

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 45754/2018

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

DATE

20 FEBRUARY 2024

SIGNATURE

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Applicant

and

CRATOS CAPITAL (PROPRIETARY) LIMITED

Respondent

JUDGMENT

MODIBA J:

[1] In an amended notice of motion, Standard Bank Ltd (“Standard Bank”) seeks an order declaring that Cratos Capital’s (“Cratos”) appeal against the arbitral award

of retired Judge of Appeal Brandt (“Brand JA”), published on 23 November 2021, has lapsed. Cratos contends that the appeal has not lapsed.

[2] Initially, Standard Bank sought an order for the liquidation of Cratos, contending that it incurred a debt which it failed to pay when due. Cratos opposed the liquidation application on various grounds. Then, the parties agreed to stay the liquidation application and referred the dispute concerning Cratos’s alleged indebtedness to Standard Bank to arbitration. They concluded the arbitration agreement to that effect on 2 February 2021.

[3] The arbitration culminated in an award of the arbitrator, Brand JA, handed down on 22 November 2021 and published on 23 November 2021, confirming Cratos’s indebtedness to Standard Bank. The arbitration agreement provides for an appeal. Cratos lodged an appeal against the arbitral award. Standard Bank alleges that Cratos failed to prosecute its appeal. Hence, Standard bank contends that the appeal has lapsed and seeks an order to that effect. Cratos blames its failure to prosecute the appeal on the fact that an appeal panel is yet to be constituted. Hence it denies that the appeal has lapsed.

[4] Cratos seeks leave to file a further affidavit to advice this Court about the events that occurred after it filed its answering affidavit. These relate to its application to lead further evidence in the appeal as well as alleged compliance with the requirement to provide security in the amount of R2 million in respect of the appeal as well as security in the amount of R36 million in respect of its indebtedness to Standard Bank. In the further affidavit, it contends that this court lacks jurisdiction to grant the leave Standard Bank seeks in its amended notice of motion.

[5] Standard Bank opposes the application for leave to file a further affidavit. It also seeks to have Cratos’s replying affidavit in that application struck out on the basis that it is filed contrary to my directives regarding the filing of papers. Further, it contains irrelevant material.

[6] I am not satisfied that Cratos has made a proper case for the filing of the further affidavit. To this affidavit, it has attached a bond of security signed by Banducci, dated 24 January 2021. To its answering affidavit in the liquidation application, it had attached an undated and unsigned one. In its answering affidavit, Standard Bank contended that the bond of security is invalid. It grounds the declaratory order it seeks in its amended notice of motion on the fact that Cratos has not furnished security for the appeal. Cratos blames the filing of an undated and unsigned security bond on its attorney. It contends that he filed the wrong one. The second security bond was clearly filed to rebut Standard Bank's contention that Cratos filed an invalid one. As a respondent, Cratos enjoys no such right. The unsigned and undated bond of security purportedly attached to Cratos' answering affidavit in error was never duly served on Standard Bank prior to the date it had to be furnished in terms of the arbitration agreement read with the Uniform Rules of Court. Therefore, the purported error by Cratos attorney does not justify the late filing of this document.

[7] The other information it seeks to place before this Court relates to merits of the arbitration and the liquidation application. As I find below, Cratos leave has lapsed. Therefore, to the extent information set out in the further affidavit relates to the appeal, it is irrelevant in these proceedings. Since Standard Bank is no longer persisting with an order placing Cratos in liquidation, information that relates to that application is also irrelevant in these proceedings. Therefore, leave for the filing of Cratos further affidavit stands to be refused.

[8] The information Cratos raises in its replying affidavit filed in response to Standard Bank's answering affidavit in the application for leave to file a further affidavit is also irrelevant for the same reasons set out above. Therefore, Standard Bank's application to strike out stands to be granted.

[9] To the extent that Cratos contends that this court lacks jurisdiction to grant the declaratory order that Standard Bank seeks, Cratos opposes Standard Bank's application to amend its notice of motion. There is no merit to this contention. The declaratory order relates to Standard Bank's rights to enforce the arbitral award.

Standard Bank contends that Cratos has been dilatory in constituting the Appeal Bench. Otherwise, delays in the prosecution of the appeal may continue ad infinitum, thus frustrating Standard Bank's right to execute the arbitral award. This Court enjoys jurisdiction in terms of Uniform Rule 49(6)(a) to grant the order Standard Bank seeks in its amended notice of motion.

