IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

21 September 2022
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DATE

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SIGNATURE

Case no: 17195/2010

A740/2014

In the matter between:

DAVID HENRY SMITH **APPLICANT**

and

SCI ESSEL OFFSHORE SERVICES LTD **FIRST RESPONDENT**

DAWIE DE BEER ATTORNEYS **SECOND RESPONDENT**

JUDGMENT

MAZIBUKO AJ

Introduction

1. The applicant seeks an order declaring that the
   a) Non-compliance with Rule 4 of the Uniform Rules of Court is condoned regarding electronic service.
   b) First respondent's appeal under case number A740/2014 has lapsed for failure to prosecute the appeal within the time periods allowed, alternatively, within a reasonable time.
   c) Judgment of the above honourable Court per Phatudi J dated 13 May 2014, in the main action, is final.

d) Second respondent is to, upon production of the original letter of undertaking, immediately make payment to Edeling van Niekerk Incorporated in the amount of R874 866.54 in terms of their written letter of undertaking dated 11 November 2016 and to pay the surplus, if any, to the first respondent.

e) First respondent pays the costs of the application.

f) First respondent pays the costs of 13 December 2021 occasioned by the removal of the matter from the roll due to the first respondent's late opposition on an attorney and client scale.

2. The first respondent opposes the application and seeks condonation for late opposition of the application. He brought a counter application seeking an order that;

a) The applicant be ordered to, within 15 days from the date of this order, deliver its replying affidavit in its applications to adduce further evidence and amend its plea in the main action.

b) The applicant be ordered to, within 15 days from the date of its compliance with paragraph a) above, deliver its supplementary heads of argument.

c) The first respondent be ordered to deliver its supplementary heads of argument within ten days of receipt of the applicant's supplementary heads of argument in response.

d) Once the parties have complied with paragraphs 2a to c above, the respondent is authorized to enrol their appeal in accordance with the provisions of uniform Rule 49 read with Uniform Rule 7.

e) The applicant be ordered to pay the costs of the counterapplication.

Background

3. The first respondent (the plaintiff in the main action, under case number 17195/2010), a peregrinus company, instituted an action in 2010 against various defendants for payment of R130 million. The applicant was the second defendant therein. The matter only proceeded against the applicant. On 13 May 2014, the first respondent's action was dismissed with costs.

4. The first respondent sought leave to appeal the Judgment and order; leave was granted on 2 September 2014 to appeal to the Full Court (Court of appeal).

5. On 12 August 2015, at the appeal hearing, before the appeal could be heard, the Court of appeal heard a postponement application by the applicant. In its motivation

for the postponement application, the applicant submitted that it was seeking to introduce fresh evidence and had filed its notice of intention to amend its plea to introduce a special plea of lack of *locus standi*. The Court of appeal also heard that the first respondent objected to the intended amendment and had filed its opposing papers.

6. Considering the above developments on the matter, the Court of appeal held that the appeal was not ripe and postponed it *sine die* with an order for the applicant to pay the costs thereof on an attorney and client scale.

7. The applicant did not effect the amendments on his plea, and no fresh evidence was ever introduced. On the other hand, the appeal was never re-enrolled.

8. On 11 November 2016, the second respondent issued a letter of undertaking to hold at the disposal of the applicant an amount of R850,000 held in their trust account as security for costs in terms of the Judgment, under case number 17195/2010 and the appeal, under case number A740/2014.

9. On 13 May 2021, the applicant sent correspondence to the first respondent in enforcing the cost order of 13 May 2014 by Phatudi J, calling for payment of the costs. The second respondent refused to make the payment on the instruction of the first respondent.

10. In June 2021, the applicant invited the first respondent to apply to reinstate the appeal before 17 June 2021. The first respondent did not bring such an application.

11. On 16 August 2021, the applicant served the application on the first respondent. On 29 November 2021, the first respondent filed his notice of intention to oppose the application, opposing affidavit, and its counterapplication. At the time of the first respondent's filing of its papers, the applicant had already set the application down for hearing on an unopposed motion court roll for 13 December 2021. The application was removed from the roll, and costs were reserved.

12. The first respondent in correspondence denied that the appeal had lapsed. It refused the second respondent to pay the applicant for his costs in terms of the letter of undertaking in respect of the action pending the appeal.

Evaluation

Electronic service

13. Rule 4 of the Uniform Rules of Court provides that

4(1) (a) Service of any process of the Court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners—
(i) by delivering a copy thereof to the said person personally: Provided that where such person is a minor or a person under legal disability, service shall be effected upon the guardian, tutor, curator or the like of such minor or person under disability;

4(1)(a)(v) in the case of a corporation or company, by delivering a copy to a responsible employee thereof at its registered office or its principal place of business within the Court's jurisdiction, or if there be no such employee willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by law;

4(1)(aA) Where the person to be served with any document initiating application proceedings is already represented by an attorney of record. Such document may be served upon such attorney by the party initiating such proceedings.

