



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: A5007/ 2018

Date of Hearing: 09 October 2018

Date of Judgment: 19 October 2018

(1)	REPORTABLE: YES/NO	<input checked="" type="checkbox"/>	<input type="checkbox"/>
(2)	OF INTEREST TO OTHER JUDGES: YES/NO	<input type="checkbox"/>	<input checked="" type="checkbox"/>
(3)	REVISED.		
<u>19-10-2018</u>		

In the matter between:

EAGLE CREEK INVESTMENTS 472 (PTY) LTD

Applicant

And

FOCUS CONNECTION (PTY) LTD

First Respondent

(REG. NO. 1995/08870/07)

QIN JIANG

Second Respondent

JUDGMENT

MASHILE J:

INTRODUCTION

[1] This is an application in terms of Rule 30A of the Uniform Rules of Court. The Applicant alleges that the launching of this application became necessary as a result of the Respondents' persistent non-observance of Rule 49(13). Once there was lack of compliance with the rule all other steps, which the Respondent took, according to the Applicant, had to be irregular. The Applicant seeks relief in the following terms:

- '1 That the filing of the record in appeal by the Respondents, in terms of the Filing Sheet dated 14 May 2018, be set aside as an irregular step;
- 2 That the Respondents' application for an appeal date, dated 14 May 2018 be set aside as an irregular step;
- 3 That the filing of the Respondents' heads of argument in the appeal be set aside as an irregular step;
- 4 That the filing of the Respondents' Practice Note in the appeal be set aside as an irregular step;
- 5 That the filing of the Respondents' notice of security be set aside as an irregular step;
- 6 Declaring that the Respondents' appeal of the summary judgment granted under case number 5738 / 2018 (in the High Court of South Africa, Gauteng Local Division, Johannesburg) has lapsed;
- 7 That the Respondents pay the costs of this application on the scale as between attorney and client, jointly and severally, the one paying the other to be absolved;'

FACTUAL BACKGROUND

[2] The facts are largely common cause. On 10 May 2017, this Court granted summary judgment against the Respondents. Upon dismissal of their application for leave to appeal, the Respondents petitioned the Supreme Court of Appeal ('SCA'). On 19 December 2017, the Supreme Court of Appeal granted them leave to appeal and specifically directed that the appeal be heard by a full court of this division. On 13 February 2018, the Respondents served their notice of appeal.

[3] Following the granting of the leave to appeal by the SCA, the Applicant applied for security for costs of appeal in terms of Rule 49(13). On 18 April 2018, the Registrar of this Court fixed the security for costs of the appeal at the amount of R65 000.00 and ordered that it be secured by way of a bank guarantee within 30 days from 18 April 2018. On 17 May 2018, the Respondents delivered a notice for security for costs without providing the actual security.

[4] On 04 June 2018, the Applicant served a Rule 30A notice on the Respondents to which they responded by delivering a notice in terms of Rule 30A (1) on 18 June 2018. The Respondents subsequently sought permission from the Judge President of the Gauteng Division that the appeal be heard by a Full Court of the Gauteng Division of the High Court in Pretoria and not as directed by the SCA that the appeal be heard by the full court of this Court.

[5] Unaware of the existence of the SCA order, the Judge President directed that the matter be heard by a Full Court of this Court. When it later transpired to the Judge President that the order of the SCA specifically provided otherwise, he

withdrew his consent. The Judge President's withdrawal of the permission notwithstanding, the Respondents proceeded to lodge the following documents with the Gauteng Division in Pretoria on 15 May 2018:

- 5.1 Application for appeal date;
- 5.2 Record of appeal;
- 5.3 Respondents' heads of argument;
- 5.4 Practice note;
- 5.5 Notice for security for costs without the provision of the actual security.

ASSERTIONS OF THE PARTIES

[6] The Respondents are persistent that insofar as they are concerned, they have complied with the Rule pertaining to the provision of security (Rule 49(13)(a)), notwithstanding that they only served the notice for security for costs without the actual security. They further assert that in view of the bank manager's letters to the Applicant, this was done timeously as envisaged by the relevant Rule. The Applicant, on the other hand, is adamant that the steps that the Respondents have taken before providing security for costs are irregular and that the appeal should be declared to have lapsed.

ISSUES FOR DETERMINATION

[7] This Court must decide whether or not:

7.1 The steps taken by the Respondents with the objective of advancing the matter towards its final hearing are irregular as contemplated in Uniform Rule of Court 30A; and

7.2 The appeal has lapsed.

LEGAL PRINCIPLES

[8] Rule 49(6)(a) provides:

‘Within sixty 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 ten days after the expiry of the said period of sixty 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.’

