Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No. : A260/2012

In the matterof:

CALVIN MERVYN FRANCOIS Applicant

v

TANIA BARKER Respondent

In re the appeal of:

TANIA BARKER Appellant

v

CALVIN MERVYN FRANCOIS Respondent

Court: Judge J I Cloete, Acting Judge A J Smit

Heard: 10 May 2013

Delivered: 10 May 2013

JUDGMENT

CLOETE J:

[1] This is an unopposed application by the respondent in an appeal lodged by the appellant against a judgment and order handed down by the learned magistrate, Mr Koeries, in the Bellville magistrate's court on 17 January 2012. For sake of convenience the parties will be referred to as they are cited in the appeal.

[2] The respondent asks for an order dismissing the appeal, alternatively that it be struck from the roll, and further alternatively for an order declaring that the appeal has lapsed. Costs (including those relating to the removal of the appeal from the roll by the registrar on 16 November 2012) are sought against the appellant on the scale as between attorney and client.

[3] The appellant noted an appeal in the magistrate's court on 16 February 2012 after the magistrate had delivered his response in accordance with magistrate's court rule 51(3) on 19 January 2012. The appeal was accordingly timeously noted within the period of 20 days stipulated in that sub-rule.

[4] The appellant was thereafter obliged to comply with the procedure and time limits for the prosecution of the appeal laid down in rule 50 of the uniform rules of court. Of particular relevance are the following. First, in terms of rule 50(1) the appeal must be prosecuted within 60 days after the noting thereof, and unless so prosecuted it shall be deemed to have lapsed. Second – and this is one of the necessary steps to be taken in the prosecution of the appeal for purposes of rule

50(1) – the appellant must, within 40 days of the noting of the appeal, apply to the registrar upon notice to all other parties for the allocation of a date for the hearing of the appeal (see rule 50(4)(a)). This is a necessary step because rule 50(4)(c) provides that upon receipt by the registrar of an application in terms of rule 50(4)(a) the appeal shall be deemed to have been duly prosecuted. Third, rule 50(5)(a) stipulates that the registrar shall not assign a date for the hearing of the appeal until the provisions of rule 50(7)(a) to (c) have been complied with. Rule 50(7)(a) requires an appellant to lodge two copies of the record with the registrar simultaneously with the application in terms of rule 50(4)(a); and rule 50(7)(c) stipulates that the record must be correct and complete as described therein. One of the essential components of a correct and complete record for purposes of rule 50(7)(c) is that all the evidence necessary for the hearing of the appeal must be included therein.

[5] The appellant has failed to comply with the provisions of rule 50 in certain material respects. First, given that she noted the appeal in the magistrate's court on 16 February 2012, she was obliged to deliver her application in terms of rule 50(4)(a) within 40 days thereafter, i.e. by not later than 17 April 2012. However the application was only delivered on 23 May 2012, i.e. four weeks after the stipulated time period expired, as is evident from a copy of the notice attached to the supplementary affidavit filed on behalf of the respondent in support of his application. Second, the appellant has still not delivered even one copy of the correct and complete record, since the entire cross-examination of the appellant

in the court *a quo* is missing; and the second copy of the record as required by rule 50(7)(a) is entirely absent. The steps that were taken by the registrar to nonetheless allocate dates for the hearing of the appeal do not remedy these fundamental defects since the registrar was not permitted, by virtue of the provisions of rule 50(5)(a), to have allocated any date at all.

[6] The registrar is not empowered to grant condonation for non-compliance with the provisions of rule 50. A court will only entertain condonation if good cause is shown by the party in default as to why it should be granted. Not only is there no opposition to the respondent's application, there is also no application by the appellant before this court for such condonation; and there is furthermore no indication in the record why good cause exists for any condonation at all. The inevitable result of the appellant's disregard for the provisions of rule 50 is that she has failed to prosecute the appeal within the stipulated period of 60 days of the noting thereof as is required by rule 50(1), and the appeal has accordingly lapsed.

[7] Turning now to the issue of costs. During June 2012 the respondent's attorneys received written notification from the registrar that he had assigned the date of 16 November 2012 for the hearing of the appeal. During October 2012 the respondent's attorneys briefed counsel to prepare heads of argument and to appear on his behalf in the appeal. The appellant did not comply with the provisions of rule 50(9) in that she failed to file heads of argument not less than

15 days before the appeal was scheduled to be heard, i.e. by 25 October 2012. In fact she did not file heads of argument at all.

[8] When the respondent's attorney contacted the appellant's attorney of record to enquire as to why her heads of argument had not been filed, he responded that the registrar had removed the appeal from the roll since the appellant had failed to arrange for an early allocation of the appeal (as required by practice note 47) given that the record exceeds 400 pages.

[9] On 31 October 2012 the respondent's attorney wrote to the appellant's attorney, drawing his attention to the provisions of practice note 47 as well as to the fact that the record of the proceedings was incomplete. It appears that the appellant's attorney failed to respond thereto.

[10] During November 2012 the respondent's attorney received a further notification from the registrar that he had assigned a new date in May 2013 for the hearing of the appeal.

[11] Leaving aside the fact that by that stage the appeal had long since lapsed, and that the registrar should thus not have even entertained a request to re-enrol the appeal for hearing,it has transpired that the appellant has again failed to arrange for an early allocation of the appeal in terms of practice note 47. In addition no heads of argument have been filed on behalf of the appellant; nor has the

appellant taken any steps to ensure that a correct and complete record, in duplicate, has been filed with the registrar.

[12] It is apparent from correspondence which is annexed to the supplementary affidavit filed on behalf of the respondent in support of this application that the appellant persists in her utter disregard for the provisions of rule 50 and practice note 47 without even attempting to provide an explanation therefor. In these circumstances it is my view that it would be appropriate, as a mark of the court's displeasure, to order that the appellant pay both the costs of the respondent's application as well as his costs incurred in the abortive appeal on a punitive scale.

[13] **In the result I propose the following order:**

[1] It is declared that the appeal has lapsed.

[2] The appellant shall effect payment of the respondent's costs in the application to declare that the appeal has lapsed, together with the costs incurred by the respondent in respect of the appeal (and including those culminating in the removal of the appeal from the roll on 16 November 2012) on the scale as between attorney and client.

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J I CLOETE

SMIT AJ

I agree.

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A J SMIT

CLOETE J

It is so ordered.

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J I CLOETE