REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No

CASE NO: 3212/2019

In the matter between:

GENESIS ONE LIGHTING (PTY) LIMITED	Applicant / Respondent
and	
BRADLEY LLOYD JAMIESON	First Respondent / Appellant
STEAMLIGHT FX (PTY) LIMITED	Second Respondent / Appellant
IRON ICE (PTY) LIMITED	Third Respondent / Appellant
RODNEY GERSON FITTINGHOFF	Fourth Respondent / Appellant
BRAD ANTHONY KALISH	Fifth Respondent / Appellant
ROBERT LARRY KALISH	Sixth Respondent / Appellant
JASON RIVKIND	Seventh Respondent / Appellant

JUDGMENT

This judgment was handed down electronically by circulation to the parties' legal representatives by email.

Gilbert AJ:

1. The central issue to be decided is whether the respondents' appeal has lapsed. There was no dispute between the parties that this court has the jurisdiction to grant such an order, rather than the appeal court.[1]

2. The applicant, who was successful in interdict proceedings against the respondents, contends that the respondents' appeal has lapsed. The respondents dispute this.

3. The applicant contends that the appeal has lapsed because the respondents have failed to file with the Registrar a compliant appeal record and to furnish copies of the record to the applicant in terms of uniform rule 49(7)(a). The applicant also contends that the appeal has lapsed because the respondents have failed to deliver their heads of argument and practice note.

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[1] See *Nawa and others v Marakala and another* 2008 (5) SA 275 (BH), where a single judge found that he did have jurisdiction to give an order declaring that an appeal had lapsed for failure to prosecute in terms of rule 50(1), which is comparable to a deeming lapsing of an appeal in terms of rule 49(6)(a). In neither rule 49(6)(a) nor rule 50(1) is there a reference to a court granting such an order, but the court nevertheless has jurisdiction to make such an order. *A fortiori* in the present instance, where rule 49(7)(d) expressly provides that the court can be approached for an order.

4. The respondents counter this by asserting that they did timeously file and furnish a compliant appeal record. The respondents accept that they did not deliver their heads of argument and practice note timeously and have launched a counter-application seeking that this court condone the late delivery of those heads of argument and practice note. The respondents in their counter-application also seek a declaration that the appeal has not lapsed.

5. The respondents have not sought condonation in relation to the filing and furnishing of the appeal record. This is because the respondents adopt the position that the appeal record was timeously filed and furnished and is materially compliant, and that they have therefore satisfied the requirements of rule 49(7)(a).

6. The inquiry narrows to whether the respondents as the appellants did file and furnish a materially compliant appeal record, and if not, what the consequences are of that failure.

7. It should ordinarily be a straightforward exercise to consider the appeal record and decide whether it is materially compliant. It should also be a straightforward exercise to determine when that compliant record was timeously filed with the Registrar and furnished to the respondent in the appeal. But not so in the present instance, where these issues, including the facts, remain contentious although four sets of affidavits have been exchanged.

8. It is therefore necessary to have regard to the affidavits to discern the factual position.

9. What is common cause between the parties in relation to the prosecution of the appeal is that.

9.1. on 19 June 2019 the respondents delivered their notice of appeal;

9.2. on 10 September 2019 the respondents timeously made written application to the Registrar for a date for the hearing of the appeal, as provided for in uniform rule 49(6)(a);

9.3. on 29 June 2020, over nine months later, the applicant launched the present application seeking an order that the appeal had lapsed because the respondents failed to deliver an appeal record and their heads of argument and practice note;

9.4. after that, during July 2020, the respondents delivered their heads of argument and practice note;

9.5. on 3 August 2020 the respondents launched their counter-application for condonation for the late delivery of their heads of argument and practice note and for an order declaring that the appeal had not lapsed.

10. The applicant’s attorneys had on 22 November 2019 addressed a letter to the respondents’ attorneys asserting that the appeal had lapsed. The

respondents' attorneys responded on 27 November 2019, disputing this and contending that all documents required in terms of uniform rule 49 had been timeously delivered. The respondents' attorneys in a subsequent letter dated 6 January 2020 stated that the appeal record had been served *"electronically on 10 September 2019 and physically during the same period"*.

