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

(1) REPORTABLE: NO (2) OF INTEREST OF OTHER JUDGES: NO (3) REVISED 12/7/2022 DATE SIGNITURE

CASE NUMBER: A5071/2021
A *quo* CASE NUMBER : 39743/2018

In the matter of

FULCRUM GROUP PROPRIETARY LIMITED **Applicant/Respondent**
(Registration Number: 2002/016025/07)

And

MARKIT SYSTEMS LIMITED **Respondent/Appellant**
(Company Number : 09305074)

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

[1] This is an opposed interlocutory application wherein the applicant **("Fulcrum"**) seeks the following order:

1. Declaring that the appellant's appeal has lapsed in terms of rule 49(6)(a) of the Uniform Rules of Court read with Chapter 7 of the Practice Manual of Gauteng Local Division Johannesburg of October 2018.
2. The wasted costs of the appeal.

Parties

[2] The applicant is Fulcrum Group (PTY) LTD (Registration Number: 2002/016025/07), a private company duly registered in accordance with the company laws of the Republic of South Africa.

[3] The applicant in this matter was the defendant in the main action.

[4] The respondent is MarkIT Systems LIMITED (Company Number: 09305074), a private company duly incorporated and registered in England and Wales.

[5] The respondent in this matter was the plaintiff in the main action.

[6] For purposes of this judgment the parties are referred to by name.

Background of relevant facts

Main Action

[7] MarklT's claim against Fulcrum arises out of a written agreement that was concluded between them in April 2017. During December 2017 Fulcrum terminated the agreement, whereafter MarklT contended that the termination was a repudiation of

the said agreement. This contention by MarkIT gave rise to its claim in this matter. Litigation commenced in October 2018.

[8] The trial in the matter proceeded in August 2020. On 8 April 2021 the court *a quo*, Adams J handed down judgment in the matter in favour of Fulcrum. Adams J dismissed MarklT's claim of R90 million and granted Fulcrum's counterclaim of R4.5 million with costs.

[9] On 29 April 2021 MarkIT filed notice for leave to appeal against that judgment which was granted to the full bench on 7 July 2021.

[11] MarkIT duly filed its notice of appeal on 4 August 2021. As per agreement between the parties, the appeal record was prepared and filed on 9 November 2021. On the same day Ms Simpson, Fulcrum's attorney's enquired as to when the heads of arguments would be delivered.

[12] On 1 December 2021, MarklT's attorneys advised Fulcrum's attorneys that its counsel was experiencing difficulties in accessing the record from his chambers because he had to go into isolation following Covid 19 exposure. Between 29 November 2021 and 10 December 2021 each of MarklT's counsel's family members, and ultimately counsel himself, tested positive for the Covid-19 virus. This prevented the preparation of the heads of argument, not only due to illness and incapacity, but also due to the requirement to self-isolate and the fact that the record was not accessible.

[13] The December/January "shutdown" over the festive period then intervened and on 20 December 2021 Fulcrum's attorneys were advised that MarklT's counsel was still in isolation due to Covid-19 exposure and that they could expect the heads of argument and practice note early in the New Year.

[14] On the same date Fulcrum's attorney's responded via email, and requested "confirmation" that the appellant's heads of argument would be received by no later than 10 January 2022.

[15] As soon as MarklT's attorney returned to the office in January 2022, she advised that MarklT's heads of argument would not be delivered by 10 January 2022, but furnished an undertaking to deliver them in the week commencing 31 January 2022.

[16] MarklT's heads of argument in the appeal were duly delivered in the week commencing 31 January 2022, namely on the Friday, 4 February 2022.

Submissions by the Fulcrum

[17] Fulcrum argued that MarkIT was granted an extension of 48 (forty-eight) days over and above the sixty (60) days afforded to MarklT in Rule 49(6)(a) in order to file the record and its heads of argument in the appeal. It further asserts that a more than generous extension was given and that MarklT's appeal prejudices Fulcrum. It is invested in the finality and recovery of its party-party costs and the R 4.5 million due to it in terms of the judgement on the counterclaim.

[18] Counsel on behalf of Fulcrum contended that despite being given a generous extension MarklT, without any excuse as to counsel's isolation or inability to access files, still overshot the deadline by almost a month. Instead of filing by 10 January 2022, MarklT only filed its heads of argument in the appeal on 4 February 2022, which was an overshoot even on its unilateral undertaking of 31 January 2022.

