

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2021/45109

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED. NO

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SIGNATURE

DATE: 6 June 2022

FIGURES & CO (PTY) LTD	1st Applicant
AISHA BEAUTY COSMETICS & FABRICS (PTY) LTD	2nd Applicant
AZAN ELECTRONICS & GENERAL DELAERS (PTY) LTD	3rd Applicant
GIZOS GENERAL TRADING CC	4th Applicant
MAZURU B	5th Applicant
NALA ORIGINALS (PTY) LTD	6th Applicant
ALIA CONSTRUCTION (PTY) LTD	7th Applicant
DING DONG CELLULAR TRADING (PTY) LTD	8th Applicant
RAJ SHAH TRADING ENTERPRISE AND PROJECTS (PTY) LTD	9th Applicant
WIG NETWORK (PTY) LTD	10th Applicant
THOSE FACILITATING THE OCCUPATION OF SHOPS	11th

Applicant AT ORIENTAL PLAZA/REPUBLIC PLACE

and

**URBAN REAL ESTATE (PTY) LTD
(REGISTRATION NUMBER: 1967/006343/07)**

Respondent

In Re:

In the matter between:

**URBAN REAL ESTATE (PTY) LTD
(REGISTRATION NUMBER: 1967/006343/07)**

Applicant

and

FIGURES & CO (PTY) LTD

1st Respondent

AISHA BEAUTY COSMETICS & FABRICS (PTY) LTD

2nd Respondent

AZAN ELECTRONICS & GENERAL DELAERS (PTY) LTD

3rd Respondent

GIZOS GENERAL TRADING CC

4th Respondent

MAZURU B

5th Respondent

NALA ORIGINALS (PTY) LTD

6th Respondent

ALIA CONSTRUCTION (PTY) LTD

7th Respondent

DING DONG CELLULAR TRADING (PTY) LTD

8th Respondent

**RAJ SHAH TRADING ENTERPRISE AND PROJECTS
(PTY) LTD**

9th Respondent

WIG NETWORK (PTY) LTD

10th Respondent

**THOSE FACILITATING THE OCCUPATION OF SHOPS
AT ORIENTAL PLAZA/REPUBLIC PLACE**

11th Respondent

JUDGMENT

MANOIM J

Introduction

[1] This is an application for leave to appeal a decision which I made in respect of two urgent applications which I heard together on 19 May 2022 and in respect of which I gave my reasons for deciding them on 26th May 2022.

Legal Question

[2] Underlying both applications, was one legal question. In a prior judgment, Mahalelo J had ordered the eviction of the appellants who were the tenants of the respondent in this application for leave to appeal.

[3] I will from now on - to avoid confusion over the changing status of the litigants, refer to the 'landlord' (now the respondent in the application for leave to appeal) and the 'tenants' (now the appellants or applicants in this leave to appeal.)

[4] The tenants who then faced an eviction if Mahalelo J's order was executed, then applied for leave to appeal from her, which she granted. That decision meant that the evictions were suspended pending the appeal. In the interim, the landlord had brought a failed application not to have the order suspended.

That was not the end of this saga. Why is this so?

[5] The Time periods are set out in the Uniform Rules for the prosecution of an appeal. One of them is set out in Rule 46(9)(a) which provides:

"49(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.”

[6] The respondents, it is common cause did not comply timeously with the requirements of Rule 49(6)(a).

[7] That rule states that the effect of non-compliance is that the appeal is deemed to have lapsed. I had to decide whether this meant that the suspension was no longer operative.

If it was not this meant that the respondent was entitled to execute in terms of the original decision of Judge Mahalelo and evict the respondents; which it had proceeded to do - which led to the conflict and hence the two applications. I held that the suspension was no longer operative.

[8] The effect of the decisions which dismissed the appellant's application and granted that of the respondents meant that; the respondent was lawfully entitled to execute the order of Mahalelo J.

It is against this order that the appellants seek leave to appeal.

The tenants rely on both sub-sections 17(1)(a) (i) and (ii) of the Superior Court's Act 10 of 2013.

[9] The first argument raised by Mr. Mantsha who appeared for the tenants, is textual. That on a proper interpretation of the rule the appellant's appeal had not lapsed - as although they were not compliant with the rule in a 60-day period they were still compliant within the subsequent 10-day period. The rule makes provision for a respondent to apply for a date if the appellant has not. But this 10-day period

cannot be relied on by an applicant. It is clear the 10-day period is for the benefit of the respondent (in this case the landlord) not the appellant. Secondly, in this case - in any event, the landlord had indicated in correspondence to the tenants that it was not appealing.

Seeming Conflict of Decisions

[10] The next argument was that in terms of section 17(1)(a)(ii) of the Act, there was a conflict between my decision and that of Judge Nicholls, who gave a judgment in the **Chespak** case¹ The basis of this argument was that, the issue of a suspension was a matter for the appeal court and not for me to decide. It is correct that Nicholls J does state in paragraph 1 of her decision that the issue of the right to appeal – was one for the appeal court to make.

But what she was dealing with then, was an application for a declaratory order brought before her to state that the appeal had been extinguished. This she held, was a matter for the court of appeal to decide. I agree entirely with this. She was not deciding the issue of suspension. There is therefore no conflict between her decision and mine.

Legal Effect of The Time Lapse

[11] In the meantime, Mr. Van der Merwe, who appears for the landlord, has referred me to several decisions on the issue that were not before me at the time that I heard the urgent applications. All of those decisions confirm the approach I had taken - that “deemed lapse” means the termination of the suspension. I go on to consider these decisions.