11. The applicant in its founding affidavit in paragraph 22 states under oath that:

> "*I pause here to emphasise that a proper and complete Record indexed and paginated had not been served by Jacobs and that the only document that was served was a bundle of documents not indexed and not paginated referring to the Court Application under Case Number 3212/2019 as well as the Application for Leave to Appeal. A typed Record of the address / argument* a quo *at the hearing of the application for leave to appeal was also delivered. I am advised that this purported "Record of Appeal" does not comply with the requirements of a Record that needs to be delivered by the Appellant.*"

12. As stated, it should have been a straightforward exercise for the respondents to identify what constitutes the appeal record and to prove delivery of that record. Instead the respondents' response, and factual version, is opaque.

13. The respondents, having been challenged on the central aspect whether they had timeously furnished a compliant record to the applicant, respond as follows in paragraph 26 of their answering affidavit:

> "*On 27 of August 2019, the respondents delivered two copies of the indexed and paginated record on the office of the applicant's attorneys in accordance with rule 49. I attach, as "AA1", a copy of the track and trace report from the courier company the respondent so employed bearing out the date and time of delivery, the person who signed for the delivery as well as photographic evidence illustrating the cover page of the documents delivered.*"

14. The applicant takes issue with this averment as not demonstrating proof of the delivery of a compliant record. There is merit in this. It cannot be ascertained from annexe "AA1" what documents were furnished by the respondents' attorney to the applicant's attorney as constituting the "two copies of the indexed and paginated record" that the respondents contend was furnished to the applicant's attorney.

15. The respondents continue in paragraph 27 of their answering affidavit:

> "*27.1 On 10 September 2019, the respondents delivered electronic copies of the following.*
>
> *27.1 First, there is the record comprising the judgment of the Court below in the main application and in*

the application for leave to appeal as well as the transcribed argument of the proceedings. I point out that the papers in the application were already indexed and paginated.

27.2 Then, there is a bond of security for Genesis' costs in the appeal.

27.3 Third, there is the requisite power of attorney."

16. The emphasis is mine, for reasons that will follow.

17. The applicant in its replying affidavit disputes that what was delivered was a compliant record. The applicant states in paragraph 60 of its replying affidavit that "*[n]othing more than the transcript of the argument in the court* a quo *and in the application for leave to appeal, is what was delivered to the applicant's attorney. This does not constitute, and appeal record no appeal record was delivered.*" The applicant disputes that any papers in the application *a quo*, which the respondent contends were already "indexed and paginated", were delivered as part of the appeal record

18. The respondents had a further opportunity their replying affidavit in their counter-application to explain clearly what constituted the appeal record and when that record was filed and furnished. In dealing with their averment that their attorneys had electronically transmitted a copy of the record to the applicant's attorneys on 10 September 2019, the

respondents qualify the averment as follows in paragraph 17 of the replying affidavit in the counter-application:

> "*In the course of my drafting this affidavit, it came to my attention that the e-mail message do not contain the* a quo *Court Proceedings bundle. This appears to be a result of a technical failure. In the event the applicant did not receive the Court* a quo *proceedings' bundle electronically, which has been enclosed in the hard copy delivered to the applicant's attorneys' office, this was clearly a* bona fide *error, which could not have caused any prejudice where it had already been delivered in hard copy.*"

19. As appears above, the applicant denied that the documents of the court proceedings *a quo* had been physically delivered on 27 August 2019, and the respondents have not adduced sufficiently cogent evidence to demonstrate otherwise. And the respondents belatedly accept that an electronic copy of the application papers in the court *a quo* were not delivered electronically on 10 September 2019.

20. The respondents in paragraph 12 of their replying affidavit in the counter-application states that by 12 September 2019, certain documents had been handed to the Registrar. In support of this the respondents attach to their affidavit filing sheets bearing the Registrar's date stamp.

21. I proceed to decide the matter based upon what is common cause between the parties, alternatively cannot be seriously disputed.

22. On the respondents' version, what they confirm was filed with the Registrar as constituting the appeal record is that which is described in paragraph 12 of their affidavit in the counter-application. Although the respondents only attach the first pages of the filing sheets to their affidavit, the complete filing sheet with the attached documents has been uploaded to the electronic Caselines file under section 023 headed "Appeal Documents of Appellant" and which the respondents contend constitutes a materially compliant appeal record.

