order:

"1. The application for summary judgment is dismissed.
2. Costs of the application for summary judgment shall be costs in the cause."

(vi) The attorney of record for the appellant (Semaushu Attorneys) is ordered to pay the costs of the appeal on an attorney-and-client scale, *de bonis propriis*, apart from the cost orders previously made by this Court, which costs shall be taxed.

(vii) Such costs to include the costs consequent upon the employment of two counsel, Senior and junior.

(viii) The matter is remitted to the court *a quo* to proceed before a judge other than Acting Judge Makoti.

JUDGMENT

HENDRICKS JP

[1] In a judgment by the Full Court delivered on 08 December 2022, the parties were erroneously swapped and cited as the appellant and respondent respectively. The citation should read that the appellant is Ngaka Modiri Molema District Municipality ('the Municipality') and the respondent is Quantibuild (Propriety) Limited ('Quantibuild'). That this appeal has a protracted history is common cause and will be referred to extensively in this judgment.

[2] Quantibuild and the Municipality entered into a contract that was concluded on 07 January 2013, for services to be rendered at the Groot Marico Wastewater Treatment Plant. Quantibuild performed in terms of the said contract, but the Municipality failed and/or refused to pay an amount of R2 153 630.85 plus interest and Value Added Tax (VAT) in the amount of R286 220.08. Quantibuild issued summons and claimed payment of these amounts. A notice of intention to defend was filed by the Municipality. Although the existence of the contract was not disputed, the Municipality disputes the validity of the contract by contending that it was wrought with serious illegality and therefore unenforceable. The

Municipality therefore disputes that the contract is valid, binding and enforceable.

[3] Quantibuild applied for summary judgment which was opposed by the Municipality. On 02 March 2021, Acting Judge Makoti granted summary judgment in the amount of R2 153 630.85 (exclusive of VAT) plus interest and ordered the Municipality to pay the costs of suit. The Municipality applied for leave to appeal, which was refused on 14 September 2021. The Municipality petitioned the Supreme Court of Appeal (SCA) for leave to appeal, which was granted on 16 February 2022 to the Full Court of this Division.

[4] On 07 March 2022 the Municipality delivered a Notice of Appeal. A defective, non-compliant appeal record was filed on 26 April 2022. No power of attorney was filed neither was security for costs put up by the Municipality. The appeal was enrolled by the Registrar of this Court for hearing on 07 October 2022, despite the absence of a Power of Attorney and security for costs. The Municipality filed a practice note and heads of argument on 14 September 2022 despite the absence of a Power of Attorney, security for costs not having been put up, and the non-compliant record of proceedings in the court *a quo* (appeal record). On 23 September 2022, Quantibuild filed a practice note and the heads of argument in the appeal, raising non-compliance in respect of the power of attorney, security for costs and non-compliant record.

[5] On 26 September 2022, the Municipality filed the power of attorney together with a notice of removal of the appeal from the roll of the Full Court of 07 October 2022. On 07 October 2022 the parties argued whether the matter should be removed or struck from the roll, pursuant to the appeal being deemed to have lapsed in terms of Rule 49(6)(a) of the Uniform Rules of Court. On 8 December 2022, this Court handed down judgment removing the matter from the roll. It is emphasized in the judgment of 8 December 2022 that insofar as the appeal was deemed to have lapsed in terms of the provision in Rule 49(6)(a) the Court before which the appeal serves, **must be approached for an order that the appeal has lapsed**. A deeming provision often portrays a situation to be what it in fact is not. **There was no application by Quantibuild for a declaratory order from the Full Court, that the appeal had lapsed**. Therefore, the Full Court ordered that *"the appeal cannot be deemed to have lapsed unless respondent (Quantibuild) applies for relief seeking an order to the effect that the appeal has lapsed, which the respondent has not done".*

[6] On 27 January 2023, Quantibuild pursuant to the order of the Full Court of 8 December 2022, applied for an order that the appeal had lapsed pursuant to Uniform Rule 49(6)(a). On 02 March 2023, the Municipality provided security for costs, applied for a date for hearing of the appeal, filed a supplementary record, and filed an application for condonation and conditional reinstatement of the appeal, if the Full Court were to find that the appeal had lapsed. This Court is called upon to adjudicate and pronounce on, the application for condonation, the issue whether the appeal has

lapsed and if it is found that the appeal has lapsed, the conditional reinstatement of the appeal.

