IN THE HIGH COURT OF SOUTH AFRICA

[NORTH GAUTENG HIGH COURT, PRETORIA]

CASE NO: 17527/10

22/10/2013

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE 18/10/13 **SIGNATURE**

In the matter between:

MCG INDUSTRIES (PROPRIETARY) LIMITED Applicant

and

CHESPAK (PROPRIETARY) LIMITED Respondent

HEARD ON: 30 SEPTEMBER 2013

JUDGMENT HANDED DOWN: 18 OCTOBER 2013

JUDGMENT

NICHOLLS J,

[1] This is an application for a declaratory order that the appeal filed by the appellant ("Chespak") has lapsed, alternatively for an order dismissing the appeal. The application is made by the respondent in the appeal ("MCG") in terms of rule 49 of the Uniform Rules of Court (the "Rules").

[2] The basis on which MCG seeks this relief is, firstly, that Chespak failed to file an application for a hearing date for the appeal within 60 days of filing its notice of appeal as required by Rule 49(6)(a). Secondly that Chespak failed to file the record of appeal within the extended 40 day time period provided in Rule 49(7)(d).

[3] On 25 March 2010 MCG launched an application seeking to interdict Chespak from infringing MCG's registered design by making, using, importing and/or disposing of any product falling within the scope of the registered design. The registered design was in respect of a bottle carrier utilised for storage, transportation and delivery of plastic soft drink bottles. The application was heard almost a year later on 7 February 2011. Zondo J (as he was then) handed down judgment on 30 September 2011 in favour of MCG, but without giving reasons therefore. Reasons were provided during October 2011. On 24 October 2011 Chespak filed and served its application for leave to appeal.

[4] In the interim Zondo J was appointed to an acting position in the Constitutional Court on 1 November 2011 with a permanent appointment from 13 August 2012. On 10 February 2012 leave was

granted to the full bench of this division. Chespak served and filed its notice of appeal on 28 February 2012.

[5] Thereafter Chespak was required to pay security for its costs of the appeal. This was conceded but the quantum was disputed. It appears that a written undertaking was not provided although the amount of R200 000 was placed into the trust account of Chespak's attorneys who have since provided the undertaking. Although raised in the papers this was not argued as one of the grounds for the appeal lapsing.

[6] Chespak applied for hearing date in terms of Rule 49(6)(a) on 29 May 2012. Because it was not accompanied by copies of the record as required by Rule 49(6)(a), Chespak were obliged to furnish an affidavit in terms of Rule 49(7)9a)(ii) explaining the failure to lodge the record and indicating that condonation would be sought at the hearing of the appeal. The application for a hearing date was accepted by the Registrar.

[7] The affidavit filed by Willem Du Preez ("Du Preez"), a candidate attorney in the employ of the attorneys of Chespak, stated that the delay in obtaining the record was due to the fact that security could only be provided "; ound the second week of April 2012". Once security was furnished, he said he proceeded on the 15th of May to try and obtain a transcription of the judgment of the hearing for leave to appeal and the proceedings.

[8] On 12 December 2012 an "Amended written application in terms of Rule 49(6)(a)" was filed with the final appeal record. This was accompanied by a further affidavit from Du Preez. In this affidavit he attributes the delay in preparation of the record to the disappearance of the court file and the appointment of Zondo J to preside in the Constitutional Court.

[9] Du Preez states that the transcripts of the original judgment and judgment in the leave to appeal were completed on 2 July 2012 after which they were sent to van der Merwe DJP for confirmation on behalf of Zondo J "and finally delivered on the 19th July 2012". He goes on to say he was not aware of the requirement that only the transcripts but also the duplicate court file had to be endorsed before the necessary orders could be drafted. It was only at a later stage that he presented the file to the clerk of Van der Merwe DJP, after erroneously believing that only a clerk associated with Zondo J was competent to endorse the court file.

[10] As a result of the above, the endorsed court file was only presented to the typists on 16 October and "finally delivered on the 19th and 22nd October 2012". The record was perused on 19 November 2012 when missing pages were identified. The final record was therefore presented only on 12 December 2012, some 10 months after the leave to appeal was granted. MCG launched the present application on 21 December 2012. The date allocated for the appeal is 23 March 2014.

[11] Rule 49(6)(a) and 49(7)(d) read as follows:

Rule 49(6)(a):-

(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.

Rule 49(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) ...; 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) ....

(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.

[12] MCG's case is that Chespak failed to file an application for the hearing date of the appeal within 60 days of filing its notice of appeal as required in rule 49(6) and failed to file the record of the appeal within the extended 40 day time period provided in Rule 49(7)(d). In respect of the former the appeal has automatically lapsed. In respect of the latter the application for the hearing date of the appeal has lapsed, and as a consequence thereof the appeal itself has lapsed.

