Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE NORTH WEST HIGH COURT,
MAFIKENG

CASE NO.: CIV APP MG 13/2023
MAGISTRATES CASE NO.: 14/1/1/3 -15/2022

In the matter between:

ARNESTA TAUTE **Appellant**

and

HENDRIK PIETER BORMAN **Respondent**

CORAM: HENDRICKS JP et PETERSEN J

DATE OF HEARING : 16 FEBRUARY 2024
DATE OF JUDGMENT : 07 MARCH 2024

FOR THE APPELLANT : ADV. B. RILEY
FOR THE RESPONDENT : ADV. V/D WESTHUIZEN

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be 14h00pm on 07 March 2024.

ORDER

Resultantly, the following order is made:

(i) The appeal is removed from the roll.

(ii) The appellant is ordered to pay the wasted costs on a party-and-party basis, to be taxed.

JUDGMENT

HENDRICKS JP

Introduction

[1] This is an appeal against an order made in the Children's Court, Tlhabane on 2nd February 2023. When the matter was argued on 23rd February 2024, counsel for the respondent raised as a point *in limine* the fact that the appeal had lapsed. It is this issue that is before this Court for adjudication.

[2] In brief, Uniform Rule 50(1) of the Uniform Rules of Court provides:

> *"An appeal to the court against the decision of a magistrate in a civil matter shall be prosecuted within 60 days after noting such appeal, and unless so prosecuted it shall be deemed to have lapsed."*

[3] Rule 50(4) makes it clear that the 60-day period includes the timeframes set for both the appellant as well as the respondent. The appellant shall prosecute an appeal within 40 days after noting the appeal. To prosecute an appeal means that the appellant must apply to the Registrar of the High Court, on notice to all the parties, for a date of hearing in terms of Uniform Rule 50(4).

See: **Erasmus, Superior Court Practice, 2nd Edition, Volume 2** on page D1 - 690.

[4] The appellant noted the appeal on 22nd March 2023, out of time. This means that the appellant did not prosecute the appeal within the prescribed 40-day period in terms of Rule 50(4)(a). The appellant only applied for a date after the expiry of the 60-day period referred to in Rule 50(1). By noting the appeal on 22nd March 2023, the appellant should have applied for a date from the Registrar on or before 23rd May 2023, being 40 days after noting of the appeal, and prosecuted the appeal. The appellant only applied for a date on 30th June 2023, some 26 days later. Even on the 60-day period which ended on 21st June 2023, the appeal was prosecuted late.

[5] No substantive application for condonation was brought by the appellant. There was only a casual attempt from the bar by counsel acting for and on behalf of the appellant, submitting that condonation ought to be granted because the best interest of the child is of paramount importance. Counsel for the respondent contended that the appeal had lapsed and that an application for re-instatement of the appeal should be brought. I disagree with the contention that the appeal had lapsed. Rule 50(1) has a deeming provision in that the "*appeal… shall be **deemed** to have lapsed*."

[6] In this division, the Full Court in **Nyaka Modiri Molema District Municipality vs Quantibuild** CIV APP FB 12/2019 (08 December 2022) dealt comprehensively with the effect of the deeming provision relevant to lapsed appeals. I find it prudent to quote extensively from **Quantibuild**, where it was said:

> *"[17] In terms of Rule 49(6)(a) if written application to the Registrar for the hearing of the appeal is not timeously made, the appeal "shall be deemed to have lapsed". This begs the question how the deeming provision in Rule 49(6)(a) is to be interpreted. In **Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd t/a Crown River Safari** 2018 (4) SA 206 (SCA) at paragraphs [29] to [34], Navsa JA, writing for the Court, provides a useful exposition on how deeming provisions in legislation has been and is to be interpreted, where he stated as follows:*
>
> > *"[29] At the outset it is necessary to have regard to how deeming provisions in legislation, have been dealt with in case law and by commentators. Bennion Statutory Interpretation 3 ed 1997 says the following about deeming provisions at 735:*

> *'Deeming provisions in Acts <u>often</u> deem things to be what they are not. In construing a deeming provision it is necessary to bear in mind the legislative purpose.' (My underlining.)*

The first sentence of the quote is demonstrated by the facts in Mouton v Boland Bank Ltd 2001 (3) SA 877 (SCA). In that case the court was dealing with a deeming provision contained in the Close Corporations Act 69 of 1984, relating to the reregistration of a close corporation. The deeming provision there in question read as follows:

> *'The Registrar shall give notice of the restoration of the registration of a corporation in the Gazette, and as from the date of such notice the corporation shall continue to exist and be deemed to have continued in existence as from the date of deregistration as if it were not deregistered.' (Emphasis added.)*

That provision deemed something to be what in fact was not so, namely, that the close corporation was never deregistered.

[30] An exposition of types of deeming provisions and how they should be construed is to be found in the decision of this court in S v Rosenthal 1980 (1) SA 65 (A). Trollip JA said the following at 75G-H:

> *'<u>The words "shall be deemed"</u> ("word geag" in the signed, Afrikaans text) are a familiar and useful expression often used in legislation in order to predicate that a certain subject-matter, eg a person, thing, situation, or matter, shall be regarded or accepted for the purposes of the statute in question as being of a particular, specified kind whether or not the subject-matter is ordinarily of that kind. The expression has no technical connotation. <u>Its precise</u>*

meaning, and especially its effect, must be ascertained from its context and the ordinary canons of construction.'