23. There is a bundle under an filing sheet / index headed "Index: Judgments Bundle" dated 10 September 2019 (section 023:3), which contains the judgments of the court *a quo* in the main interdict proceedings on 18 March 2019 and in the application for leave to appeal on 31 May 2019. This bundle, consisting of 36 pages is nothing more than the two judgments which the respondents' attorneys have paginated in manuscript and then attached to a filing sheet. The bundle bears none of the characteristics of what is usually expected in a properly prepared appeal record. For example, every tenth line on each page is not numbered, although this is required in terms of uniform rule 49(8)(a).

24. The next bundle (section 23:4) commences with an index / filing sheet dated 3 May 2019 that is simply labelled "Index" and contains two items. The first item is a repeat of the judgment *a quo* in the main interdict proceedings. The second item is the respondents' application for leave to appeal. Again, all that the respondents' attorneys have done is attach

these two documents to a filing sheet. These documents are poorly paginated and again do not have each tenth line numbered. It is also unexplained why the judgment of the court *a quo* in the main application is duplicated. As the date of the filing sheet to this bundle is 3 May 2021, which is before the application for leave to appeal was heard on 7 May 2021, it appears that what the respondents had done was simply include a pre-existing bundle as part of the appeal record.

25. The next two bundles that the respondent contends forms part of the appeal record (sections 023:6 and 023:7) are not bundles prepared at the instance of the respondents. Rather, these two bundles are nothing other than the affidavits and other papers in the main proceedings *a quo* as they appeared before the court *a quo*, the form of two paginated volumes. These are the indexed and paginated papers that the applicant had prepared as the applicant in the main proceedings.

26. This also then brings into focus what the respondents had stated in their answering affidavit in paragraph 27.1, which I repeat:

> "*27.1 First, there is the record comprising the judgment of the Court below in the main application and in the application for leave to appeal as well as the transcribed argument of the proceedings. I point out that the papers in the application were already indexed and paginated*."

27. Considering all the affidavits as well as what the respondents themselves contend to be the appeal record, it is clear that the

respondents did not compile as part of the appeal record any of the notice of motion and affidavits in the court *a quo*, let alone as compliant in the form as required by rule 49(8). The respondents have not compiled an appeal record consisting of the notice of motion, affidavits and other documents that served before the court *a quo*[2] but have contented themselves with simply again filing with the Registrar on 10 September 2019, purportedly as part of the appeal record, the same indexed and paginated volumes that featured in the proceedings *a quo*.

28. Two further bundles that the respondents contend form part of the appeal record (sections 023:9 and 023:10, and which are duplicated under section 022) contain only the transcription of the argument before the court *a quo*. As the applicant points out, the inclusion of the transcription does not advance the respondents' case that they have filed and furnished a compliant record, particularly where it is unnecessary to include the argument before the court *a quo* as part of the appeal record.

29. Even should the matter be approached on the basis that all of these documents that were filed with the Registrar which according to the respondents constitute the appeal record were furnished to the applicant's attorneys, which the applicant disputes, it remains that a non-compliant record was filed to the Registrar as required in terms of rule 49(7)(a). Given the deficiencies in what the respondents contend is the appeal record, it is not surprising that the respondents have difficulty

[2] *South African Express Limited v Bagport (Pty) Ltd* [2020] ZASCA 13 (19 March 2020), at para 23.

in performing what should have been a relatively straight-forward exercise in pointing out what constitutes the appeal record and its timely delivery.

30. I therefore find that a compliant record was not filed with the Registrar.

31. The next issue is the consequences of that failure.

32. As stated, the respondents adopted the position that a compliant record had been filed and have not sought condonation for any non-compliance in relation to the record. The condonation application is limited to condonation for the late delivery of the respondents' heads of argument and practice note. In any event, it is for the appeal court to decide whether to grant condonation in relation to any deficiency in the prosecution of the appeal, rather than this court. But that no condonation application has been made by the respondents for the appeal court to consider may constitute a factor to be taken into account by this court in deciding whether the appeal has lapsed.

33. Rule 49(6)(a) expressly provides that if written application to the Registrar for the hearing of the appeal is not timeously made, the appeal "*shall be deemed to have lapsed*". Accordingly, the consequence of a failure to comply with rule 49(6)(a) is a deemed lapsing of the appeal. Should there be a dispute about this, then the court can be approached for the appropriate declaratory relief as to whether the appeal has lapsed or not.[3]

[3] See *Nawa* above for the comparable position under rule 50(1).