[7] I deem it prudent to repeat Uniform Rule 49(6)(a) of the Uniform Rules of Court which provides that:

> *"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."*

[8] In giving effect to a proper interpretation of Rule 49(6)(a), **the Full Court on 8 December 2022** found that should the appellant fail to comply with Rule 49(6)(a), its appeal is "**deemed to have lapsed**", and **the respondent in the appeal is entitled to apply for an order to that effect** and for the wasted costs. As indicated *supra* Quantibuild as the respondent filed an application to that effect on 27 January 2023, seeking an order by the Full Court before which the appeal serves, that the appeal has lapsed. This is based mainly on the fact that no power of attorney was filed as well

as the lack of security for costs, which renders the appeal fatally defective.

See: **Corlett Drive Estates Ltd v Boland Bank en 'n ander another** 1978 (4) SA 420 (C).

[9] The first prayer in the interlocutory application by Quantibuild is that the Court should order that "the appeal against the judgment and order of Acting Judge Makoti dated 02 March 2021 is deemed to have lapsed in terms of Uniform Rule 49(6)(a)". That this Court should still order that the appeal "**is deemed to have lapsed**" is incorrect. What this Court should find is that the appeal **has lapsed** and not "**deemed to have lapsed in terms of Uniform Rule 49 (6)(a)**" as prayed.

[10] The Municipality contended that the appeal, although deemed to have lapsed in terms of Rule 49(6)(a), should not be declared to have lapsed. This Court is implored to condone the non-compliance with the Rules of Court, which is premised solely on the lack of diligence and negligence on the part of the attorneys of the Municipality, for its failure to comply with the requirements for the timeous prosecution of the appeal, to put up security for costs, to file a power of attorney, and to file a completely compliant record of appeal. Furthermore, in the event that this Court pronounces that the appeal has lapsed, then in that regard, the Municipality contends that this Court should grant an order reinstating the appeal.

[11] The lackadaisical approach of the Municipalities' attorneys is striking. The attorneys were negligent in the prosecution of the appeal. They did not file a power of attorney; provide security for costs; and file a complete and compliant record of appeal. This cannot be countenanced. It is expected of attorneys to prosecute an appeal, on the instructions of client, diligently, professionally, and promptly. The Municipalities' attorneys failed to execute their mandate. This Court will mark its disquiet with an appropriate costs order. It is telling that with Quantibuild having filed its application to declare the appeal lapsed on 27 January 2023, the attorneys for the Municipality only on 2 March 2023, belatedly, provided security for costs, filed a complete appeal record, and applied for a date for the hearing of the appeal. This is inexcusable.

[12] In a similar scenario to the present, a Full Court of this Division in **Harrys Tyres (Pty) Limited v Symes and Others** (CIV APP FB10/2023) [2024] ZANWHC 75 (13 March 2024), marked its disapproval with the conduct of the attorneys for the appellant who failed to timeously prosecute an appeal. The following was said in that regard:

> *"[9] Harry's, through Pienaar has not heeded the warning of the SCA that:*
>
> *"A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related*

then the date, duration and extent of any obstacle on which reliance is placed must be spelled out."

See: ***Uitenhage Transitional Local Council v South African Revenue Service*** ***2004 (1) SA 292*** *(SCA) at paragraph [6]).*

[10] In the absence of any cogent explanation, it can be accepted that nothing was done by Harry's attorneys of record and the correspondent attorney during the aforesaid time periods; clearly showing a lack of diligence and culpable remissness on their part. Pienaar and the correspondent remained supine during the relevant time. The director of Harry's also does not depose to an affidavit setting forth any enquiries Harry's itself may have made with its attorneys on the status and prosecution of the appeal. It is trite that even Harry's cannot hide behind the remissness of its attorneys.

…

[15] In addition, the application for condonation has also not been brought without delay. The need for condonation was present in the mind of Pienaar since ***7 November 2022****, yet the application was only brought on* ***9 January 2023****. No explanation is proffered for this delay.*

[16] Harry's delay in diligently and properly prosecuting its appeal results in prejudice to the liquidators' and body of creditors', not only financially but also their interest in the finality of the judgment, which could not be executed upon. There must be finality in litigation. Harry's delay has clearly prejudiced the liquidators and body of creditors' rights and interest in the judgment and the finality thereof.

[17] The authorities are clear that in cases of flagrant breaches of the Rules, especially where there is no acceptable or satisfactory explanation advanced therefore, as in casu, it is unnecessary for the court to assess the prospects of success

and condonation should not be granted, whatever the merits of the appeal might be. This applies even where the blame lies solely with the attorney."

