

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



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

Case Number: A5008/2021

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
_____	_____
DATE	SIGNATURE

In the matter between:

M[...], M[...] Applicant

and

M[...], L[...] Respondent

In Re:

M[...], L[...] Appellant

and

M[...], M[...] Respondent

JUDGMENT

R. STRYDOM, J

Introduction

- [1] Before an application for an amendment of her notice of motion, which the court will deal with later in this judgment, Ms M[...], the Respondent in the appeal and applicant in this application, as well as the respondent in the reinstatement of the appeal application (Respondent) launched an application in this court for the dismissal of the Appellant's appeal due to various alleged non-compliances with the Rules and Practice Directives of this court.
- [2] The Appellant filed an opposing affidavit explaining the delay in obtaining the full transcribed record. The record of proceedings was initially uploaded on CaseLines but it took a long period to obtain the transcribed record of appeal. This caused a delay in obtaining an appeal date. The Appellant also filed a counter-application seeking condonation for the late filing of the appeal record, heads of argument, and a practise note. The Respondent filed a replying affidavit in which the Appellant's non-compliances with rule 49(6) and (7) is set out. In this affidavit, the Respondent now makes reference to the appeal having lapsed.
- [3] The application for the dismissal of the appeal was previously enrolled for hearing but not proceeded with as a date for the hearing of the appeal, to wit 5 October 2022, was allocated by the registrar of this court and it was decided by the Respondent that all applications should be heard simultaneously with the appeal before the Full Court. It should be mentioned that in my view that was the correct decision at that stage.
- [4] On 5 October 2022, the appeal was then on the roll before the Full Court of this division but was not heard on the merits nor were the applications for the dismissal of the appeal or its reinstatement heard. The Full Court was of the view that the appeal record was not in order. The Full Court made an order that the appeal of the Appellant is removed from the roll and that the Appellant was

to attend to the correction of the record within 30 days of the order prior to setting the appeal down again for hearing. (the "Full Court order").

- [5] The respondent alleges that the appeal record was never corrected, either before or after, the 30-day period. As a result of this, the respondent decided to set the matter down before this court to hear her original application for the dismissal of the appeal for non-compliance with the Rules and Directives of this court.
- [6] Before the hearing of this matter, set down in the opposed motion court for the week starting from 31 July 2023, the Respondent filed a notice of amendment of her notice of motion, to be considered on the date of hearing, for the deletion of the words "*leave to appeal*", which words were wrongly inserted in the notice of motion. Further for the deletion of the words "*for non-compliance of the Rules of Court and the Practice Directives*" and the insertion of the words "*and/or lapsed*" after the word "*dismissed*".
- [7] The Appellant filed a notice of objection to the proposed amendment. He alleges that the notice to amend failed to comply with Rule 28, as, *inter alia*, the pleadings have closed, and the matter has already been set down for hearing; that the Appellant would be prejudiced by the amendment, and that there is no tender for costs. The Appellant also filed a notice in terms of Rule 30A alleging that "exception" (sic) is taken against the proposed amendment as the Respondent failed to appoint an address where the Respondent will accept notice and service of all documents and failed to inform the Appellant that he has a right to object to the proposed amendment within 10 days of delivery of the notice to amend.
- [8] In my view, both these notices are ill-advised as rule 28(10) determines that a party can at any time before judgment apply for an amendment. In considering such an amendment the court will have regard to any prejudice suffered by a party if the amendment is granted. In matters where a party indicates that he or she will apply for an amendment at the hearing of the matter, there is no need to provide an address for the delivery of documents. That information is already available to the objecting party. The lack of affording a party a 10-day period for

objection can be condoned by the court, again depending on any prejudice shown to be suffered by the objecting party if such period is not applied.

- [9] In my view, the Appellant failed to show any prejudice he might suffer as a result of the proposed amendment. The first two amendments are not material. The amendment concerning the alternative relief that the appeal has lapsed was previously raised in the replying affidavit and could not come as a surprise to the Appellant. Accordingly, the amendment should be granted.
- [10] The next issue is whether the court should allow the Respondent's application, dated 12 July 2023, to file a further affidavit. On 19 July 2023, the Appellant filed his notice to oppose the application to allow the further affidavit. On 21 July 2023, the Appellant filed a Rule 30A "exception" (sic) to the application for filing of the further affidavit.
- [11] In my view, this objection and application to oppose the filing of a further affidavit on behalf of Respondent is also ill-advised. A court has wide discretion to allow further affidavits. The facts of this matter indicate that subsequent events transpired after the filing of the original affidavits which will have a material impact on the adjudication of this matter. In such a case a further affidavit will be allowed. In this case, the subsequent event is the order of the Full Court for the correction of the record. The Respondent alleges in her further affidavit that this correction never took place and is now seeking an order for the dismissal of the appeal, or, alternatively, after the amendment of her notice of motion, for a declaration that the Appellant's appeal has lapsed, on the grounds stated in her founding and replying affidavits read with the further affidavit. Instead of disputing the allegations contained in the further affidavit by filing a supplementary affidavit, together with a condonation application to file such an affidavit, the Appellant has chosen to follow the rule 30A route. The application for the filing of Respondent's further affidavit should be allowed. The Appellant failed to show that he will be prejudiced by the filing of this further affidavit by Respondent. The Appellant may, depending on the outcome of this application, elect to file a further affidavit.

