Dispute Resolution

17 February 2026

SOUTH AFRICA

- Are you on the right track?When fast track turns into a slow track in construction contracts
- Constitutional rights versus statutory timelines – SCA grants condonation in *Rossouw v Blignaut & Wessels*

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Are you on the right track? When fast track turns into a slow track in construction contracts

Many construction contracts include provision for fast-track procedures so that certain types of disputes can be determined under a faster and more cost-effective procedure than a full-scale arbitration.

This article discusses the potential pitfalls of fast track dispute resolution, with reference to the case of *Kathu Solar Park (RF) Ltd v Mahon and Another* [2020] JOL 47418 (GJ).

Kathu Solar Park (RF) (Pty) Ltd (Kathu) and Liciastar (Pty) Ltd (Liciastar) entered into an engineering, procurement and construction contract, in terms of which Liciastar was to construct a solar powerplant. A dispute arose between the parties regarding the imposition of delay liquidated damages by Kathu. The contract included a dispute resolution clause, which included fast-track resolution by an independent expert.

Liciastar referred the dispute to fast track, in terms of which the first respondent, Terry Mahon was appointed as the independent expert who was to determine the dispute. The matter before the court was whether Mahon had the requisite jurisdiction to make a finding in the matter, with Kathu having brought an urgent application to interdict Liciastar and Mahon from proceeding with the fast-track proceedings until a determination on Mahon's jurisdiction was made.

Finding

After considering the contract and the fast-track provisions, the court found that the contract was clear that disputes were to be expressly referred for determination and only such referred disputes would be determinable by the independent expert by way of fast track.

The court held that Liciastar did not refer the dispute, and as such Mahon did not have the requisite authority to determine the liability dispute.

As is evident from this case, if there is ambiguity or lack of clarity in relation to the powers of the independent expert, or the nature of the dispute to be referred, then this may result in the aggrieved party approaching the courts to have the fast track process or outcome set aside. This creates significant delays, given the current court backlogs, and additional costs, which is contrary to the original intention of the parties in having a faster dispute resolution procedure in the first place.

Another important aspect for parties to carefully consider is what types of disputes are to be referred to fast track and what party is to determine the dispute. Often an independent expert (engineer), rather than a lawyer, is appointed to determine a dispute under fast track, as the types of disputes so referred are often perceived as *"technical"* disputes. However, all disputes arising out of a construction contract involve, to some extent, the interpretation of the relevant clauses in the contract, evidence, procedure, an award/ruling and the issue of costs. Having a non-lawyer determine these issues can be problematic and can lead to a review application to court (with attendant delay and wasted costs).

A further potential pitfall is that, in some instances, the third party that has been appointed as an independent expert is not a party to the contract and does not even know of their appointment. This can be problematic, in particular if they refuse to take the appointment.

Sometimes what is meant to be a fast track can morph into a procedure that is akin to an arbitration and the parties would have been better off simply referring the dispute to arbitration from the outset, which is a recognised and established procedure with a proper timetable and rules of evidence, with a lawyer as the arbitrator determining the matter, all of which provides for a proper ventilation of the dispute.

Another factor to consider is the status of the award/ruling of an independent expert. In particular, whether it is susceptible to challenge in a subsequent arbitration or whether it is final and binding on the parties. This is important as, depending on the nature of the dispute, the ruling could have a significant effect on the position of the parties, e.g. a case concerning the existence of a serial defect, the outcome of which would have significant consequences for both parties.

The judgment in *Kathu Solar Park* reinforces the principle that dispute resolution clauses should clearly and expressly set out which disputes are to be referred to fast track, the independent expert's authority and the status of any award/ruling made in such process. These types of clauses should be carefully drafted and applied, otherwise what seemed like a fast track can turn into a slow track.

Timothy Baker, Claudia Moser and Zenande Mnyamana

Constitutional rights versus statutory timelines – SCA grants condonation in *Rossouw v Blignaut & Wessels*

The case of *Rossouw v Blignaut & Wessels and Another* [2025] ZASCA 146 dealt with important issues around applications for condonation, special leave of appeal to the Supreme Court of Appeal (SCA), and constitutional rights, especially those of children.

The judgment concerned an application for condonation for the late delivery of a statutory notice under section 3(1)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (Act) for a loss of support claim. The purpose of the notice is to notify an organ of state of a litigant's intention to institute legal proceedings against it for the recovery of a debt. Importantly for this matter, the Act prescribes that this notice must be delivered within six months of the date that the debt becomes due.

Factual background

On 29 May 2011, Ms Rossouw's husband and the father of her children was involved in a motor vehicle collision in the Free State and sustained such severe bodily injuries that he died the following day.

Three weeks after his death, Rossouw instructed the first respondent, Blignaut & Wessels, as her attorneys to pursue an action for loss of support against those responsible for her husband's death. Blignaut & Wessels advised Rossouw institute proceedings against the Road Accident Fund (RAF).

One of the main contentions of Rossouw was that the accident was a direct result of the road being riddled with potholes, in a state of disrepair and without any appropriate warning signs. This claim, it later transpired, lay against the Member of the Executive Council for Police, Roads and Transport, Free State Province (MEC) and not the RAF. The MEC was responsible for maintaining the roads in the Free State. Having proceeded against the incorrect party, Blignaut & Wessels informed Rossouw in 2017 that her claim for loss of support had prescribed but that the claim of her children had not.