[19] As a consequence of this excessive delay Fulcrum asserts that the appeal has lapsed.

[20] Fulcrum also submits that the appeal has lapsed, and an application for a reinstatement of the appeal would have to be launched by MarklT. It has done this in the form of a conditional application for condonation and reinstatement.

[21] Counsel on behalf of Fulcrum argued that the court hearing the condonation and reinstatement application would have to be the court hearing the appeal. It would exercise its discretion to allow the reinstatement or not.

[22] Fulcrum persisted with the argument that on a proper application of the Rules and the Practice Manual the appeal has lapsed and that it is entitled to its relief.

Submissions by the MarkIT

[23] MarklT denies that the appeal has lapsed and seeks a dismissal of the application. In the alternative, MarklT seeks the requisite condonation for what may be considered the late delivery of its heads of argument in accordance with the provisions of Rule 49(6)(b) and the reinstatement of its appeal.

[24] Counsel on behalf of MarkIT argued that it is only the Practice Manual that provides for the heads of argument to be delivered simultaneously with the record. The Rules, which take precedence, provide only that the heads of argument must be delivered fifteen days before the actual hearing of the appeal itself. MarkIT asserts that the Rules do not provide for the lapsing of an appeal if the heads of argument are not timeously filed. The only provision for such a lapsing, and upon which Fulcrum relies for the relief it seeks in this application, is to be found in Rule 49(6)(a). However, that subrule deals only with the lapsing of an appeal in the event of a failure to timeously deliver the record.

[25] MarkIT contended that it was unable to find any authority that deals with the lapsing of an appeal in this or any other lower division of the High Court for failure to

submit heads of argument on time and therefore it is obvious that the appeal has not lapsed as argued by Fulcrum.

Common Cause

[26] It is common cause between the parties that only the Appeal Court can entertain such an application of condonation of the late filing of heads of argument and/or the reinstatement of the appeal.

[27] It is further common cause between the parties, the Uniform Rules of Court take precedence to the Practice Manual.

Issue for determination

[28] The issue this court has to decide is whether MarklT's appeal has lapsed given the late filing of its heads of argument in the appeal when considered in light of Rule 49 and Chapter 7 of the Practice Manual.

Legal Principles and Directives

[29] The issue to be decided upon in this application relates to the interpretation of the Uniform Rules of Court (**"the Rules")**, specifically Rule 49, and the directives contained in Chapter 7 of the Practice Manual relating to civil appeals. Therefore, I find it prudent to quote the relevant sections of Rule 49 and the directives for purpose of this judgment.

Uniform Rules of Court

[30] Rule 49 provides the following;

> "**49 Civil Appeals from the High Court**

(1) *(a)* When leave to appeal is required, it may on a statement of the grounds therefor be requested at the time of the judgment or order.

(b) …

(c) …

(d) …

(e) …

(2) If leave to appeal to the full court is granted the notice of appeal shall be delivered to all the parties within twenty days after the date upon which leave was granted or within such longer period as may upon good cause shown be permitted.

(3) A notice of cross appeal shall be delivered within ten days after delivery… of the notice of appeal or within such longer period as may upon good cause shown be permitted and the provisions of these Rules with regard to appeals shall mutatis mutandis apply to cross appeals.

(4) Every notice of appeal and cross appeal shall state—

(a) …; and

(b) …

(5) …

(6) *(a)* 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. [my emphasis]

(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.

(7) *(a)* At the same time as the application for a date for the hearing of an appeal in terms of subrule (6)*(a)* of this rule the appellant shall file with the registrar three copies of the record on appeal and shall furnish two copies to the respondent. The registrar shall further be provided with a complete index and copies of all papers, documents and exhibits in the case, except formal and immaterial documents: Provided that such omissions shall be referred to in the said index. If the necessary copies of the record are not ready at that stage, the registrar may accept an application for a date of hearing without the necessary copies if—

(i) the application is accompanied by a written agreement between the parties that the copies of the record may be handed in late; or

(ii) failing such agreement, the appellant delivers an application together with an affidavit in which the reasons for his omission to hand in the copies of the record in time are set out and in which is indicated that an application for condonation of the omission will be made at the hearing of the appeal.