[13] The application to declare that the appeal has lapsed is now duly made and this Court is called upon to pronounce on same. The Municipality launched a counter application for condonation for the late delivery of the power of attorney, security for costs, and the corrected appeal record. Against the background of the *ratio decidendi* in *Harry's Tyres* supra, the conduct of the attorneys for the Municipality *in casu* already alluded to *supra* may succinctly be summarized as follows to place the application for an order that the appeal has lapsed and the counter application for condonation by the Municipality, in proper context. On 16 February 2022, the SCA granted the Municipality special leave to appeal to a Full Court of this Division. On 7 March 2022, the Municipality filed its Notice of Appeal, followed by the filing of a defective, non-compliant appeal record on 26 April 2022. No power of attorney was filed neither was security for costs put up by the Municipality. Given that the Registrar of this Court failed in his duty to enroll the defective appeal for hearing on 07 October 2022, despite the absence of a Power of Attorney and security for costs and a proper appeal record, this does not avail the Municipality as it remains *dominus litis* in the prosecution of its appeal.

[14] The Municipality only took heed of its shortcomings in the prosecution of its appeal when Quantibuild on 23 September 2022 filed its practice note and heads of argument in which it raised non-compliance in respect of the power of attorney, security for costs

and non-compliant record. The reaction of the Municipality was to belatedly file the power of attorney on 26 September 2022 together with a notice of removal of the appeal from the roll of the Full Court of 07 October 2022.

[15] Notwithstanding the judgment and order of the Full Court on 8 December 2022, and the application of Quantibuild which was filed on 27 January 2023, the Municipality only 02 March 2023, nearly three (3) months after the judgment of 8 December 2022, provided security for costs, once again applied for a date for hearing of the appeal, purportedly filed a supplementary record, which subsequently transpired was not on file for any of the three judges allocated to hear the appeal, and filed an application for condonation and conditional reinstatement of the appeal, if the Full Court were to find that the appeal had lapsed.

[16] The explanation proffered by the Municipality in its condonation application is that it *bona fide* omitted to file a power of attorney together with its application for a date of hearing of the appeal as required in terms of the provisions of Rule 7(2); and failed to put up security for costs in terms of Rule 49(13)(a). Notwithstanding, the Registrar allocated the date for hearing of the appeal by this Full Court on 07 October 2022. This Court in its judgment dated 08 December 2022 made it clear when it stated that:

> *"It is an imperative that the Registrar should not set an appeal down on the roll without a power of attorney been filed and security for costs being put up."*

[17] The Municipality further contends that the Full Court held that the appeal had not lapsed. This is not entirely correct. The Full Court found that the deeming provisions in terms of Rule 49(6)(a) means that the appeal is deemed to have lapsed, but the other party (Quantibuild) may approach the court (Full Court) seized with the appeal, for an order that the appeal has lapsed. Because there was no such application before the Full Court by Quantibuild seeking a declaratory order that the appeal has lapsed, therefore the appeal was removed from the roll and the Municipality was ordered to pay the wasted costs. The Full Court held:

> *"[25] Resultantly, the appeal cannot be deemed to have lapsed unless the respondent [Quantibuild] applies for relief seeking an order to the effect that the appeal has lapsed, which the respondent has not done."*

[18] That the appeal has lapsed is beyond dispute having regard to the conduct of the Municipality in the prosecution of the appeal. The order sought by Quantibuild that the appeal has lapsed accordingly stands to be granted. The remaining question, based on the counter application for condonation by the Municipality is whether a case is made for condonation to be granted and the consequent re-instatement of the appeal.

[19] An appeal that has lapsed (or deemed to have lapsed) can be resurrected *via* a successful application for condonation and re-

enrolment. It is trite that insofar as condonation is concerned, that the test for determining whether condonation should be granted or refused is the **interests of justice**. In **Turnbull-Jackson v Hibiscus Court Municipality and Others** 2014 (6) SA 592 (CC) at paragraph 23 the Constitutional Court referred to certain "factors" which the Court seized with adjudicating an application for condonation should consider. The following was stated in this regard by the Constitutional Court:

> *"Factors that the Court weighs in that enquiry include: the length of the delay; the explanation for, or cause of the delay; the prospects of success for the party seeking condonation; the importance of the issues that the matter raises; the prejudice to the other party or parties; and the effect of the delay on the administration of justice. It should be noted that although the existence of prospects of success in favour of the party seeking condonation is not decisive, it is a weighty factor in favour of granting condonation."*
> *(See* ***Brummer v Gorfil Brothers Investment (Pty) Ltd and Others*** *2000 (2) SA 837 (CC) at para 3 read with* ***Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*** *2008 (2) SA 472 (CC) at para 20).*

[20] The Constitutional Court in ***Turnbull-Jackson*** at paragraph 26 re-affirmed the trite principle that (within limits):

> *"Courts are reluctant to penalise litigants for the tardiness of their legal representatives. I do not read this Court's pronouncement in Ferris to say that this long-standing principle no longer avails. It is more a question of what the facts of a given case dictate. Courts have made it clear though that in a fitting case the fault of a legal*

representative will be imputed to the litigant. In the oft-cited decision in Saloojee the Appellate Division said:

"There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. … The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship"."