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She then instructed new attorneys to pursue the loss of support claim on behalf of her minor children, and she was advised to deliver a notice in terms of section 3(1)(a) of the Act. For some unexplained reason, the notice was delivered only on 13 December 2018. Summons was served on the MEC on 7 May 2019. In defence of the claims in the summons, the MEC raised a special plea alleging that the notice was delivered out of time and was therefore not compliant with section 3(2) of the Act. Rossouw subsequently applied for condonation for the late filing of the notice.

In the High Court

The High Court dismissed her condonation application as her delay in delivering the notice was "*extreme*" and her explanation for that delay was insufficient. The court held that she had instructed attorneys after the death of her husband and "*lay supine*" until she was advised that her claim had prescribed, whereafter she instructed new attorneys, and the notice was delivered another year after that.

The High Court also found that she had no prospects of success in the action as her evidence was weak, and that Rossouw had failed to satisfy the onus for the absence of unreasonable prejudice on the part of the MEC. The High Court considered the interests of the minor children, but concluded that, given the unexplained delays and the lack of prospects of success, the children's rights were not decisive.

Rossouw then took the judgment on appeal to the full bench of the High Court and was again unsuccessful in her condonation application. She then sought special leave to appeal to the SCA.

In the SCA

The SCA's judgment highlighted that there were two questions to be considered:

1. Whether Rossouw established good cause for the granting of condonation.
2. Whether the MEC will be unreasonably prejudiced by Rossouw's delay in delivering the notice.

Good cause for condonation

The SCA held that good cause is informed by, *inter alia*, the reasons for the delay, the sufficiency of the explanation, the *bona fides* of the applicant, any contribution by other persons to the delay and the applicant's responsibility therefore, and the prospects of success in the main action.

In relation to the reason for the delay, the SCA held that Blignaut & Wessels were entirely to blame for the delay in delivering the notice in the period between 29 November 2011 and 2017, as they incorrectly went after the RAF and allowed her claim to prescribe in their hands.

The delay between 2017 and 13 December 2018, when the notice was ultimately delivered by Rossouw's new attorneys, also could not reasonably be attributed to Rossouw. It rested on her attorneys to deliver the notice timeously upon being instructed by Rossouw to pursue the claim for her children. The position would have been different had Rossouw delayed in instructing attorneys or been a passive litigant. The court therefore concluded that she had done all that she could and that she had delivered an adequate, albeit not entirely satisfactory, explanation for the belated delivery of the notice.

As to prospects of success, the SCA held that Rossouw need not convince the court that she would be successful at trial and that a *prima facie* case and *bona fide* intention to have the matter tried is sufficient. The High Court in the condonation application was not a trial court and had misdirected itself in the assessment of Rossouw's prospects of success by attempting to evaluate her evidence at that stage already.

Prejudice to the MEC

The MEC argued that due to the delay, vital documentary evidence which could have been used in defending the action **may** have been destroyed or misplaced, and that the personnel with the relevant knowledge **may** no longer be employed by the MEC or **may** have faded memories.

The SCA relied on *Premier, Western Cape v Lakay* [2011] ZASCA 224; 2012 (2) SA 1 (SCA) which held that the effluxion of time causing evidence to deteriorate was not sufficient to constitute unreasonable prejudice. The SCA was not convinced by the MEC's speculative argument relating to the availability of documents and status of employees with knowledge of the matter. Firstly, she had not shown that she had made an attempt to establish the true position of the situation – she had not investigated availability and/or reliability of documents or employee witnesses. Secondly, there was documentary and oral evidence already shown to be available for the MEC to construct a defence to the action. Instead of dealing with this evidence on its merits, the MEC merely relied on the fact that it, in her view, constituted hearsay evidence.

The SCA confirmed that it was satisfied that Rossouw had shown good cause and that the MEC would not be unreasonably prejudiced by the late filing of the notice, and accordingly granted condonation for the delay.

Constitutional considerations

The SCA also highlighted that two constitutional rights were implicated, namely section 28, which entrenches the importance of children's rights in every matter concerning them, and section 34, which guarantees the right to access to courts.

The SCA held that the High Court failed to distinguish between the rights of the children and those of Rossouw. The right to access to courts in section 34 extends to children, and the High Court paid no regard to these rights. The SCA held that the question that should have occupied the mind of the High Court was whether it was in the children's interests to deny them the right to have their loss of income claim determined by a court of law, based on procedural failings of others. Therefore, the SCA concluded that had the children's rights been considered properly, it would have led to the conclusion that the children's right to have their claim for loss of support determined by a court should be vindicated.

Special leave to appeal

In order to be granted special leave to appeal, a litigant must show, in addition to prospects of success on appeal, special circumstances justifying the granting of special leave. This can include the fact that a matter is of significance to the public or the parties. The SCA held that this matter was of immense importance to the minor children and that they must be given a chance to have their case against the MEC heard in accordance with section 34 of the Constitution. Special leave was therefore granted and the SCA held that the matter must proceed to trial.

Conclusion

It is trite that condonation is not for mere asking, however, this judgment shows the court's preparedness to relax the requirements for the granting of condonation – even where an explanation for the delay has not been entirely satisfactory – where:

- constitutional rights are at stake, especially the rights of children;
- the delay cannot be laid at the litigant's door; and
- prejudice is purely speculative.

This judgment is also a cautionary tale not only about undue delays in acting, but also about relying on speculative grounds to claim prejudice.

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