(b) The two copies of the record to be served on the respondent shall be served at the same time as the filing of the aforementioned three copies with the registrar.

(c) **After delivery of the copies of the record, the registrar of the court** that is to hear the appeal or cross appeal **shall assign a date for the hearing of the appeal** or for the application for condonation and appeal, as the case may be, and shall set the appeal down for hearing on the said date and shall give the parties at least twenty days' notice in writing of the date so assigned. [my emphasis]

(d) **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. [my emphasis]

(8) *(a)* …

(b) …

(9) …

(10) …

(11) ...

(12) …

(13) *(a)* 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.

(b) In the event of failure by the parties to agree on the amount of security, the registrar shall fix the amount and the appellant shall enter into security in the amount so fixed or such percentage thereof as the court has determined, as the case may be.

(14) …

(15) **Not later than fifteen days before the appeal is heard the appellant shall deliver** a concise and succinct statement of the main points (without elaboration) which he intends to argue on appeal, as well as a list of the authorities to be tendered in support of each point, **and not later than ten days before the appeal is heard the respondent shall** deliver a similar statement. Three additional copies shall in each case be filed with the registrar.[my emphasis]

(16) …

(17) …

(18) …"

Practice Directive October 2018[1]

[31] Chapter 1 states the following;

"APPLICATION OF THE PRACTICE MANUAL

1. This Practice Manual…

2. As such it seeks to inform how the courts in this High Court function. It also seeks to obtain uniformity amongst Judges in respect of practice rulings. It must be emphasised that **no Judge is bound by practice directives**. Accordingly, the Practice Manual is **not intended to bind judicial discretion**. Nonetheless, it should be noted, that the Judges of this High Court strive for uniformity in the functioning of the courts and their practice rulings. The Practice Manual thus sets out what can be anticipated occurring, in the normal course of events, on any issue dealt with in the Practice Manual." [my emphasis]

[32] Chapter 7 of the Practice Manual refers to civil appeals- new procedures- and the following procedure is prescribe;

1. 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. [my emphasis]

[1] Practice Manual – Gauteng Local Division: Johannesburg – 30 October 2018.

2. The appellant or the appellant's attorney shall:

2.1 Thereupon serve on the respondent or the respondent's attorney of record, the record and the appellant's heads of argument, practice note and a copy of the registrar's acknowledgement, and further state that the respondent's heads of argument and practice note must be filed with the registrar not later than 30 court days from the date of that service; and

2.2 File a copy of such service with the registrar within 5 days of such service.

3. The appellant or the appellant's attorney shall not earlier than the day after the respondent's heads of argument and practice not are due, act as follows:

3.1 of the respondent has complied with paragraph 2.1, apply to the registrar to have the matter set down, whereupon the registrar shall provide the appellant or the appellant's attorney with a notice of set down, which the appellant or the appellant's attorney shall serve on the respondent or the respondent's attorney forthwith, and file a copy of such service with the registrar within five days of such service;

3.2 if the respondent has not complied with paragraph 2.1, set down an application to compel compliance in the special interlocutory court as provided for in paragraph 9.10 of the practice manual, with the necessary changes;

3.3 the registrar shall, notwithstanding the non-compliance by the respondent with paragraph 2.1, upon presentation by the appellant or the appellant's attorney with an order of the special interlocutory court, act further in accordance with that order to set down the matter and issue a notice of set down."

Discussion

[33] It is important to note that the objectives of the Practice Manual are clearly stated in Chapter 1 of the said directives. The stipulations therein should at all times be adhered to. However, the Practice Manual is not prescriptive and does not take precedence over the Rules. The main objective of the Practice Manual is to regulate practice and to ensure the smooth and efficient functioning of this court.

[34]An application for leave to appeal, a decision from a single judge of the High Court is regulated by Rule 49 of the Rules. The substantive law pertaining to applications for leave to appeal is dealt with in section 17 of the Superior Courts Act, Act 10 of 2013 (**"the Act"**).[2]

[35] The Act raised the threshold for the granting of leave to appeal, so that leave may now only be granted if there is a reasonable prospect that the appeal will succeed. The possibility of another court holding a different view no longer forms part of the test. There must be a sound, rational basis for the conclusion that there are prospects of success on appeal.

