


REPUBLIC OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO. 16168/2017

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
12/12/19	
DATE	SIGNATURE

In the matter between:

ABSA BANK LIMITED

Applicant

and

HOWELL PHILLIP MARSHALL
HOWELL NOELENE JANE

First Respondent
Second Respondent

In re: the matter between:

HOWELL PHILLIP MARSHALL
HOWELL NOELENE JANE

First Appellant
Second Appellant

and

ABSA BANK LIMITED

Respondent

JUDGMENT

NOTSHE AJ

[1] In this matter, the applicant has instituted an application for a declaratory order to the effect that notice of application for leave to appeal delivered on 14 March 2019 against the judgment of Justice Mokosi handed down on 21 September 2017 has lapsed. It also seeks an order of costs against the respondents. It avers that the respondents have failed to prosecute the application for leave to appeal timeously or at all.

[2] The genesis of the application is a successful summary judgment application that was instituted by the applicant and granted by Mokosi AJ on 21 September 2017.

[3] On 14 March 2019, nearly eighteen months after the judgment and order were delivered, the respondents delivered a notice of application for leave to appeal against the judgment and order of Mokosi AJ. They have not prosecuted the application despite the lapse of more than six months and without an explanation.

[4] The issue of the application for leave to appeal and its prosecution is governed by the provisions of s17 of the Superior Courts Act, 2013 (Act No. 10 of 2013) and Rule 49 of the Uniform Rules of Court. S17 merely makes provision regarding the power and the grounds for granting of leave to appeal. Rule 49 also merely provides for the time period within which a notice of application for leave to appeal should be delivered. It also provides that the application shall be set down by the Registrar who should inform the parties thereof. Both provisions do not deal with the consequences for the failure to prosecute the application timeously or at all.

[5] Rule 49 cannot apply in this case. The aforesaid rule deals with the issue of the failure to prosecute the appeal after leave to appeal has been granted.¹

[6] Despite the fact that there is no time limit within which an application for leave to appeal has to be prosecuted, the respondent therein is not without a remedy.

[7] It is now trite law that it is desirable and in the public interest that finality must be reached within a reasonable time in respect of litigation. The Courts have the power, as part of their inherent jurisdiction, to regulate their own proceedings to refuse and regarded as lapsed, an application that has not been prosecuted after an unreasonable delay.²

[8] I am mindful of the fact that setting down of the application does rest solely upon the applicant. Rule 49(1)(d) provides that the application shall be set down on a date arranged by the registrar who shall give written notice thereof to the parties. This means that the date of the hearing of the application is arranged by the Registrar with consultation with the Judge and the parties. If however this does not happen the applicant has a duty to persistently request an arrangement for a date of hearing the application. In those circumstances the applicant will have a reasonable explanation for the delay.

¹Subrules 49(6) and (7) provide for the application for a date of appeal and the record of appeal.

² *Wolgroeiërs Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 38H–42D; *Radebe v Government of the Republic of South Africa* 1995 (3) SA 787 (N) at 798A–F; *Associated Institutions Pension Fund v Van Zyl* 2005 (2) SA 302 (SCA) at 321B; *Gqwetha v Transkei Development Corporation Ltd* 2006 (2) SA 603 (SCA) at 606G–H and 612D–E; *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) at 649I–650B; *Madikizela-Mandela v Executors, Estate Late Mandela* 2018 (4) SA 86 (SCA) at 91A–D; Section 173 of the Constitution of the Republic.

[9] In this case, despite the fact that the respondents were reminded of their responsibility to prosecute the application and were served with this application, they have not opposed it nor have they given an explanation for their failure to prosecute the application.

[10] In my view, the notice of application for leave to appeal was delivered merely to delay the effect of the Order.

[11] In the circumstances, I am of the view that the application for leave to appeal and its effect have lapsed. As a result, I make the following order:

(a) The notice of application for leave to appeal against the judgment and order of Justice Mokosi handed down on 21 September 2017 and which notice was delivered on 14 March 2019 has lapsed.

(b) The respondents are directed to pay the costs of this application, jointly and severally, the one paying the other to be absolved.



V S NOTSHE
Acting Judge of the High Court

HEARD ON:	09 December 2019
JUDGMENT DATE:	12 December 2019
FOR THE APPLICANT:	Adv E Nhutsve
INSTRUCTED BY:	Messrs Lowndes Dlamini
FOR THE RESPONDENT:	No Appearance