[31] The court in Rosenthal went on to explain:

'Some of the usual meanings and effect deeming provisions can have are the following. That which is deemed shall be regarded or accepted (i) as being exhaustive of the subject-matter in question and thus excluding what would or might otherwise have been included therein but for the deeming, or (ii) in contradistinction thereto, as being merely supplementary, ie, extending and not curtailing what the subject-matter includes, or (iii) as being conclusive or irrebuttable, or (iv) contrarily, thereto as being merely prima facie or rebuttable. I should add that, in the absence of any indication in the statute to the contrary, a deeming that is exhaustive is also usually conclusive, and one which is merely prima facie or rebuttable is likely to be supplementary and not exhaustive.'.

…

[33] The court in Rosenthal, at 76B-77A, had regard to R v Haffejee & another 1945 AD 345, … At 352-353, Watermeyer CJ, in considering the meaning and effect of deeming provisions, with reference to English case law, said the following:

> *'It is difficult to extract any principle from these cases, except the well-known one that the Court must examine the aim, scope and object of the legislative enactment in order to determine the sense of its provisions…*

[34] From what is set out above, it follows that a deeming provision must always be construed contextually and in relation to the legislative purpose…"

(my emphasis)

[18] Of importance to note is that there is no application before this Court by the respondent seeking a declaratory order that the appeal has lapsed. This is despite the fact that the respondent knew as far back as 17 May 2022, when it was served with the notice of set down, that there was non-compliance with Rule 7(2), 49(13)(a) and 49(7)(d) of the Uniform Rules of Court.

[19] In ***Genesis One Lighting (Pty) v Bradley Lloyd Jamieson and Others*** *(3212/2019) [2021] ZAGPJHC 862 (23 July 2021), the central issue in the matter was whether the respondents' appeal had lapsed. At paragraphs [33] to [38], Gilbert AJ provides a useful exposition in this regard where the following is said:*

[33] Rule 49(6)(a) expressly provides that if written application to the Registrar for the hearing of the appeal is not timeously made, the appeal "shall be deemed to have lapsed". Accordingly, the consequence of a failure to comply with rule 49(6)(a) is a deemed lapsing of the appeal. ***Should there be a dispute about this, then the court can be approached for the appropriate declaratory relief as to whether the appeal has lapsed or not****.*

[34] In contrast, as pointed out by the respondents, non-compliance with rule 49(7)(a) relating to the filing and furnishing of an appeal record does not contain a similar provision that there is a deemed lapsing of the appeal. Rather, rule 49(7)(d) provides that:

"*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***."

[35] ***Although rule 49(7)(d) does not refer to the "appeal" as lapsed but rather "the application" as lapsed, the application referred to is the application for a date for the hearing of the appeal in terms of rule 49(6)(a), the lapsing of which would have the effect as the appeal itself having lapsed****.*

[36] One interpretation of rule 49(7) is that upon a failure of a party to timeously file and furnish the record, the appeal lapses, as is the position with non-compliance with rule 49(6)(a). If this is correct, then the court when approached under rule 49(7) would be confirming that the appeal has lapsed.

[37] ***An alternate interpretation of rule 49(7) is that if the appellant fails to file or furnish the record, the appeal is not deemed to have lapsed (in contrast to rule 46(6)(a)) but the court can then be approached for an order to effectively decide whether the appeal has lapsed rather than confirming what would already have been a deemed lapsing of the appeal. This would enable the court to take into account a variety of factors in deciding whether to grant an order that the appeal has lapsed****.*

[38] One of those factors may be whether by the time the application in terms of rule 49(7)(d) is heard there is a compliant appeal record and the appellant has launched an application for the appeal court to consider in due course as envisaged in rule 49(7)(a)(ii) condoning its failure to have timeously filed and furnished that record. Rule 49(7)(a)(ii) expressly provides that an appellant who fails to timeously file and furnish the record can apply for condonation for the omission. The condonation application will be considered by the appeal court at the hearing of the appeal. Rule 49(7)(c) further provides that the Registrar after delivery of the copies of the record shall assign a date for the hearing of the appeal or for the application for condonation and appeal, as the case may be. It is clear that it is for the appeal court to consider the condonation application. Accordingly, a court faced with an application in terms of rule 49(7)(d) for an order that the appeal has lapsed may decline to an order that the appeal has lapsed provided that there is an application for condonation that will serve before the appeal court in course.

(my emphasis)

[20] Having regard to the approach to be adopted when dealing with a deeming provision as espoused in ***Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd*** *and the useful exposition in* ***Genesis One Lighting (Pty) v Bradley Lloyd Jamieson and Others,*** *the alternate interpretation of Rule 49(7) that if the appellant fails to file or furnish the record, the appeal is not deemed to have lapsed (in contrast to Rule 46(6)(a)), but the court can then be approached for an order to effectively decide whether the appeal has lapsed, rather than confirming what would already have been a*

deemed lapsing of the appeal is to be preferred. This would enable the court to take into account a variety of factors in deciding whether to grant an order that the appeal has lapsed."

[7] The underlying rationale of the **Quantibuild** judgment is that when an appeal is **deemed** to have lapsed, an application must be made to the court hearing the appeal, for that court to make a finding and to pronounce on whether the appeal has in fact lapsed. This was not done. The meaning of the word "*deemed"* is "*to consider or judge something in a particular way*".
See: Cambridge dictionary.

It is still for the court hearing the appeal (either as a Full Bench or a Full Court) to make a pronouncement that the appeal that is deemed to have lapsed, did in fact lapse.

[8] That being the case, the present appeal stands to be removed from the roll. The usual costs order that costs follow the result should be made in favour of the respondent. The scale of the costs to be on a party-and-party basis, to be taxed.

Order

[9] Resultantly, the following order is made:

(i) The appeal is removed from the roll.

(ii) The appellant is ordered to pay the wasted costs on a party-and-party basis, to be taxed.

_____

R D HENDRICKS
JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISION, MAHIKENG

I agree.

_____

A H PETERSEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISION, MAHIKENG