[36] Evidently, Rule 49 purely deals with procedural aspects pertaining to civil appeals. The rule set out clearly the procedures and time frames to be adhered to when leave to appeal is required.

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[2] Section 17(1) in turn stipulates that:

(1)Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

(a)

(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

[37] Counsel for the applicant submits that the requirement to file heads of arguments at the same time as the record is also in line with the rules of the Supreme Court of Appeal. (**"SCA Rules"**) The said rules differ as to the appeal procedures as stated in Rule 49.

[38] The following procedures and time frames are required when lodging an appeal in the Supreme Court of Appeal;

1. The papers in an application for leave to appeal to the Supreme Court of Appeal must be clear and succinct and to the point and must fairly furnish all such information as may be necessary to enable the court to decide the application.[3]

2. The record must not accompany any of the papers and neither may the papers traverse any extraneous matters.[4]

3. The founding and answering affidavits may not exceed 30 pages each, and the reply may not exceed 10 pages.

4. A notice of appeal must be lodged with the Registrar of the Supreme Court of Appeal within one month after the granting of leave.[5] The same applies to a cross-appeal.[6] The notice of appeal (and cross-appeal) must state what part of the judgment or order is appealed against, and it must state the particular aspect which the variation of the judgment or order is sought.[7]

5. Within 3 months of the lodging of the notice of appeal, the appellant is obliged to deliver six copies of the record of proceedings in the court of first instance to the Supreme Court of Appeal and the respondent.[8] Failure to lodge copies of

[3] See rule 6(5)(a) of the SCA Rules.
[4] See rule 6(5)(b) of the SCA Rules.
[5] See rule 7(1) of the SCA Rules

[6] See rule 7(2) of the SCA Rules.

[7] See rule 7(3) of the SCA Rules.
[8] See rule 8(1) of the SCA Rules.

the record timeously, or within any extended time period, results in the appeal lapsing.[9]

6. Six weeks after the record has been lodged with the Registrar of the Supreme Court of Appeal, six copies of the appellant's heads of argument must be lodged. A failure by the appellant to lodge his/her heads within the prescribed (or extended) time period, will result in the appeal lapsing.[10]

7. Thereafter, the respondent has one month to lodge his/her heads of argument.

Conclusion

[39] Following in depth consideration for the Rules of the Supreme Court of Appeal, Rule 49 of the Rules and the Practice Manual of this Division, I make the following findings.

[40] The directives contained in the Practice Manual are subservient to the Rules, and the Rules must at all times be adhered to, furthermore the directives contained in the Practice Manual are not intended to bind judicial discretion.

[41] The Rules and the Practice Manual do not contradict each other regarding the procedures and time frames to be adhered to in cases of appeals. The Practice Manual mainly focus on uniformity in the functioning of courts in the Division.

[42] Rule 49 is clear as to the procedures and timeframes to be adhered to in appeal matters. Rule 49(6)(a) states that the appellant **shall** within 60 days after delivery of the notice of appeal, apply to the registrar for a hearing date of the appeal. Simultaneously with the application for such date, the record of the appeal should be filed. Furthermore, if the appellant fails to do so, the respondent **may** within 10 days after the expiry of the period, apply for the setdown of the appeal. If no such application is made by either party, the appeal shall be deemed to have lapsed. In this

[9] See rule 8(3) of the SCA Rules.

[10] See rule 10(2A)(a) of the SCA Rules

matter before me, MarkIT filed its notice of appeal on 4 August 2021 and as per agreement between the parties the appeal record was filed on 9 November 2021. Thus, MarkIT complied with rule 49(6)(a) and (b).

[43] If Fulcrum was dissatisfied that MarkIT did not adhere to Rule 49(6)(a) and (b) it could have evoked Rule 49(7)(d), which states that if the appellant fails to deliver the required copies of the record within 40 days after the registrar has accepted the application for a date for the hearing of the appeal, Fulcrum may approach the court for an order that the appeal has lapsed. Fulcrum did not make use of the procedure contained in Rule 49(7)(d).

[44] Rule 49(7)(c) instructs the registrar on receiving the appeal record, a date for hearing the appeal **must** be allocated, and the registrar will give 20 days' notice to the parties of the hearing date.