[21] It is trite that "good cause" must be shown to exist on the merits of the matter for the requisite condonation to be granted.

See: **Melane v Santam Insurance Co Ltd** 1962 (4) SA 531 (A).

Madinda v Minister of Safety and Security 2008 (4) SA 312 (SCA).

[22] In **Songo v Minister of Police and Others** (63867/17) [2020] ZAGPPHC 673 (17 November 2020) at paragraphs [23] and [24] the following was said:

[23] In condonation applications a court considers the merits together with the grounds advanced for the failure. As stated in Madinda supra and quoted above, strong merits may mitigate fault whilst no merits may render mitigation pointless. It is also accepted that the interests of justice play an important role in condonation applications and that it is expected of an applicant to set out fully the explanation of his delay during the entire period of the delay and such explanation must be reasonable.

Also, a condonation application must be brought as soon as the party concerned realises that it is required. Bearing all this in mind, Heher JA in ***Madinda*** *highlighted the two important elements to be considered in adjudicating applications in terms of s 3(4)(b), namely the subject's right to have his case tried by a court of law and the fight of the organ of state not to be unduly prejudiced. In casu no facts are alleged as mentioned supra and it is not even vaguely suggested that prejudice has been or will be suffered by respondents due to applicants' non-compliance.*

[24] There is no onus on an applicant for condonation to prove his/her case on a balance of probabilities. The court must merely be satisfied that the three requirements contained in section 3(4)(b) have been met. Although applicant and/or his attorneys might be blamed for the delay in bringing the application for condonation, there is no obvious prejudice to the respondents and as I have found above that the notice was sewed within the prescribed time period as prescription only began to run from 7 June 2017 when the applicant became aware that his claim was enforceable. As a result, the application for condonation was not even required. The overall impression created by the undisputed facts is such that I am satisfied that applicant is entitled to have his case tried by a court of law."

(own emphasis)

See also: **National Union of Metalworkers of South Africa v Jambo Products CC** 1996 (4) SA 735 (A).

[23] The concept of "**good cause**" entails a consideration of the following factors: a reasonable and acceptable explanation for the default; a demonstration that a party is acting *bona fide*; and that

such party has a *bona fide* defence which *prima facie* has some prospect of success.

See: **Colyn v Tiger Food Industries Limited t/a Meadow Feed Mills (Cape)** 2003 (6) SA 1 (SCA) at para [11],

Chetty v Law Society Transvaal 1985 (2) SA 756 (A) at 764J - 765E and

Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 354 (A) at 353A.

[24] In **Collatz and Another v Alexander Forbes Financial Services (Pty) Ltd and Others** (A 5067/2020; 43327/2012 [2022] ZAGPJHC 93 (10 February 2022) at paragraphs [19], [20], [22], [23], the Court notwithstanding delays and dilatory conduct on the part of the appellant applying for condonation and numerous "… unsatisfactory aspects in the condonation application…", granted the appellant's application for condonation for its failure to provide security and granted an order for reinstatement of the appeal, which had lapsed, stating that:

> *"All things considered, the interests of justice, fairness and finality necessitates that the appeal be heard, determined and disposed of on its merits, and I intend to do so. I am not prepared to kick the can down the road. Accordingly, I am prepared to grant the condonation sought by the appellants. While the appellants do not ask for condonation therefore, I am also prepared to overlook, for purposes of this appeal, their failure to furnish security in the appeal. The cost consequences of the issue of the appellants' outstanding security and the appellants' condonation application are dealt with at the end of this judgement."*

[25] In the founding affidavit of the Municipality, it provided a detailed explanation for its non-compliance with the Rules of Court. I agree with the approach adopted in **Collatz and Another v Alexander Forbes Financial Services (Pty) Ltd and Others**, when regard is had to the peculiar circumstances of this matter and the prospects of success on appeal. I am therefore of the considered view, **in the interests of justice**, to condone the late prosecution of the appeal; the late filing of the power of attorney; the late putting up of security for costs, as well as the late filing of the corrected, compliant record of appeal. However, this Court will mark its disapproval with the way the attorneys for the Municipality conducted the appeal on behalf of the Municipality, with an appropriate cost order, on a punitive scale, mindful that this Court has already ordered costs in favour of the respondent (Quantibuild) when the matter was removed from the roll and again when it was postponed for the filing of heads of argument on the merits of the appeal.

