REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A740/2014

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

Date: 15 February 2024 E van der Schyff

In the matter between:

DAVID HENRY SMITH APPLICANT

and

SCI ESSEL OFFSHORE SERVICES LIMITED RESPONDENT

In Re

SCI ESSEL OFFSHORE SERVICES LIMITED APPELLANT

and

DAVID HENRY SMITH RESPONDENT

REASONS

Van der Schyff J (Davis J and Mahosi J concurring)

Introduction

[1] On 31 January 2024 this court granted an order:

i. Declaring that the enrolment of the appeal under case number A7402014 set down for 31 January 2024 in the absence of compliance with the provisions of Rule 7(2), constituted an irregular step;

ii. The irregular step was set aside, and the appeal was removed from the roll with costs;

iii. The respondent was ordered to pay the costs of his application claiming the irregularity;

At the time, it was indicated that reasons would be furnished in ten days.

[2] This exposition constitutes the reasons for the order.

Background

[3] The respondent in this application (hereafter SCI) is a *peregrinus* company situated in Mauritius. SCI instituted action proceedings in 2010 against various defendants on the strength of an acknowledgement of debt in respect of monies ostensibly lent and advanced to a principal debtor and secured by certain personal suretyships. SCI eventually proceeded only against one of the sureties, being the applicant (Mr. Smith).

[4] The court *a quo* found in Mr. Smith's favour in a judgment handed down on 13 May 2014. SCI applied for and was granted leave to appeal to the Full Court. On 12 August 2015, the appeal was postponed *sine die*. Almost six years later in July

2021, Mr. Smith issued an application to declare that the appeal had lapsed because SCI had not taken any steps to further its appeal since the postponement. On 21 September 2022, Mazibuko AJ handed down a judgment in the declaratory application. For purposes of these reasons, it suffices to state that Mazibuko AJ was not called upon to consider the issue of whether the provisions of Rule 7(2) of the Uniform Rules of Court were adhered to. The application before Mazibuko AJ was limited to a declaratory order that the appeal has lapsed for failure to prosecute it within the periods allowed. Subsequent to the Mazibuko judgment being handed down, SCI approached the Appeals Registrar, applying for the allocation of an appeal hearing.

[5] After a date was obtained and the notice of setdown was filed, Mr. Smith issued the interlocutory application which served before court on 31 January 2024. Therein he took issue with the respondent's ostensible non-compliance with Rule 7(2) and Rule 49(13)(a). Mr. Smith also sought an order declaring the judgment of the court *a quo* to be final.

Rule 49(13)

[6] As an aside, Mr Smith complained that the amount of security for costs initially determined was no longer sufficient. This court drew Mr. Smith's counsel's attention to the provisions of Rule 49(13)(b). The rule provides that the registrar shall fix the appropriate amount for security of costs for an appeal where the parties fail to agree on the amount of security. The issue regarding the extent of security for costs is thus not an issue that this Court can, at this point, adjudicate.

Rule 7(2)

[7] Mr. Smith contended that the enrollment of the Appeal in the absence of compliance with the provisions of Rule 7(2) constituted an irregular step. The effect of Rule 7(2) is that the filing of a power of attorney in compliance with the rule needed to occur simultaneously with the filing of the application for a date of hearing. The requirement is peremptory, and where it is not adhered to, the appeal

has not been properly enrolled. As a result, Mr. Smith sought an order that the appeal to be struck from the roll, alternatively to be removed from the Roll.

[8] Mr. Smith contended that although he initially only took issue with the fact that no power of attorney was filed when the appeal was re-enrolled after the Mazibuko order, it became apparent that there had been no compliance with Rule 7(2) since when the appeal had initially been enrolled. The attorneys who had initially prosecuted the appeal was Stroh Coetzee Inc. SCI had failed to demonstrate that a power of attorney for Stroh Coetzee Inc. had been filed authorising the prosecution of the appeal. There was also no indication that SCI had mandated Göthe Attorneys Inc. who represented SCI when the new date for the appeal was applied for. Mr. Smith's issue with the non-compliance with Rule 7(2) was founded on his view that the *peregrinus* company no longer exists, a belief communicated to SCI's legal representatives. Mr. Smith took issue with a later power of attorney dated 21 November 2023 and avers that in addition to not complying with Rule 7(2) is also does not comply with Rule 7(4). This power of attorney is dealt with in par 10 hereunder.

[9] SCI submitted that Mr. Smith is relying on a purely technical point. Mr. Lutzkie, SCI's agent, averred that the entirety of the relief sought is *res judicata* since it was dealt with by Mazibuko AJ. SCI regarded the power of attorney dated 24 May 2010, signed by one Kim Fat HO FONG nominating and appointing Stemela & Lubbe Inc. *'as its attorneys to represent the company in all its legal proceedings in the Republic of South Africa in respect of the action instituted by the company against Fantasy Construction (Central) (Pty) Ltd, David Henry Smith, Kennith Bernard Stricker and Adam Johannes Sherpherd in the North Gauteng High Court … and further to take such legal steps and/or action in any Court necessary to protect the Company interest in the Republic of South Africa'*, as sufficient to meet the requirements of Rule 7(2).

[10] In a supplementary answering affidavit Mr. Lutzkie attached two powers of attorney. The first, dated 24 May 2010 authorises Mr. Lutzkie to represent SCI in all legal proceedings against, amongst others, Mr. Smith. The second, dated 21 November 2023, is a power of attorney granted by Mr. Lutzkie to Göthe Attorneys Inc. to institute and defend legal proceedings against Mr. Smith under case numbers 17195/2010 and A740/2014 (the latter case number being that of the appeal).

[11] Since the appeal was simply re-enrolled, SCI contended that it was unnecessary to file a power of attorney again. SCI further submitted that the provisions of Rule 30 were not adhered to and that the applicant, who is a 'stickler for rules' should also be held to the requirements and time-periods set out in Rule 30.

Discussion

[12] Rule 7(2) of the Uniform Rules provides:

> '*The registrar shall not set down any appeal at the instance of an attorney unless such attorney has filed with the registrar a power of attorney authorizing him to appeal, and such power of attorney shall be filed together with the application for a date of hearing*.'

[13] A power of attorney is necessary for the prosecution of an appeal because it is proof of authorisation for the conduct of further proceedings. It is to prevent a person whose name is used in the process from afterward repudiating the process altogether and denying the giving of authority and to prevent the institution of an appeal in the name of a person who never authorised it.[1]

[1] *Oos-Randse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk en Andere (1)* 1978 (1) SA 160 (W) at 162C-D; *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705E-F.

[14] On a plain reading of the rule, it is evident that to prosecute an appeal, it is essential to file the power of attorney when the application is made for a hearing date. Filing an application for a date of hearing without a power of attorney is not the proper 'making' of that application within the meaning of the rules.[2] The imperative of Rule 7(2) becomes clearer when considered in light of the fact that Rule 7(1) does not prescribe the general filing of a power of attorney when litigation commences.

[15] Dendy and Loots, in *Herbstein & Van Winsen The Civil Practice of the Superior Courts of South Africa,*[3] explain with reference to authority, that the courts of various Divisions have for many years adhered to the practice of striking off the roll with costs an appeal prosecuted without authority in the form of a power of attorney filed at the time of set-down.[4] They suggest, however, that the practice of striking off an appeal should be reconsidered in light of the decision in *Smith v Kwanonqubela Town Council*.[5] Since the appeal *in casu* was removed from the roll and not struck off, dealing with this aspect further is unnecessary.

[16] As stated above, the issue of compliance with Rule 7(2) was not raised before Mazibuko AJ, and the judgment and order she handed down cannot be regarded as having finally dealt with this issue. The matter is thus not *res judicata.* SCI and Mr. Lutzkie did nothing to allay Mr. Smith's fears that SCI does not exist anymore. In the factual context where the appeal is re-enrolled eight years after it was postponed *sine die*, where the applicant expressly states that it believes that the appellant does not exist anymore, I find no justification for the argument that Rule 7(2) simply does not apply. The issue of whether an attorney has a mandate from an existing appellant is a material one.

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[2] *Corlett Drive Estate Ltd v Boland Bank Ltd and Another* 1978 (4) SA 420 (C) at 425D-E, *Aymac CC and Another v Widgerow* 2009 (6) SA 433 (W) para [6].

[3] 6th ed, JUTA, 6-17.

[4] See, amongst others, *Combrink v Maritz* 1951 (4) SA 288 (T) at 290B-291B.

[5] 1999 (4) SA 947 (SCA).

[17] The fact of the matter is that no power of attorney had been filed authorising either Stroh Coetzee Inc. or Göthe Attorneys Inc., respectively, to prosecute an appeal, when the appeal was enrolled and re-enrolled. The only power of attorney existent at the time when the appeal was initially enrolled is a power of attorney appointing Stemela & Lubbe Inc. Since no power of attorney had been filed authorising either Stroh Coetzee Inc. or Gothe Attorneys Inc. to enroll or re-enroll the appeal, it is not necessary to deal with the question of whether a general power of attorney authorising the institution of legal proceedings sufficient for purposes of prosecuting an appeal.

[18] SCI had taken issue with the fact that the requirements of Rule 30 were not followed. However, the nature of the improper step renders adherence to the time periods and process provided for in Rule 30 nugatory. I am of the view that the Rule 30 application had been justified and, even if the criticism against it might have been legitimate, a court hearing the appeal, once alerted to the non-compliance with Rule 7(2), may then *mero motu* proceed to deal with the issue since it relates to the question of whether the appeal was properly before the court. The combination of these factors led to the granting of the order already described above.

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E van der Schyff

Judge of the High Court

Gauteng Division, Pretoria

I agree

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D Mahosi

Judge of the High Court

Gauteng Division, Pretoria

I agree

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N Davis
Judge of the High Court
Gauteng Division, Pretoria

For the applicant:	Adv. T. Ellerbeck
Instructed by:	Edeling Van Niekerk Inc.
For the respondent:	Adv. J.G. Smit
Instructed by:	Göthe Attorneys Inc.
Date of the hearing:	31 January 2024
Date of judgment:	15 February 2024