[45] The filing of heads of argument only comes into play following the date of the hearing of the appeal being allocated by the registrar. In terms of Rule 49(15) the appellant has to file heads of argument **not later than** 15 days before the appeal is heard, and in turn the respondent is required to file heads of arguments **no later than** 10 days before the hearing.

[46] Even though the Practice Manual[11] provides that the appellant should file heads of arguments simultaneously with the record of appeal, I am of the view that the Rules have to take precedence as the directives contained in the Practice Manual which as stated are intended to provide guidance in the smooth and efficient functioning of the Division. Furthermore, the directives contained in the Practice Manual make no provision for circumstances in which an appeal would lapse. The effect of the failure to file heads of argument as provided for in the Practice Manual will result in the registrar not allocating a date for hearing of the appeal.

[47] All the above views are consistent with the Rules in the Supreme Court of Appeal. The said rules clearly, expressly and unequivocally provides for the lapsing

[11] Chapter 7(1) of Practice Manual.

of an appeal when heads of arguments are not timeously filed. If the same consequence was intended in the Practice Manual of this Division the said directive would have made clear provision for this.

[48] I therefore find that, in applying Rule 49 in the matter before me, the appeal has not lapsed as argued by Fulcrum.

[49] Despite the above findings, I have to make mention of the correspondence between the parties that lead to the said application. Since the filing of the notice of appeal by MarkIT on 4 August 2021, counsel on behalf of MarkIT kept Fulcrum's counsel informed as to the challenges they experienced. The parties even agreed to an extension for the filing of the record of appeal, which was done on 8 November 2021.

[50] Following the filing of the record of appeal and after receiving the directive from the registrar to file heads of arguments, both parties agreed that heads of arguments will only be filed in January 2022. From November until January, Fulcrum at no stage indicated to MarkIT, that the terms of filing heads of arguments are not acceptable.

[51] Fulcrum during this period never approached the interlocutory court for an order to compel MarkIT to file its heads of arguments. Furthermore, Fulcrum was well aware of the challenges counsel for MarkIT was experiencing due to Covid 19 exposure and December 2021 recess period.

[52] Counsel on behalf of MarkIT approached the Registrar twice in order to confirm whether the appeal would lapse if the heads of argument were not filed with the appeal record. The Registrar, correctly so, advised MarkIT that the appeal will not lapse in such circumstances. I cannot find any indication that MarkIT is acting unscrupulous in delaying the hearing of the appeal.

[53] Fulcrum referred me to the following case law, namely, *Aymacc CC v Widgerow*[12] and *Eagle Creek Investments 472 (Pty) LTD v Focus Connection (Pty)*

[12] 2009 (6) SA 433 (W) paragraph 40.

LTD and Other.[13] The facts in both cases referred to are not similar to this matter. Both matters addressed the failure to provide security in appeal hearings, which is not the issue before me.

[54] There is no need for purposes of this judgment to make any finding pertaining to condonation and/or the reinstatement of the appeal in terms of Rule 49(6)(b).

Costs

[55] What remains is the question of costs. The general rule is that costs must follow the result. Nothing emerges from this matter warranting a deviation from this principle.

Order

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

1. The application is dismissed.
2. Costs to be paid by the applicant, which include costs of senior counsel.

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CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT

Date of hearing: **7 June 2022**
Date of Judgment Delivered: **12 July 2022**

Counsel for the Applicant:

[13] 2018 JOL 40609 (GJ).

Adv L Morison SC
AFSA JHB Chambers 2nd Floor Grindrod Tower
8A Protea Place,
Sandton
Email: Ijmorison@gmail.com
les.morison@me.com
Tel: 083 676 5380

M. Mncube —079 994 7257
The Bridge Group,
Sandown Village, Chambers
Email: nmncube@advocatesa.co.za

Respondent's Attorneys

Clyde & Co Incorporated
6th Floor, Kathrine & West Building
114 West Street Sandton,
Johannesburg
Tel: 010 286 0345
Email: amelia.costa@clydeco.com
celeste.dutoit@clydeco.com

Counsel for the Respondent

B Berridge SC —083 377 2932
Group One,
Pybus Road,
Sandton
Email: berridge@law.co.za