[26] The application for condonation by the Municipality is accordingly granted and the appeal is reinstated.

[27] This brings me to the merits of the appeal. As alluded to earlier in this judgment, summary judgment was granted against the Municipality. Leave to appeal was granted by the SCA. The appeal turns to a great extent on the following defence raised by the

Municipality in opposition to the summary judgment application, as stated in the judgment of Acting Judge Makoti:

> *"[6] The exact terms of the contract, in which Quantibuild was appointed by the Municipality as a contractor, were not dispute by the Municipality. As indicated, the Municipality took the view that the contract was marred by serious illegality and therefore unforgeable. As part of the device, the municipality plea was accompanied by a counterclaim seeking an order to interview and set aside the contract. It also says that quality build should be ordered to pay all the amounts that were irregularly paid, which are still to be quantified.*
>
> *[7] Paragraph 2.3.8.1 of the plea sets out the Municipality's substantive defence to the claim, and it states that the contract was illegally and unlawfully awarded to Quantibuild. The illegality pleaded stems from an allegation that the person who signed the contract on behalf of the Municipality did not have authority to bind it to the contract. Alternative defences were that the duration of the contract was extended beyond the initial period of six months to six years. Furthermore, the Municipality also contended that the scope and the monetary value of the tender were unlawfully extended in breach of s 217 of the Constitution, that MFMA and applicable treasury regulations. For these reasons the Municipality has refused to pay the amount that was claimed by Quantibuild as balance for the work that has been completed."*

[28] Quantibuild contends that the appellant's plea and affidavit resisting summary judgment were scant in respect of facts or particularity. Pursuant to the appellant's failure to satisfy the requirements of Uniform Rule 32(3)(b), its opposition to the

summary judgment application stood to fail. In its plea the appellant relied on four bases in support of its contention that the contract relied upon by the respondent should be held to be invalid and null and void *ab initio*:

- The contract was “illegally and unlawfully” awarded to the respondent.
- The contract was “illegally and unlawfully” concluded on behalf of the appellant by a person who had no statutory and/or delegated authority to do so.
- The contract was “illegally and unlawfully” amended and/or extended in respect of duration, scope, and value.
- The contract exceeded the three-year period prescribed in terms of section 33(1) of the Local Government: Municipal Finance Management Act.

[29] The defences raised by the appellant in its plea and affidavit resisting summary judgment all consisted of allegations of non-compliance by the appellant with certain statutory provisions and procedural requirements, and the appellant’s conduct in relation to certain administrative acts. Apart from its contention that the contract value was “impermissibly” increased during 2016, the appellant’s remaining contentions as set out hereinabove to impugn the contract was only raised for the first time in the appellant’s plea delivered seven years after the contract was concluded, and three years after works commenced.

[30] It was further contended by Quantibuild that the issue raised by the appellant pertains to the status of an administrative act asserted to be invalid (whether void or voidable). Reliance was placed on **Oudekraal Estates (Pty) Ltd v City of Cape Town** 2004 (6) SA 222 (SCA) at paragraphs [26] and [36] in which the Supreme Court of Appeal held that:

> *"[26] … until the administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for iudicial review it exists in fact and it has legal consequences that cannot simply be overlooked… Our law has always recognized that even an unlawful administrative act is capable of producing legallv valid consequences for so long as the unlawful act is not set aside."*
>
> …
>
> *"[36] … (a court) that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy… It is that discretion that accords to judicial review its essential and pivotal role in administrative law for it constitutes the indispensable moderating tool for avoiding or minimizing injustice where legality and certainty collide".*
>
> (emphasis added)

[31] The learned authors of the *Law of South Africa* "*LAWSA*" Lexis Nexis state the following at Chapter 19:

> *"The discretionary remedy of setting aside on review is accordingly not governed by the principle of legality alone; legality may be overridden by considerations such as certainty and practicality. This is important as the substantive validity or invalidity of an administrative act 'will seldom have*

relevance in isolation of the consequences that it is said to have produced'. In Judicial Service Commission v Cape Bar Council it was reiterated that 'unless and until an administrative decision is challenged and set aside by a competent court, the substantive validity of its consequences must be accepted as a fact … Moreover, even if an administrative decision is challenged and found wanting, courts still have a residual discretion to refuse to set that decision aside'.