[9] This Court held in *Aymac CC v Widgerow* 2009 (6) SA 433 (W) at 440H–441I, with regard to the above rule that, where an application for a date for the hearing of

the appeal fails to comply with the Rule, the appeal if set down, should be struck off the roll. Similarly, if an appellant fails to serve notices of appeal or court records within the time provided under Rule 49(2) and 49(6)(a) respectively, it will cause the appeal to lapse with fatal consequences unless an application to reinstate it is launched. See, *Panayiotou v Shoprite Checkers (Pty) Ltd and Others* 2016 (3) SA 110 (GJ) at paragraph 13.

[10] Rule 49(13)(a) provides that:

‘Unless the respondent waives his or her right to security or the court in granting leave to appeal or subsequently on application to it, has released the appellant wholly or partially from that obligation, the appellant shall, before lodging copies of the record on appeal with the registrar, enter into good and sufficient security for the respondent’s costs of appeal.’

It was held in *Boland Konstruksie Maatskappy (Edms) Bpk v Petlen Properties (Edms) Bpk* 1974 (4) SA 291 (C) that if security is not provided as stipulated in this Rule an appeal may be struck off the roll.

[11] Chapter 7 of the Practice Manual of this Court provides further that:

‘Once an appeal has been timeously noted, the registrar shall not accept any appeal matter [as contemplated in Rule 49(2), 6(a) and 7(a) or Rule 50 6(a) and 7(a)], unless the appellant or the attorney of the appellant simultaneously submits to the registrar:

1.1 A complete record, indexed and paginated;

1.2 The appellant's heads of argument and practice note.

The registrar shall thereupon allocate a case number and shall issue an acknowledgement of receipt thereof.'

[12] It has been held that the lodging of the record with the Registrar prior to the provision of security constitutes an irregularity as envisaged in Uniform Rule of Court 30A. In this regard the case of *Jyoti Structures Africa (Pty) Ltd v KRB Electrical Engineers; Masana Mavuthani electrical and Plumbing Services (Pty) Ltd t/a KRB Masana* 2011 (3) SA 231 (GSJ) is instructive.

[13] The Applicant initially insisted that the Respondents served their notice of appeal out of time having regard to the date on which the SCA granted the petition, 19 December 2017. However, while the Applicant did not, in so many words, state that it was prepared to accept that in view of the fact that the Respondents were only notified of the order of the SCA on 17 January 2018, it would not rigorously hold the Respondents to compliance with Rule 49(6)(a). For that reason I do not consider it necessary to traverse the point whether there was compliance or not.

ANALYSIS

[14] On 18 April 2018, the registrar determined the amount of security for costs in the amount of R65 000 and decreed that it be provided within 30 days from that date. The 30 day period lapsed on 01 June 2018. The date of 01 June 2018 came and went without the Respondents furnishing security for costs to the registrar. The Respondents had at that stage only served a notice for security for costs without providing the actual security.

[15] The Court was advised during argument that the Respondents were still to provide security for costs to date. In terms of Chapter 7 of the Practice Manual, 'the registrar shall not accept any appeal matter [as contemplated in Rule 49(2), 6(a) and 7(a) or Rule 50 6(a) and 7(a)], unless the appellant or the attorney of the appellant simultaneously submits to the registrar, a complete record, indexed and paginated, heads of argument and practice note.'

[16] Accordingly, the Respondents' failure to provide security timeously, on or before 01 June 2018, precluded them from furnishing the registrar with the appeal record, heads of argument and practice note. See, Chapter 7 of the Practice Manual *supra*. All the steps that the Respondents took without providing security to the registrar in an attempt to advance the matter towards a hearing date are irregular as contemplated in Rule 30A.

[17] Initially, the Respondents were persistent that the matter be heard in the Gauteng Division of the High Court in Pretoria. However, by the time the parties came before Court, the Respondents had accepted that the order of the SCA has directed that the matter be heard by the Full Court of this Court. I did not hear any opposition from the Applicant and I therefore regard the matter as resolved.

CONCLUSION

[18] In the circumstances, I find as follows:

18.1 All the steps that the Respondents took prior to furnishing security for costs are irregular as envisaged in Rule 30A;

18.2 The appeal has lapsed.

ORDER

[19] In the result, the application succeeds and I make the following order:

19.1 The submission of the record of appeal by the Respondents to the Registrar on 15 May 2018 is set aside as an irregular step;

19.2 The Respondents' application for appeal delivered on 15 May 2018 is set aside as an irregular step;

19.3 The filing of the Respondents' heads of argument in the appeal is set aside as an irregular step;

19.4 The filing of the Respondents' Practice Note in the appeal is set aside as an irregular step;

19.5 The filing of the Respondents' notice of security without furnishing the actual security is set aside as an irregular step;

19.6 The Respondents' appeal of the summary judgment granted under case number 5738/ 2018 by this Court has lapsed;

19.7 The Respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.



B A MASHILE
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

APPEARANCES:

For the Applicant: Adv. R Boueer
Instructed by: Craig Berg Inc Attorneys

For the Respondents: In person