[10] Therefore, Standard Bank's proposed amendment is granted.

[11] With the preliminary issues out of the way, the issue that arises for determination is very crisp. It is whether Cratos's appeal against the arbitral award has lapsed.

[12] The parties are effectively in agreement that except for providing for the determination for the date of the filing of heads of argument and the hearing, the Arbitration Agreement incorporates Uniform Rules of Court's Rule 49's procedural timetable for the prosecution of the appeal.

[13] Standard Bank contends that clause 7 of the Arbitration Agreement, read with the relevant subsections of Rule 49 requires an appellant to serve and file the appeal record, and enter security in the amount of R2 million, within 60 days of the notice of appeal. Standard Bank further contends that if that schedule is not abided, clause 7 and Rule 49, read in context, determines that the appeal lapses.

[14] Standard Bank filed its notice of appeal on 15 December 2021. The 60 days lapsed on Friday, 4 March 2022 without Cratos filing the appeal record and furnishing the requisite security. These facts are common cause.

[15] Cratos contends that it is impossible to prosecute the appeal because the Appeal Bench has not been constituted. It further contends that it intends to argue before the Appeal Bench that it should provide only a percentage of the R2 million. But, since an Appeal Bench has not been constituted, it has no forum to determine what percentage of the R2-million quantum should be provided as security.

[16] According to Standard Bank, Cratos was dilatory in appointing Justice Cameroon who was next in line to be appointed in terms of the arbitration agreement. It eventually did and he accepted his appointment. He made certain disclosures on 18 March 2022. Cratos objected to his appointment contending that his disclosures constitute grounds for his recusal. Standard Bank disputes that the disclosure constitutes a ground of recusal. I do not even need to determine this issue because I am not ceased with an application for Justice Cameroon's recusal.

[17] Rule 49(7) provides as follows:

“(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.

(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.”

[18] The above rule incorporates Rule 49(6) which provides as follows:

“(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.”

[19] Clause 7.2.9 of the Arbitration Agreement which incorporates Uniform Rule 49(13) determines the instant at which security is to be provided. Security ought to be provided before the filing of the appeal record.

[20] Cratos’s obligation to furnish security is not contingent on the Appeal Bench being constituted. It clearly did not comply with this obligation within the time frame provided in Uniform Rule 49(13). Cratos’s contention that it did not furnish security because it sought a lower amount determined which it could not do in the absence of an Appeal Bench is a red herring. The amount of security is provided for in the arbitration agreement. The fact that Cratos sought a lower amount to be paid in security determined by the Appeal Bench does not extend the timeframe provided for in Uniform Rule 49(13).

[21] I therefore find that Cratos failed to meet its obligation to furnish security within 60 days of lodging its appeal as required in terms of Uniform Rule 49(13).

[22] As argued on behalf of Standard Bank, when Justice Cameron made the disclosure, the appeal had already lapsed. Therefore, any impossibility of performance does not sustain Cratos' impossibility of performance argument as it was self-created. I therefore find that Cratos failed to deliver the appeal record as required by clause 7.2.4 of the Arbitration Agreement, which incorporates Rule 49(7).

[23] For the above reasons, I find that Cratos failed to prosecute the appeal before the timeframes set out above. Therefore, its appeal against the arbitral award of Brandt JA, published on 23 November 2021 has lapsed.

[24] In the premises, the following order is made:

ORDER

1. The application by Cratos Capital (Pty) Ltd ("Cratos") for leave to file a further affidavit is dismissed.
2. The application by Standard Bank of South Africa Limited ("Standard Bank") to strike out Cratos's replying affidavit to the Standard Bank's answering affidavit dated 22 June 2022 succeeds.
3. It is hereby declared that the appeal provided for in the arbitration agreement between Standard Bank and Cratos, agreeing to arbitrate the merits of the matter in this court under case number 18/46754, has lapsed.

MODIBA J
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the applicant: W Lüderitz SC assisted by N van der Walt

Instructed by: Fluxman Inc Attorneys

Counsel for the respondent: N Riley

Instructed by: Snaid & Morris

Date of hearing: 24 June 2022

Date of judgment: 21 February 2024

Mode of delivery: this judgment is handed down by sending it by email to the parties' legal representatives, loading on Caselines. The date and time for delivery is deemed to be 10 a.m.