Our courts have pointed out that the difficulty presented by invalid administrative acts is that they have often been acted upon by the time they are brought under review, for example, when a contract had been entered into with a tenderer and the latter entered into further contracts in implementation of the main contract. Elements such as the failure to bring a review within a reasonable time, the public interest in the finality of administrative decisions; considerations of pragmatism and practicality are all factors which come into play when the court has to decide on whether or not to set aside an administrative action. Thus, in Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd it was held that, where the contract had almost been completed. the case fell within the categorv of those where by reason of the effluxion of time and intervening events an invalid administrative act had to be permitted to stand.

In Kirland Investments the Constitutional Court affirmed the ruling in Oudekraal that a local authority could not simply treat the administrator's act which it regarded as invalid as though it did not exist. To the argument by the government that administrators can without recourse to legal proceedings disregard administrative actions by their peers, subordinates or superiors if they consider them mistaken, the court's riposte was that that was a licence to self-help as it "invites officials to take the law into their own hands by ignoring administrative conduct they consider incorrect. That would spawn confusion and conflict, to the detriment of the administration and the public. And it would undermine the courts' supervision of the administration Moreover, the courts are to insist on due process from which there is no reason to exempt a government."

(emphasis added)

[32] It was submitted by Quantibuild that the appellant has failed to allege any facts and provided no particularity in support of its bare legal conclusions pleaded and raised. All the grounds raised by the appellant to impugn the contract, constituted administrative action by the appellant. Such administrative acts are valid until set aside by a competent court in accordance with the provisions of the Promotion of Administrative Justice Act, or in terms of a common law legality review, so the contention goes. This contention must be considered with due regard to the judgment in **Kunene Rampala Inc. v North West Province Department of Education and Sport and Development** (460/2022) [2023] ZASCA 120 (15 September 2023) where the respondent Provincial Department challenged the validity of an agreement in its plea and not by way of self-review. The Supreme Court of Appeal stated as follows:

> *"[12] The Departments case was simply that the addendum was concluded without complying with the procurement prescripts and as such, it sought that the contract be declared unlawful and invalid. It specifically pleaded that the addendum was concluded in contravention of s 217 of the Constitution of the Republic of South Africa (the Constitution), Regulation 16A of the Treasury Regulations issued in terms of the Public Finance Management Act (PFMA) and the National Treasury Instruction Supply Chain Management Instruction Notes, in that, no bidding process was undertaken. The respondent asserted in its plea that the addendum was in fact concluded before any work had been done in respect of the SLA under bid EDU 04/15 NW and as such, denied that the addendum was concluded to avert an 'emergency situation in the Province'… 'in order to secure the proper and efficient distribution of the LTSM throughout the province before the start of the 2016 school year'.*

[13] The matter came before Petersen J in the court a quo who dismissed the claim with costs. The high court found that the appointment of KR Inc. as the suitable service provider came about by way of a mere 'swoop of the pen' with a total disregard to fair, equitable and transparent processes as is envisaged by s 217 of the Constitution. In addition, it concluded that the addendum extended 'the SLA without an open tender process, was clearly contrary to the Treasury's Instruction Note on Enhancing Compliance Monitoring and Improving Transparency and Accountability in Supply Chain Management.' ***Placing reliance on Gobela Consulting CC v Makhado Municipality and Valor IT v Premier, North West Province and Others (Valor IT), the high court also found that on the evidence before it, the Department was entitled to challenge the validity and lawfulness of the addendum in its plea, without seeking to review and set it aside. It accordingly dismissed KR Inc.'s claim as the contract was concluded in breach of the applicable procedure prescripts and was thus invalid and unlawful****.*

[14] The crisp question in this appeal is whether the high court was correct in finding that the contract was invalid, unlawful and in breach of the applicable procedure prescripts, in the absence of a counter-application seeking a review and setting aside of the addendum.