[12] In **Herf v Germani** 1978 (1) SA 440 (T) Melamet J held that:-

“Although not required to decide this issue, I am of the opinion that the term “lapsed” in Rule 49 (6) (a), although translated by the word “verval” which seems to

¹ *MCG Industries (Proprietary) Limited v Chespak (Proprietary) Limited* 2013 JDR 2420 (GNP).

convey an idea of finality, is in the context used in the sense of "shall be deemed to have been discontinued".

The court went on to state:

"I am of the view therefore that, although there has not been a final decision on the merits of the dispute in the appeal, there has been a decision on the appeal which has the effect of discontinuing the appeal. In the light of such decision the appeal is discontinued and there is no appeal pending against the order. In such event, both under the provisions of the Rules and at common law, the judgment would no longer be suspended. I should point out that Rule 49 (1) (a) provides for notice of appeal and the noting of an appeal referred to in Rule 49 (11) (a) can only refer to this action on the part of the appellant. This is merely a notice by a person intending to appeal and it is clear from the Rule that this is but the first prescribed step in the appeal by the appellant and that if, thereafter, application is not made for a date within the prescribed period, i.e., the second step taken, the appeal is deemed to lapse with the consequences set out above. In such event, it is clear that the first step in the proceeding cannot possibly continue to suspend the operation of the judgment and no rights in this regard will flow from such initial step."

[13] In **Mohr v Rohmoser and Another** [2006] 3OL 17199 (SE) Froneman J explained the effect of lapsing in this way:

"What he presently seeks is confirmation of an order to prevent the respondents from pursuing execution "pending the Appeal of the main action under case number 208/03". There is no such appeal pending. It has lapsed by virtue of the provisions of rule 49(6)(b) and the applicant has done nothing to attempt to reinstate it in terms of rule 49(6)(b). Thus the order sought by the applicant cannot be granted.²"

Matter reinstatement

[14] Mr Mantsha sought to argue, based on this decision, that he had re-instated the matter in terms of Rule 49(6)(b). I do not understand this passage to mean that the

² The first reference to in the final sentence of this quote to rule 49(6)(b) seems erroneous. It must mean a reference to rule 49(6)(a).

mere bringing of a 49(6)(b) application leads to reinstatement. Certainly, the clear meaning of the rule is that reinstatement does not take place until the appeal court has ruled on the matter. In any event - even if I am wrong on this point, he has yet to bring such an application before the court.

- [15] Then there is the case of **Sabena Belgian World airlines v Ver Elst and Another** 1980 (2) SA 238 (W) which deals squarely with an issue of a stay of execution when an appeal lapses:

“The right which Sabena seeks to protect is to stay the writ and suspend execution of the judgment. It is true that, at common law, noting appeal suspends execution automatically (De Lange v Bonini 1906 TH 25; Reid v Godarf 1938 AD 511 at 513). But here the appeal has lapsed. In such event execution is no longer suspended, but the judgment can be carried into execution. It is for that reason that the clerk of the court issued the warrant of execution on 12 June 1979. See Herf v Germani 1978 (I) SA 440 (T) at 449G. It follows that Sabena has not proved that it has a right to a stay of execution, not even a prima facie right open to some doubt.”

- [16] Nor is there any authority in support of the point that the issue of lapsing is the preserve of the appeal court. Rather the authority is to the opposite. As was held in **City of Tshwane Metropolitan v Shai and Another** [2007] 30L 19201 (T):

“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.”

- [17] Mr Mantsha then argues that case needs to be viewed through a total consideration

of the provisions of rule 49. I must say I did not understand what this argument meant. If it meant reading down the language of deemed lapsed in rule 46(9)(a) then I do not understand how the court can adopt such a liberal and elastic approach to the clear language. Further arguments were that compliance was not substantially late. This may or may not be so, but that is an issue of condonation in term of 46(9)(b) for the appellate court not an argument on how to interpret 46(9)(a). Unlike rule 49(6)(a) it is rule 46(9)(b) which refers to the possibility of reinstatement on "... *good cause shown*".

Is right of appeal being extinguished?

[18] Then several decisions were referred to me about the interest of justice and preventing irreparable harm to the respondents. My decision as I explained does not have the effect of extinguishing the right to appeal, so these decisions and considerations do not seem apposite to what I had to decide.

[19] Then an argument was made that without the benefit of suspension the appeal would be hollow as the respondents could not regain access to the premises. This is not something I can decide is correct as a fact. As I mentioned earlier the rule does not permit a court a discretion to consider why the appeal should not be considered to have lapsed. The language is clear cut.

[20] Finally, Mr Mantsha repeated the constitutional arguments he had made previously. I did not get referred to anything new in this regard and my reasons on this point are explained in my original decision and need not be repeated.

[21] For all these reasons I do not consider that another court would come to a different decision nor is there any conflict in the cases law on this point. Such decisions as I have now been referred to, support the interpretation I have given and its consequences.

ORDER

1. Leave to appeal is dismissed.
2. Costs are reserved for the court of appeal to decide in the event the appeal is reinstated in terms of Rule 46(9)(b). In the event the appeal is not reinstated or pursued within a reasonable time the respondent (in this application i.e., the landlord) may approach the court for an award of costs for successfully opposing this application.

N MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 6 June 2022.

Date of Hearing: 18 May 2022

Date of Judgment: 6 June 2022

Appearances:

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