14. The first respondent took no issue with the electronic service of the pleadings and responded to the court processes. The first respondent suffered no prejudice. The applicant's non-compliance with Rule 4 is hereby condoned.

Condonation application

15. The first respondent seeks condonation for late opposition to the applicant's application. He asserts that due to the incorrect facts presented by the applicant in the correspondence between the parties and the founding papers, the first respondent applied for a copy of the official transcript of the audio of the appeal hearing on 12 August 2015. The first respondent received the transcripts on 24 November 2021. It further states that the delay in obtaining the audio and transcription was due to computer hacking.

16. Upon receipt of the application, the first respondent did not file their notice of intention to oppose the application within the time period specified in the notice of motion. The respondent opposes the application for condonation.

17. Though one would have expected the first respondent to file their notice of intention to oppose the application, pending the transcription of the record. Alternatively, send correspondence to the applicant stating the reason for the delay. Upon perusing the correspondence attached to the founding affidavit, the first respondent's explanation regarding the delay is reasonable. The late filing of the prosecution of the appeal is hereby condoned.

Jurisdiction

18. Before dealing with the declaratory order and the lapse of the appeal, a determination about a single judge hearing the matter at hand must be made. The first respondent, through its Counsel, submitted that this Court has no jurisdiction to declare that its pending appeal has lapsed. It argued that only the appeal court could declare the appeal before it lapsed.

19. On behalf of the first respondent, it was argued that the Court of appeal is and remains seized with the matter as the appeal was duly noted and prosecuted and set down for hearing by the full Court on 12 August 2015. The Court of appeal granted a postponement for the applicant to attend to procedural matters to get the matter ready for adjudication by that Court. Also, a postponement was granted with a punitive cost order. Therefore, only the Court of appeal is empowered to declare that a pending appeal before it has lapsed.

20. On the other hand, the applicant submitted that this Court is, and if not, it can exercise its inherent powers in Section 173 of the RSA Constitution. Section 173 provides that *"The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."*

21. In the case of Nawa vs Marakala[1]' Landsman J had to deal with the question of the lapsing of an appeal that had been noted. He said:

"I am satisfied that a single judge has by virtue of s 13(1)(a) of the Supreme Court Act 59 of 1959 the jurisdiction to entertain an application, such as this one, for a declaration

[1] Nawa and others v Marakala and Another 2008(5) SA 275 at 278 A-B.

that an appeal has lapsed. It is salutary practice for a single judge, sitting in term time, to refer a matter concerning a procedural aspect of an appeal within his or her jurisdiction to a bench consisting of an appropriate number of judges where it necessitates a consideration of the prospects of success of an appeal. Where the prospects of success of an appeal need not be traversed, it is permissible for a single judge to dispose of the matter."

22. In City of Tshwane Metropolitan v Shai and Another [2007] 30L 1920 1 (T): It was said; *"It is contended on behalf of the applicant that it is the appeal court that can determine whether the appeal has lapsed. I am of the view that, it is the other way round, the Court to which it is appealed can decide to resuscitate an "appeal that is deemed to have lapsed". However, there must be an application for condonation brought before such Court for it to exercise its discretion. In the absence of such a substantive application setting forth the reasons for the non-compliance with the rules, or put otherwise, for the failure to prosecute the appeal in time, I am unable to evaluate the prospects of success for the as yet to be made application for condonation, and as the result, I am unable to exercise my discretion in favour of the applicant."*

23. The party contending that an appeal has lapsed is to approach Court for an order to that effect. The applicant, in its application, seeks an order for a declaration that an appeal has lapsed.

24. This Court may decide on the matter as, firstly, it was not requested to determine the prospects of success in the appeal, but, whether the applicant has made out a case for the first respondent's appeal to be declared as having lapsed. Secondly, in the unique circumstances of this matter, it is in the interest of justice whilst fortified, to guide the parties to bring this matter to finality. It is unique because, since August 2015, none of the parties pestered themselves to bring the matter into conclusiveness though each has a direct interest, including financial, in the matter. Each held its fire for over six years for the other to take a step to bring the matter into finality.

Declaratory relief

25. Turning to the issue of the lapse of the appeal. The applicant submitted that the first respondent had not prosecuted the appeal within the prescribed time or within a reasonable time. Therefore, the appeal must be declared to have lapsed.

26. Section 21 of the Superior Courts Act 10 of 2013 provides that:
21(1) *A Division has jurisdiction over all persons residing in or being in, and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance, and has the power –*
(1)(c) in its discretion and at the instances of any interested person to enquire into and determine any existing, future, or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

27. It is common cause that both parties have an interest in the matter. The applicant is interested in the matter, as the Court in 2014 found in its favour as it dismissed the first respondent's claim. The first respondent has an interest since it appealed the Judgment and order that dismissed its claim against the applicant.

Lapse of appeal

28. On 12 August 2015, the hearing date of the appeal, the appeal was not heard. The applicant applied for postponement of the appeal, seeking to introduce further evidence and amend its plea by filing a special plea of lack of *locus standi.* The Court of appeal granted the postponement *sine die*, with the applicant bearing the costs on an attorney and client scale. The purpose of the postponement was to grant the applicant an opportunity to reply to the first respondent's answering affidavit regarding the fresh evidence and the special plea, which answering affidavit had been filed a day before the appeal hearing.

29. The applicant took no steps to deliver the replying affidavit, prosecute the application to introduce fresh evidence or amend its plea to introduce the special plea of lack of *locus standi.* None of the parties took any steps to re-enrol the appeal.

30. It was argued on behalf of the applicant that the respondent is *dominus litis* in the appeal matter and therefore had a responsibility to re-enrol the matter. Further, since the first respondent had lost a claim of R130 million, it could not just wait for over six years to prosecute and finalize its appeal against such an order.

31. On the other hand, it was argued on behalf of the first respondent that the respondent was waiting for the applicant to deliver its replying affidavit or prosecute the application to introduce fresh evidence as envisaged during the postponement application in August 2015.

32. On behalf of the first respondent, it was argued that Rule 49 is not applicable. Whilst the applicant is opposed to that submission, it, to a certain extent, appeared to concede that there is no provision in Rule 49 dealing with appeal postponed *sine die.*

33. The applicant relied on Rule 49(6), where the following is required in prosecuting an appeal:
Rule 49(6)*(a) "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." (my emphasis relating to paragraph 35 below).*
Rule 49(6)*(b) "The Court to which the appeal is made may, on application of the appellant or cross-appellant, and upon good cause shown, reinstate an appeal or cross-appeal which has lapsed."*

34. In putting its reliance on Rule 49(6), it was submitted, on behalf of the applicant that Rule 49, especially the 60 days period, should have been used as a guide by the first respondent when the applicant's amendments and the special plea did not come forth.

35. It is challenging to follow the applicant's submission in this regard, as Rule 49 also provides that the respondent may apply for a set down of the appeal matter. On the one hand, the first respondent did not apply to re-enrol the appeal matter for hearing after the expiry of prescribed time limits within which the applicant needed to prosecute its application to introduce fresh evidence and effect amendments.

36. Conversely, the applicant chose not to follow the same Rule 49(6)(a) it argued was to guide the first respondent. However, it also did not apply to enroll the appeal as provided in the said rule. It means the applicant did not use the same Rule 49 to guide itself to, within 10 days, after the respondent failed to re-enrol, apply to have the appeal matter re-enrolled.

37. There is no provision made in Rule 49 addressing the appeals postponed *sine die*. Reference to Levenberg v Denholm 1930(2) PH L13 (C) was made, *where the Court had to deal with an application for condonation where the appellant failed to apply for a date within the required time period allowed leading to the application being refused with costs.* This matter is distinguishable from the matter at hand. It, therefore, offers no assistance in determining the issue.

38. In the matter of Eke v Parsons 2016(3) SA 37 (CC), in paragraph 40, it was stated that "*Under our constitutional dispensation, the object of court rules is twofold. The first is to ensure a fair trial or hearing. The second is to "secure the inexpensive and expeditious completion of litigation and . . . to further the administration of justice". I have already touched on the inherent jurisdiction vested in the superior courts in South Africa. In terms of this power, the High Court has always been able to regulate its own proceedings for a number of reasons, including catering for circumstances not adequately covered by the Uniform Rules and generally ensuring the efficient administration of the courts' judicial functions."*

39. It was argued that the first respondent did not properly prosecute the appeal timeously in terms of the rules, nor within a reasonable time. He is *dominus litus* and ultimately remains responsible for the efficient disposal of its appeal. Any interlocutory applications do not preclude it from progressing and finalizing its appeal.

40. The first respondent properly prosecuted its appeal timeously and enrolled it. On the day of the appeal hearing, the applicant requested a postponement. The first respondent did comply with Rule 49 at the correct stage of the prosecution of the appeal.