…

[20] ***I now turn to address the issue of a collateral and reactive challenge. It is noted that KR Inc. appreciates that which was enunciated in Gobela in respect of collateral challenges. However, it argues that the high court should not have applied the principles of Gobela in this matter, as the facts of that case are distinguishable from this case. It is well settled now that if justice is to be served, a court is***

entitled to declare a contract invalid and unlawful, even if a collateral challenge is absent, in instances of a review of an invalid and unlawful contract. Importantly, it would depend on the facts of each case, in order to ensure that justice is served*.*

[21] In Gobela, likewise in this case, the court was seized with the question of whether a declaration of invalidity and unlawfulness could be pronounced without a collateral challenge being raised to review and set aside the offensive contract. Molemela JA writing for this Court summarised the position as follows:

'The law relating to collateral challenges was settled by the Constitutional Court in Merafong City Local Municipality v AngloGold Ashanti Limited (Merafong). Having surveyed the pre-constitutional case-law, the majority judgment found that South African law has always allowed a degree of flexibility in reactive challenges to administrative action. Having considered the impact of the Constitution on that body of law, it re-asserted that the import of Oudekraal was that the government institution cannot simply ignore an apparently binding ruling or decision on the basis that it was patently unlawful, as that would undermine the rule of law; rather, it has to test the validity of that decision in appropriate proceedings. The decision remains binding until set aside. That court expressed some guidelines for assessing the competence of a collateral challenge. With specific reference to Kirland, it stated as follows:

"But it is important to note what Kirland did not do. It did not fossilise possibly unlawful – and constitutionally invalid – administrative action as indefinitely effective. It expressly recognised that the Oudekraal principle puts a provisional brake on determining invalidity. The brake is imposed for rule of law reasons and for good administration. It does not bring the

process to an irreversible halt. What it requires is that the allegedly unlawful action be challenged by the right actor in the right proceedings. Until that happens, for rule of law reasons, the decision stands.

Oudekraal and Kirland did not impose an absolute obligation on private citizens to take the initiative to strike down invalid administrative decisions affecting them. Both decisions recognised that there may be occasions where an administrative decision or ruling should be treated as invalid even though no action has been taken to strike it down. Neither decision expressly circumscribed the circumstances in which an administrative decision could be attacked reactively as invalid. As important, they did not imply or entail that, unless they bring court proceedings to challenge an administrative decision, public authorities are obliged to accept it as valid. And neither imposed an absolute duty of proactivity on public authorities. It all depends on the circumstances*.*

…

Against this background, the question is whether, when AngloGold sought an order enforcing the Minister's decision, Merafong was entitled to react by raising the invalidity of her ruling as a defence.

…

A reactive challenge should be available where justice requires it to be. That will depend, in each case, on the facts. (Emphasis added.)"'

…

[23] ***Further, the invalidity of the addendum was raised in the Department's cancellation letter and in its plea; thus KR Inc. was well aware of the case it was to meet and it would therefore, be an injustice to say the lack of a counter-application precludes the Department***

from seeking a declaration of invalidity and unlawfulness. The Department pleaded non-compliance with s 217 of the Constitution, contravention of Regulation 16A of the Treasury Regulations issued in terms of the PFMA and contravention of the National Treasury Instruction Supply Chain Management Instruction Notes. The high court in its judgment mentioned that, the Department, even in the absence of a collateral challenge, had raised the validity and lawfulness of the addendum in the pleadings*.*

…

[25] Lastly, the court a quo was correct in entertaining the collateral challenge of the Department, and declaring the addendum invalid and unlawful, for non-compliance with the prescripts of the public procurement processes. This is clearly contrary to what s 217 of the Constitution seeks to prevent, in respect of organs of state, like the Department in this case. Therefore, the declaration of invalidity and unlawfulness of the addendum by the high court was warranted and justice required that the collateral challenge be entertained.

…"

[33] It is crucial for the adjudication of this appeal to bear in mind that in terms of the contract entered into between Quantibuild and the Municipality, under the heading: 'Conditions of Contract', it is specifically stated that:

*"The General Conditions of Contract for Construction Works (**2004**), published by the South African Institute of Civil Engineering, is applicable to this contract."*

[34] The court *a quo* found:-

> *"[11] When it became clear that the Municipality was unwilling to settle the amounts due as per payment certificates, Quantibuild referred the dispute for determination by the Adjudicator. It relied on the provisions of the General Conditions of Contract for Construction Works, Second Edition, 2010 ('GCC 2010') to refer the dispute for determination by the Adjudicator.*
>
> *…*
>
> *[13] **Though the Municipality objected to the adjudication process, it attended and participated in the proceeding, raising a number of other defences**. Upon consideration of the facts from both parties, the Adjudicator ruled that the Municipality was liable to pay for services that it received from Quantibuild. As indicated, this claim seeks enforce the award. The Municipality continued with its refusal to pay Quantibuild for the services. Its contention being inter alia that the contract is void ab initio. Further, the Municipality contends that it is entitled to ignore or refuse to comply with the obligations created in terms of the invalid contract."*

[35] The Court *a quo* erred in its finding in this regard. This is a valid triable defence raised by the Municipality. A finding to the contrary in paragraph [17] of the judgment of the court *a quo* is fatally flawed, where that court states:

> *"Under the circumstances, the argument that the contract is void ab initio avails no triable defence for the Municipality. However, that is not the end of the inquiry as there is still the question of the counterclaim to determine. In line with this legality defence, the*

Municipality prayed for the awarding of the contract to be declared invalid, reviewed and set aside."

