

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



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

**DELETE WHICHEVER IS NOT
APPLICABLE**

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES:
~~YES~~/NO
(3) REVISED

DATE: 18 June 2024__

SIGNATURE: [...]

Case No A47/23

In the matter between:

**PROGRESSIEWE PRIVAAT
SEKURITEIT MONITERING
EN REAKSIE (PTY) LIMITED**

APPELLANT

and

**THE NATIONAL COMMISSIONER OF
THE SOUTH AFRICAN POLICE
SERVICES
GENERAL KJ SITHOLE N.O.**

FIRST RESPONDENT

**COLONEL PN SIKHAKHANE
(in her capacity as acting Section
Head, Central Firearms Registry)**

SECOND RESPONDENT

THE FIREARMS APPEAL BOARD

THIRD RESPONDENT

ADV. LUNGELWA CAROL SHANDU
N.O. (CHAIR OF THE APPEAL
BOARD)

FOURTH RESPONDENT

THE MINISTER of POLICE

FIFTH RESPONDENT

Coram: KOOVERJIE J, COX AJ *et* MOGOTSI AJ

Heard on: 15 MAY 2024

Delivered: 18 June 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 16H00 on 18 June 2024.

ORDER

It is ordered that:

- [1] The appeal is removed from the roll;
- [2] The appellant is to pay the respondent's wasted costs on a party – party scale, including the costs of senior counsel;
- [3] The scale of costs to be in terms of Uniform Rule 69(7), scale C

JUDGMENT

COX AJ (KOOVERJIE J, MOGOTSI AJ CONCURRING)

- [1] On 6 June 2022 Khumalo J dismissed the urgent application of the appellant against the respondents which concerned the second and third respondents' refusal to renew the appellant's application of further firearm licences in terms of Section 24 of the Firearms Control Act, 60 of 2000. The appellant was granted leave to appeal before the full court on 6 October of the same year.
- [2] The Director of the appellant is also the director and shareholder of Magena Trading (Pty Limited t/a Magena Security Services (herein after referred to as Magena Trading). Magena Trading also lodged a similar application against the same respondents on the same date. The remaining aspect in contention was the costs dispute.
- [3] For the sake of convenience, the court *a quo* heard both applications simultaneously and delivered a judgment in both applications. The same process was followed in the application(s) for leave to appeal. The two applications were however never consolidated. Each application was allocated with its own case and appeal number, and the attorney for the appellant subsequently applied for separate dates for the appeals. The registrar provided the appellant with the date of 15 May 2024 whilst no date for an appeal hearing was allocated in respect of Magena Trading.
- [4] The appellant's understanding that both appeals were to be heard on the same date is misconceived. It cannot be disputed that no date was allocated

for the appeal of Magena Trading. Consequently, this court was seized only with the appeal of the appellant.

[5] It is necessary to emphasize that when the matter was heard before us, the parties were in agreement that the appeal had lapsed. The remaining issue in dispute pertains to the costs.

[6] The respondents persist in their view that the appellant failed to fully comply with Rules 49(6)(a) and (13)¹. Moreover, in terms of Rule 49(6)(a) the appeal had lapsed since the appellant failed to apply for a date of hearing when it filed the appeal record. This entails that the appellant would have to launch a substantive application in accordance with Rule 49(6)(b) for its reinstatement.

[7] It was further argued that the appellant failed to do so timeously, namely within 60 days of its delivery of its notice of appeal as required by Rule 49(6)(a). As early as 20 February 2023 the respondents' attorney informed the appellant of the lapsing of the appeal.

[8] The appellant concedes that it did not apply for a hearing date within 60 days of its delivery of its notice of appeal. In *Genesis*² it was held that if a written application for a date of hearing an appeal is not timeously made to the registrar then the appeal is deemed to have lapsed. On the facts and contrary to the Rules, the appellant applied for a date long after the expiry of 60 days. Rule 49(6)(a) reads:

¹ The Uniform Rules of Court

² *Genesis v Jamieson and Others* (Unreported) (3212/2019) [2021] ZAGPJHC 862 923 July 2021 para 33

“Within 60 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 10 days after the expiry of the said period of 60 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.”

[9] It was argued on behalf of the respondents that such non-compliance with the Rule forms the basis of the respondents’ argument that they are entitled to their wasted costs as provided for. The appellant, on the other hand, argued that the question of costs should be reserved for the appeal court to decide. It contended that prior to making a costs order it would be necessary to establish whether the appeal has indeed lapsed and which party was to blame for the fact that the provision in Rule 49(13) had not been complied with, namely the furnishing of security.

[10] The appellant’s argument is untenable. On 7 May 2024 the appellant filed its application for reinstatement of its appeal. That is clearly indicative of an acceptance by the appellant that the appeal had lapsed and further on counsel’s concession in court that ‘technically’ it did.

[11] Rule 49(13)(a) is prescriptive and stipulates that an appellant is required to furnish security for the respondents' costs of appeal. It was common cause that there was a dispute between the parties regarding the amount of security. Consequently, the provisions of Rule 49(13)(b) should have been invoked since it provides for the way forward if the parties are unable to agree on the amount of security. In such a case, the registrar should fix the amount. The rules are clear. The issue of security was to be finalised prior to filing of the appeal record with the registrar. This essentially means that the appeal record should not have been filed before security was furnished.

[12] The appellant argued that the responsibility was on the respondents to approach the registrar to fix a suitable amount. The appellant was further unhappy with the security amount suggested by the respondent which it found to be exorbitant. The appellant's view was that at that point its hands were tied and that it was the responsibility was on the respondents to finalise the security amount with the registrar. I do not agree with the contention that it was only the responsibility of the respondents to approach the registrar. Nothing barred the appellant from persisting with the security issue and cause the registrar to fix an amount.

[13] When the appellant applied for the hearing date, it was well aware that the issue of security was not settled. Nevertheless, it proceeded to obtain a hearing date. In *LG v JG*³ at para 13 Windell J stated as follows:

Therefore, if when applying for leave to appeal in terms of rule 49(1), no application is launched as envisaged by rule 49(13)(a) to release the

³ *LG v JG* (32377/2012) [2023] ZAGPJHC 450 (28 April 2023)

appellant wholly or partially from the obligation to give security, and leave is granted to the Full Court (as contemplated in rule 49(2), then the remainder of rule 49 is triggered, which sets out the procedure to be followed by the parties in the prosecution of their appeal before the Full Court.

- [14] The rules are unambiguous. If security has not been furnished, the appeal record cannot be lodged. Rule 49(13) is peremptory and in this regard it was stated at para 25 of the said authority:

If security is not furnished, the appeal record may not be lodged. Without an appeal record, no date can be assigned for the hearing of the appeal (rule 49(7)(c)), and rule 49(7)(d) may apply.

The aforesaid provisions are prescriptive and demonstrate that due to non – compliance with the Uniform Rules of Court the appeal was not ripe for hearing.

- [15] It is reiterated that the appellant proceeded in obtaining a date for the hearing of the appeal despite its knowledge of the shortcomings referred to. Counsel for the appellant was hard pressed to explain why the appeal was enrolled for hearing when it was obviously not ripe for hearing. The response that it did so, as ‘the respondents did nothing’, is not plausible. That is hardly a reason to enrol a matter for hearing that was obviously not ready to be heard.

- [16] Notably the appellant submitted in his supplementary heads of argument that it had applied for a date at the insistence of the respondents. Even if that was the case, it remained irregular to have applied for a hearing date if the jurisdictional requirements aforesaid were not met. In my view, the

respondents are thus entitled to their wasted costs on that basis alone. There is no substantive reason before us to saddle the appeal court with a decision on the costs of the proceedings before us.

[17] The respondents persisted in their argument that a punitive costs order against the appellant on the attorney and client scale is justified. Ultimately the question of costs is within the discretion of the court. Such discretion must be exercised judicially, and all relevant factors have to be considered. The objective test regarding costs is always to enquire what is just and fair in the circumstances.

[18] I accept that the respondents were put through unnecessary expense as a result of the conduct of the appellant. Our courts have pronounced that in order to justify a punitive costs order, exceptional circumstances must exist. The list is not exhaustive. The courts have granted punitive costs under various circumstances. Hence there are no set of rules that prescribe when punitive costs orders are justified. Ultimately this court is required to exercise its discretion judicially.

[19] When considering the punitive costs orders, one of the factors taken into consideration is whether a party conducted itself in bad faith. In my view, there was no element of *mala fides* on the part of the appellant when it enrolled the appeal for hearing. Consequently, a punitive cost order is not justified in these circumstances.

[...]

I COX
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered

H KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree

J MOGOTSI
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON: 15 MAY 2024
JUDGMENT DELIVERED ON: 18 JUNE 2024

COUNSEL FOR THE APPELLANT:

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INSTRUCTED BY:

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