[12] During argument before this court counsel for the Appellant submitted that the record has been correct all along and that the Full Court should not have made the order. It appears from a joint practice note that the case of Respondent is that the corrected appeal record was not delivered within 30-days whilst the Appellant avers that he was not afforded an opportunity to explain and/or elaborate why the appeal record was not corrected – if a correction was at all necessary. This statement is not correct. After the Respondent filed her further affidavit, nothing prevented the Appellant from following suit and applying to the court for the filing of a supplementary affidavit indicating that the record was corrected or correct all along.

[13] What further appears from the joint practice note is that the Appellant applied for a further date for the set down of the appeal on 3 April 2023. In the “Directive Compliance Affidavit” deposed to by the Appellants attorney he declares on oath as follows:

“I declare that the appellant has complied with the court order issued on the 5th of October and corrected the appeal record as reflected on CaseLines.”

[14] From what the court could ascertain from CaseLines no date has yet been provided for the further hearing of the appeal before the Full court. In the interim, this current application was set down for hearing before this court.

[15] The first and obvious question for consideration by this court is which court should adjudicate on the dismissal or declaration that the Appellant’s appeal has lapsed, including the reinstatement application. This issue affects the jurisdiction of this court to adjudicate this matter.

[16] At the outset, it should be noted that I am of the view that this court cannot dismiss a Full Court appeal as this would fall within the exclusive jurisdiction of that court. The appeal was already on the roll of the Full Court and only that court can dismiss an appeal. In a case of non-compliance with rule 49(6)(a)¹,

¹ Rule 49(6)(a) provides as follows:

“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

i.e., the appellant not making application for a date to hear the appeal within 60 days after delivery of a notice of appeal, then the appeal would be deemed to have lapsed. The appellant can then apply to the court to which the appeal is made for reinstatement of the appeal. In the case where the appeal record was not filed when the application for a hearing date was made then rule 49(7)(a)-(d)² will apply. A single judge can, on application made by a respondent, order that the “*application*” for an appeal date has lapsed. Effectively, this would mean that the court can decide that the appeal has lapse. See in this regard the matter of *Genesis One Lighting (Pty) Limited v Jamieson and Others*³ where it was accepted, following the decision in *Nawa and Others v Marakala and Another*⁴, that a single judge can decide whether an appeal has lapsed as a consequence of an appellant not filing or deliver copies of the record, (which can only be a reference to the appeal record) which was not filed at the same time as the application for a date for the hearing of an appeal. This would mean

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.”

² Rule 49(7) provides as follows:

“(a) At the same time as the application for a date for the hearing of an appeal in terms of sub-rule (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 afore-mentioned 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 20 days’ notice in writing of the date so assigned.

(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 sub-rule (7)(a), the other party may approach the court for an order that the application has lapsed.”

³ *Genesis One Lighting (Pty) Limited v Jamieson and Others* [2021] ZAGPJHC 862.

⁴ *Nawa and Others v Marakala and Another* 2008 (5) SA 275 (BH).

that the reference to “*court*” in rule 49(7)(d) would be a reference to this court and not to the appeal court. This sub-rule does not have a similar rule as provided in sub-rule 49(6)(b) providing that an application for the reinstatement of a lapsed appeal should be made to “*the court to which the appeal is made*”, thus the Full Court. This is an indication that condonation applications for reinstatement of appeals could only be made to the Full Court.

[17] An application that an appeal has lapsed as the appeal record was not filed or delivered brought by a respondent in an appeal to this court can obviously be opposed. I cannot imagine that this will happen when no appeal record was filed or delivered at all. But in a case like this one before court there is a dispute about the correctness of the record. If a court decide that a fully compliant record was not filed, and therefor the appeal has lapsed, then an appellant may apply for condonation as can be done in terms of rule 49(6)(b). Rule 49(7) however does not provide for this. In my view, condonation for the reinstatement of a lapsed appeal should be adjudicated by the appeal court. More so in a case where the appeal court removed an existing appeal from its roll for correction.

[18] The difference in this matter before this court is that an appeal date to the Full Court was already granted and the parties had appeared before that court. The registrar must have been satisfied that the record was complete.⁵ After the record was filed, substantially outside the periods mentioned in rule 49(7) the Appellant filed his heads of argument and practice note also outside the periods stipulated in the Directives. The Full Court, however, was not satisfied that the appeal record was in order and ordered that the appeal record should be corrected within 30 days, and if not, the matter could not be set down again in the appeal court. Implied in this order is that, should the record be corrected, the Full Court would hear the Respondent’s application for dismissal, and or lapsing of the appeal, as well as the Appellant’s reinstatement application. What is further clear is if the record is not corrected within 30 days the appeal

⁵See item 83 of the Judge President’s revised – 18 September 2021 Consolidated Directive which provides that—

“The Registrar shall review the documents for compliance and completeness. The Registrar may communicate non-compliances and/or other defects and/or discrepancies by email or on the case file using CaseLines Notes”

cannot be set down to be heard by the Full Court. It will be for the registrar to consider compliance with the order as far as the corrected record is concerned. Non-compliance would mean that the registrar will not provide a date for the set down of the matter. What is not clear is which court should hear a dispute regarding whether the record was corrected or not within the time limit.

[19] What happened in this matter is that application for a date was made without the full appeal record being paginated and indexed and uploaded onto CaseLines. What was already uploaded were electronic files that covered some portions of the record. The registrar waited for the full record of appeal to be filed before a date was allocated. By that time the prescribed period in subrule 49(7) was long over extended. Subrule 49(7)(d) deals with a situation where a party who applied for a date for the hearing of the appeal fails or neglects to deliver copies of the record within 40 days after the acceptance of the application for a date of hearing. This would mean this subrule deals with a situation where the appeal record was not delivered at all and not with a situation where the appeal record was delivered, albeit late, but the Full Court was not satisfied with the correctness of the record.

[20] In my view, the appeal court seized with the matter should deal with the application whether the appeal has lapsed simultaneously with a condonation application for reinstatement, should it be found that the appeal in fact lapsed. One of the considerations to reinstate the appeal would be prospects of success. The appeal court will be in the best position to decide this.

[21] In my view, rule 49(7) provides this court with jurisdiction to declare that an appeal has lapsed but only if the circumstances and facts relevant to the application fall within the ambit of the rule. This rule does not cover the situation where the matter was already allocated a hearing date by the registrar but was removed from the roll and the Full Court ordered the correction of the record. Only the appeal court can consider a condonation application for reinstatement should it be found that the appeal has lapsed.

[22] This court's finding that the appeal and interlocutory applications should be heard by the Full Court does not resolve the question of how the appeal could

find its way back onto the roll of the Full Court as the order stipulated that the registrar could only place the matter on the roll once the record was corrected. In light of the peculiar circumstances of this case where the Appellant persists in its stance that the appeal record is in substance correct and that the problem was only an index and pagination problem caused by uploading of the record onto CaseLines. I am of the view that the registrar should re-enrol the matter before the Full Court for consideration.

[23] Having found that this court lacks the jurisdiction to adjudicate this application does not mean that the current application should be dismissed. It would still be considered by the Full Court.

[24] Considering the cost to be awarded in this matter the court was made aware thereof by the Appellant that this matter was not enrolled in line with item 136.1 of the Practice Directive 2 of 22. The Respondent's heads of argument were for instance filed two weeks after the set down. Despite this, the court decided to hear the application as both parties filed heads of argument, albeit, late.

[25] A court have a wide discretion when it comes to the awarding of costs. There certainly have been long delays in the finalization of this matter. The Respondent has shown that she continues to be prejudiced by the delays in the finalization of this appeal. She is not responsible for this. She is suffering financial hardship whilst the Appellant apparently refuses to pay to the Respondent that portion of her accrual claim which is not subject to the appeal. The delays means that Appellant is favoured thereby. This reflects on the *bona fides* of the Appellant. In such circumstances the court is not going to order costs in this application against the Respondent.

[26] Having considered the delays to have the appeal heard, which was not caused by the Respondent, I am of the view that the costs of this application should be costs in the adjudication of these applications by the Full Court of Appeal.

[27] The registrar should again allocate a date for the hearing of this appeal and applications as soon as possible considering the available dates for Full Court appeals.

[28] Accordingly, the following order is made:

- a. The applicant's amendment is granted in terms of the Notice to Amend her Notice of Motion.
- b. The applicant is granted leave to have filed her supplementary affidavit.
- c. This application and counter-application are postponed *sine die* to be heard by the Full Court of this Division simultaneously with the appeal under case number A5008/21.
- d. The Registrar is requested to allocate a date for the appeal to be heard as soon as possible.
- e. The cost of this application and counter-application shall be costs in the appeal when these applications are considered by the Full Court.

R. STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

For the Applicant:

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Instructed by:

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Date of hearing:

01 August 2023

Date of judgment:

25 August 2023