[36] The issue of legality as a defence needs to be ventilated by a trial court (*cf* Ramphala Kunene *supra*). Much weight was attached to the fact that an adjudicator found in favour of Quantibuild. The court *a quo* remarked as follows:

> *"[21] What seems decisive in this matter is the question relating to the legal effect of the adjudication award. The Municipality did not challenge the award and there is no explanation why it did not do so, either through process of arbitration by approaching Court to review and set it aside. All that the Municipality raised as a defence against the award was that:*
>
> > *"4.3.3 The Defendant did not contractually, or otherwise consented to the jurisdiction of and/or the execution and/or the conducting of and/or to be bound by any "… adjudication proceedings …" and as such same cannot have any binding force or effect vis-à-vis the Defendant."*
>
> *[22] This defence calls for the Court to simply tum a blind eye to a process in which the Municipality fully participated. I do not believe that it is open for the Court to ignore the award, which, whether it was decided by the Adjudicator rightly or wrongly, finally determined the question of validity of the contract and the Municipality's liability for service rendered. Our courts have consistantly held the view that, as long as the Adjudicator acted generally in accordance to the usual rules of natural justice and without bias and within his terms of reference, the Adjudicator's decision should be enforceable."*

[37] The remarks of the court *a quo* would have mustered approval if the parties in their contract had agreed to referral of any dispute for adjudication by an adjudicator. There was no such agreement. Had there been such agreement, the decision in **Sasol South Africa (Pty) Ltd v Murray & Roberts Limited** (425/2020) [2021] ZASCA 94 (28 June 2021) which followed just more than a month after the judgment of the court *a quo* would have been apposite and on all fours with the argument advanced by Quantibuild. In that judgment, where an agreement was reached to refer the matter to adjudication, the SCA, with reference to its summary found that:

> *"**Summary:** Construction contract – contract providing for dispute resolution process – arbitration award final and binding on the parties until and unless set aside on review – Project Manager refusing to implement some of the findings of arbitrator – dispute relating to Project Manager's refusal to implement arbitrator's findings referred to adjudicator for adjudication - adjudicator applying the principles established in arbitration award – a party to the contract not entitled to ignore the adjudicator's decision simply on the ground that it considers it to be invalid – appeal dismissed."*

[38] The conclusion reached by the court *a quo* in paragraph [25] of its judgment is vitiated by misdirection. The raising of a defence based on legality merits ventilation. The court *a quo* should, based on the defences raised, have dismissed the application for summary judgment with costs to be costs in the cause.

Order

[39] Resultantly, the following order is made:

(i) The application by the respondent to declare the appeal lapsed, is granted.

(ii) Condonation is granted to the appellant for the late filing of the power of attorney, security for costs and the corrected record of appeal.

(iii) The conditional application for reinstatement of the appeal is granted.

(iv) The appeal is upheld.

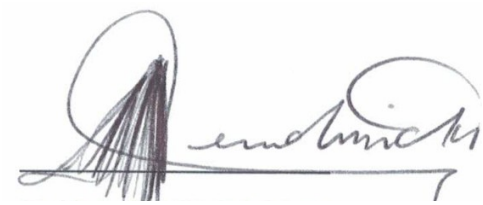
(v) The order of the court a quo (per Acting Judge Makoti) is set aside and replaced with the following order:

"1. The application for summary judgment is dismissed.
2. Costs of the application for summary judgment shall be costs in the cause."

(vi) The attorney of record for the appellant (Semaushu Attorneys) is ordered to pay the costs of the appeal on an attorney-and-client scale, *de bonis propriis*, apart from the cost orders previously made by this Court, which costs shall be taxed.

(vii) Such costs to include the costs consequent upon the employment of two counsel, Senior and junior.

(viii) The matter is remitted to the court *a quo* to proceed before a judge other than Acting Judge Makoti.



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R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree.

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A H PETERSEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree.

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O DIBETSO-BODIBE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG