

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT  
(JOHANNESBURG)

CASE NO: 26040/13

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: YES  
(3) REVISED.

24 JULY 2013

  
FHD VAN OOSTEN

In the matter between

PRODUCTIVITY SA

and

JABU'S CONCEPT WAREHOUSE AND  
FRANKTALK COMMUNICATION AS A  
JOINT VENTURE CONSORTIUM

SHERIFF OF HALFWAY HOUSE

APPLICANT

FIRST RESPONDENT

SECOND RESPONDENT

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J U D G M E N T

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VAN OOSTEN J:

[1] The application before me arises from an appeal between the applicant (as the appellant) and the first respondent (as the respondent) (the appeal). For the sake of ease of reference I shall refer to the parties as in the application before me. The appeal was enrolled for hearing on 29 November 2012 before a Full Court. The record of the

proceedings in the trial court however, was defective in a number of respects resulting in the appeal being postponed *sine die* and the appellant ordered to pay the wasted costs occasioned by the postponement. The appeal was re-enrolled for hearing on 13 June 2013. The record of the proceedings was still defective and the notice of appeal moreover filed out of time resulting in an order that the matter be struck from the roll and the applicant to pay the costs on a punitive scale. The first respondent proceeded in obtaining from the Registrar a warrant of execution in respect of the judgment debt and costs. On 10 July 2013 the warrant was served on the applicant at its place of business and an inventory prepared by the second respondent of all the applicant's moveable assets. The first respondent's attorneys by way of correspondence addressed to the applicant's attorneys unsuccessfully attempted to procure a stay of the warrant. On 19 July the applicant paid to the second respondent the full amount in satisfaction of the warrant which amount was paid over to the first respondent's attorneys. The payment however, was made "under protest" and pending the outcome of the present application.

[2] On 17 July 2013 the applicant issued an urgent application seeking similar relief to that sought in the present application, but withdrew the application the next day and launched the present application, also by way of urgency. In the present application the applicant seeks an order for the setting aside of the writ of execution, for an interdict restraining the first respondent from executing the judgment, for an order that the execution of the warrant by the second respondent be suspended (both these orders pending the final outcome of the appeal) and costs. The first respondent has filed an answering affidavit and the applicant a reply thereto.

[3] The crucial issue in this matter concerns the effect of the striking-off order of the Full Court on the continuation of the appeal. The applicant contends that the appeal, despite the order, remained pending and that it merely for its continuation required re-enrolment for hearing. In its answering affidavit the first respondent takes the opposite stance: the appeal it contends lapsed as a result of the order and could only be re-enrolled by way of an application for re-instatement on the roll and condonation for the late filing of the notice of appeal. Having been alerted to the first respondent's view, the applicant in its replying affidavit slightly changed course: a notice of application for a trial date for the

hearing of the appeal was annexed to the replying affidavit which had been filed the day prior to the hearing of the present application. The notice the applicant states, was served much as by way of *ex abundanti cautela* as it is stated on behalf of the applicant, "there is no need to apply to reinstate the appeal as it has not lapsed and is still pending". In response to the notice the first respondent's attorneys in a letter addressed to the applicant's attorneys, pointed out that the notice constituted an irregular step in the proceedings but this did not deter the applicant from proceeding with the application. The applicant has furthermore annexed to the replying affidavit a notice of motion seeking condonation for the late filing of the notice of appeal, dated 21 November 2011, which I was informed formed part of the court record in the appeal when the matter was heard by the Full Court.

[4] I shall first deal with the opposing contentions of the parties thus far raised. The effect of an order striking a matter from the court roll has been pronounced on in a number of cases (see *Herf v Germani* 1978 1 All SA 539 (T) 545; *City of Tshwane Metropolitan v Shai and another* [2007] JOL 19201 (T); and *Aymac CC and another v Widgerow* [2008] JOL 19201 (T). The nett result derived from the judgments is that the striking-off order results in, firstly, the lapsing of the appeal and, secondly, the suspension of the staying effect thereof. An appeal that has lapsed can only be resurrected by an application for re-enrolment which in the normal course will be adjudicated upon by the court hearing the appeal. Counsel for the applicant did not take issue with the legal position I have thus far alluded to. Instead counsel, in the alternative, made an about turn and sought an order for the removal of the application from the roll in order to enable the applicant to bring its house in order.

[5] I am unable to accede to the request for a postponement of the application. As Mr *Moshoana*, who appeared for the first respondent, has convincingly pointed out, the applicant has launched the application on a basis of urgency. In its replying affidavit the applicant seeks to make out a different case. When the shoe pinched the applicant, albeit in the alternative, sought the indulgence of a postponement which, if granted, would have removed the urgency of the application relied upon by the applicant. A further hurdle presents itself: the applicant's case is based on the contention that the appeal is still pending: as much has been repeatedly stated under oath. The applicant

now seeks the opportunity to file a notice of re-instatement of the appeal which, for purposes of this application, would fly in the face of the stance it has taken thus far. This was not the basis on which the first respondent was brought to court; nor should the applicant be allowed, on the papers as they stand, to simply disregard urgency and adopt a new approach entirely inconsistent with the case it has made out thus far. For these reasons the application cannot succeed and is doomed to failure.

[6] Mr Moshwana asked for a punitive costs order. I am not satisfied that a punitive costs order is justified in the circumstances of the case.

[7] In the result the application is dismissed with costs.



**FHD VAN OOSTEN**  
JUDGE OF THE HIGH COURT

**COUNSEL FOR APPLICANT**

**ADV C GEORGIADES**  
**ADV M NDUMISO**

**APPLICANT'S ATTORNEYS**

**MOLOTO STOFIL INC**

**ATTORNEY FOR FIRST RESPONDENT**

**MR GN MOSHOANA**

**FIRST RESPONDENT'S ATTORNEYS**

**MOHLABA & MOSHOANA INC**

**DATE OF HEARING**

**23 JULY 2013**

**DATE OF JUDGMENT**

**24 JULY 2013**