34. In contrast, as pointed out by the respondents, non-compliance with rule 49(7)(a) relating to the filing and furnishing of an appeal record does not contain a similar provision that there is a deemed lapsing of the appeal. Rather, rule 49(7)(d) providers that:

> "*If the party who applied for a date for the hearing of the appeal neglects or fails to file or deliver the said copies of the record within 40 days after the acceptance by the registrar of the application for a date of hearing in terms of subrule 7(a) the other party may approach the court for an order that the application has lapsed.*"

35. Although rule 49(7)(d) does not refer to the "*appeal*" as lapsed but rather "*the application*" as lapsed, the application referred to is the application for a date for the hearing of the appeal in terms of rule 49(6)(a), the lapsing of which would have the effect as the appeal itself having lapsed.

36. One interpretation of rule 49(7) is that upon a failure of a party to timeously file and furnish the record, the appeal lapses, as is the position with non-compliance with rule 49(6)(a). If this is correct, then the court when approached under rule 49(7) would be confirming that the appeal has lapsed.

37. An alternate interpretation of rule 49(7) is that if the appellant fails to file or furnish the record, the appeal is not deemed to have lapsed (in contrast to rule 46(6)(a)) but the court can then be approached for an

order to effectively decide whether the appeal has lapsed rather than confirming what would already have been a deemed lapsing of the appeal. This would enable the court to take into account a variety of factors in deciding whether to grant an order that the appeal has lapsed.

38. One of the those factors may be whether by the time the application in terms of rule 49(7)(d) is heard there is a compliant appeal record and the appellant has launched an application for the appeal court to consider in due course as envisaged in rule 49(7)(a)(ii) condoning its failure to have timeously filed and furnished that record. Rule 49(7)(a)(ii) expressly provides that an appellant who fails to timeously file and furnish the record can apply for condonation for the omission. The condonation application will considered by the appeal court at the hearing of the appeal. Rule 49(7)(c) further provides that the Registrar after delivery of the copies of the record shall assign a date for the hearing of the appeal or for the application for condonation and appeal, as the case may be. It is clear that it is for the appeal court to consider the condonation application. Accordingly, a court faced with an application in terms of rule 49(7)(d) for an order that the appeal has lapsed may decline to an order that the appeal has lapsed provided that there is an application for condonation that will serve before the appeal court in course.

39. But, as stated, the respondents have approached the matter on the basis that the appeal record they contend was filed in September 2019 was compliant. I have found that it is not compliant. The respondents

have not launched any condonation application for the appeal court to consider. Whatever merit there may have been in the respondents' counsel's submission that the appeal remains duly prosecuted unless and until the court refuses to condone any defects in the records, relying upon *Fedco Cape (Pty) Ltd v Meyer* 1988 (4) SA 207 (E)[4] dissipates in the absence of the respondents having launched a condonation application for the appeal court to consider.

40. The applicant has succeeded in demonstrating that the respondents have failed to comply with rule 49(7)(a) in relation to the filing of a compliant record and is entitled to an order that the application for a date for the hearing of the appeal, and accordingly the appeal, has lapsed in terms of section 49(7)(d). I find that this is so whichever of the interpretations of section 49(7)(d) are to prevail.

41. It follows that the counter-application declaring that the appeal has not lapsed must fail.

42. In the circumstances, it is unnecessary for me to consider the effect of the respondents' failure to timeously deliver their heads of argument and practice note or the related application for condonation. In any event, it would have been for the court hearing the appeal to consider an application for condonation and not for this court.

43. There is no reason why the costs should not follow the result. I also find no reason to depart from the costs being on the usual scale.

[4] In *Fedco*, an application for condonation had been made and would subsequently be granted by the appeal court.

44. The following order is made:

44.1. The first to seventh respondents' application for a date for the hearing of the appeal, and accordingly the appeal, has lapsed.

44.2. The first to seventh respondents, jointly and severally, are to pay the applicant's costs for the applicant's application dated 29 June 2020.

44.3. The first to seventh respondents' counter-application dated 3 August 2020 is dismissed, with the applicant's costs to be paid by the first to seventh respondents, jointly and severally.

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Gilbert AJ

Date of hearing:	31 May 2021
Date of judgment:	23 July 2021
Counsel for the applicant:	C Garvey
Instructed by:	Otto Krause Inc
Counsel for the Respondents:	J J Meiring
Instructed by:	Chad Jacobs Attorneys