41. The first respondent did not have to wait for the applicant indefinitely after the expiry of the prescribed time for the applicant to file its replying affidavit and prosecute its application for a special plea. No explanation has been proffered as to why the first respondent did not apply to re-enrol the matter. Also, none as to what prevented them from sending courtesy correspondence to the applicant finding out about the special plea and the amendment of the plea thereof, which the applicant opted not to pursue.

42. On the other hand, the applicant was granted postponement for it to amend its plea by filing a special plea, which he, for undisclosed reasons, opted not to pursue. Nothing

prevented the applicant from sending correspondence to the first respondent informing him that it was no more pursuing its application to amend its plea.

43. Since the appeal postponement in August 2015, none ensured this matter came to finality. Only in May 2021 made the applicant attempt to enforce the order per Phatudi J. Which order is pending its determination before the Court of appeal.

44. Though the applicant is under no obligation to file a replying affidavit, in this instance, the applicant, before the Court of appeal, sought to consider filing same in pursuit of introducing fresh evidence. The applicant did not and that marked the end of the special plea issue and amendments thereof. The appeal before the Court of appeal remained pending, and no law mentioned that stood in the way for the appeal to be re-enrolled for hearing.

45. Conversely, nothing stopped the applicant from communicating their intention of no more pursuing their special plea application.

46. Both parties chose not to take any of the various options at their disposal in concluding the matter. They also gave no explanation why none of them took no steps to advance the matter or call upon each other to do so. None of them seemed to have been interested in the matter nor been prejudiced by the stalemate of the appeal after it became clear that the applicant was no more prosecuting its application to introduce fresh evidence.

47. Indeed, a significant amount of time has passed since 12 August 2015. The Court of appeal, where the matter is pending, may still determine all the issues surrounding the appeal itself. Therefore, the appeal does not need to be declared to have lapsed.

Counterapplication

48. The first respondent submitted that the parties be granted an opportunity to file all outstanding papers before the re-enrolment of the appeal, meaning the special plea

raised before the Court of appeal during the postponement application in August 2015.

49. The applicant, without expressly and formally abandoning or withdrawing or even communicating its intention relating to its application to introduce fresh evidence, has,

in May 2021 already, attempted to effect the court order pending determination at the Court of appeal. Which appeal the first respondent was ready to argue on 12 August 2015. The applicant did not even mention that it could use an opportunity to prosecute its application for amendments. It, therefore, can be safely accepted that the applicant has no intention to amend its plea or any papers relating to the amendment notice and application delivered in 2015.

50. Therefore, though in 2015, the applicant considered amending its plea and introducing fresh evidence, ordering them to do the same would not serve any purpose and the interest of justice. However, they may follow the rules to do so, if so desired.

51. The abandonment of the amendment application and special plea meant that the Judgment of Phatudi J remained pending determination by the Court of Appeal, as it remained seized with the matter. The effect is that the operation and execution of Phatudi J's decision are suspended pending the appeal decision.

Conclusion

52. No case is made out for a declaratory order based on the appeal being deemed to have lapsed.

53. There is also no case made out for a compelling order for the applicant to file their amendments, including the special plea. The case is partially made out for the counterapplication relating to the re-enrolment of the appeal.

54. When the Court of appeal postponed the appeal *sine die*, the appeal proceedings were stopped, without actually fixing a date for them, to be continued later. In this type of adjournment, the hearing stands open indefinitely.

55. Where a matter is postponed *sine die*, the practice in this division usually is that the parties must apply again to the registrar's office for another hearing before whichever presiding officer is allocated to hear that particular matter on the hearing date allocated.

56. Considering this matter's history and circumstances, though the counterapplication partially succeeds, each party must bear its own costs.

57. In the result, the following order is made for all these reasons.

Order

1. The applicant's non-compliance with Rule 4 is hereby condoned.
2. The first respondent's condonation application for late opposition is hereby condoned.
3. The first respondent is to pay the costs of 13 December 2021 on an attorney and client scale.
4. The applicant's application is dismissed.
5. The first respondent is, within 20 days of this order, to re-enrol its appeal under case number A740/2014 or withdraw same.
6. Where the first respondent does not comply with paragraph 5 above, the applicant, within ten days of the respondent's non-compliance with paragraph 5 above, may enrol the appeal if so desired.
7. Consequently, where the parties do not comply with paragraphs 6 or 7 above, the Judgment and order per Phatudi J stand.
8. Each party is to pay its costs, save for paragraph 3 above.

N. MAZIBUKO
Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

Counsel for the Applicant	Advocate T Ellerbeck
Instructed by:	Edeling van Niekerk Inc
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Instructed by:	Gothe Attorney, Inc.
Date of hearing:	18 July 2022
Judgment delivered on:	21 September 2022