[13] MCG contends that on this basis alone its application should be granted and any explanations that Chespak may have for the delays is irrelevant. It is only in an application for re-instatement that the explanations for the delays become relevant, and only an appeal court can re-instate a lapsed appeal. However, the submission is that the rules are clear that if the 40 day deadline provided for in 49(7)(d) is missed then an order may be granted declaring that the application for an appeal date, and thus the appeal, has lapsed.

[14] Chespak's counsel agrees that the appeal automatically lapses under the deeming provisions of rule 49(6)(a) if an application for an appeal date is not timeously filed, but argues that the same is not applicable in terms of Rule 49(7)(d). Here the court has a discretion to grant an order that *"the application"* has lapsed. The application referred to is not the appeal but the application for a date for the hearing of the appeal. Therefore the only order that is competent for this court to make is not that the appeal has lapsed but that the application for the hearing of a court date has lapsed.

[15] Although conceding that the application in terms of rule 49(6)(a) was filed two days late, the Chespak argues that MCG did not object to the late filing as an irregular step and did not raise this point in its founding affidavit to this application. In fact MCG went on to take further steps in the prosecution of the appeal, including

evincing an intention to apply for condonation. It is therefore not open to the applicant to contend that the appeal is deemed to have lapsed at this juncture but only at the hearing of the appeal.

[16] This view was confirmed in *Strouthos v Shear*[1] where it was held that where no application has been brought in terms of Rule 30, the appeal will have to be proceeded with and a respondent will have to move for the appeal to be struck from the roll for want of compliance with the rule as was done in *Boland Konstruksie Maatskappy (Edms) Bpk v Petlen Properties (Edms) Bpk* 1974 (4) SA 291 (C).

[17] Both parties accept that the Registrar was obliged to accept the application for a date for the hearing in terms of rule 49(6)(a) and has no discretion to refuse.[2] The question is then whether in terms of 49(7) the lapsing of the application for a hearing date axiomatically means the lapsing of the appeal.

[18] On an ordinary reading of Rule 49(7)(a)(d) the reference to "the application" is clearly a reference to the application for a date of hearing for the appeal. This view finds support in *Jyoti Structures Africa (Pty) Ltd v Krb Electrical Engineers/Masana Mavuthani*

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[1] *Strouthos v Shear* 2003 (4) SA 137 (T) at 141

[2] *Fedco Cape (Pty) Ltd v Meyer* 1988 (4) 207 (E) at 209; *Unimark Distributors (Pty) Ltd v Erf 94 Silverton (Pty) Ltd* 2003 (1) SA 204 (T)

Electrical and Plumbing Services (Pty) Ltd t/a Krb Masana[3] where the court held at paragraph 15:-

> *"The concept of 'lapsing' appears twice in rule 49. It appears in the context of rule 49(6)(a), which provides, inter alia, that an appeal and cross-appeal shall be deemed to have lapsed if neither the appellant nor the respondent made application for the appeal to be heard within the specified time periods. It also appears in the context of rule 49(7)(d), which allows one party to approach the court for an order that the application for the hearing of an appeal has lapsed in the absence of delivery of copies of the record within the specified period. Note that this applies to the application for the hearing, not the appeal itself. The rule having made specific provision for lapsing in these respects, there seems little room for finding that other failures would also lead to lapsing of the appeal. There are other remedies which are readily available, such as striking the appeal off the roll. That is an appropriate remedy where, for instance, no power of attorney was filed (Aymac CC and Another v Widgerow 2009 (6) SA 433 (W) at para 6), or there was a failure to file a complete appeal record timeously (Van der Riet v Rheeder 1965 (3) SA 712 (O); Dinath v Breedt 1966 (3) SA 712 (T); Kanderssen (Pty) Ltd v Bowman NO 1979 (4) SA 296 (T)).In Boland Konstruksie Maatskappy (Edms) Bpk v Petlen Properties (Edms) Bpk 1974 (4) SA 291 (C) the appeal was struck off the roll where, inter alia, no security had been*

[3] 2011 (3) SA 231 (GSJ)

furnished in terms of the then rule 49(12) (the equivalent of the present rule 49(13)). However it is not necessary that I resolve this issue in the light of the conclusion that I come to. Suffice it to say that I do not believe that a party which complains of the failure by the other party to furnish good and adequate security may demand an order that the appeal has lapsed." (my underlining)

[19] What MCG has done is to conflate the application for an appeal date with an application for the appeal itself. 'The application' referred to throughout in rule 49(6) and 49(7) is for a hearing date. Therefore MCG's reliance on Rule 49(7) to declare the appeal to have lapsed is misplaced. It may well be that the application for a trial date has lapsed but this is not the issue for determination.

[20] It should be further noted that insofar as it may be argued that inadequate security is grounds for declaring an appeal to have lapsed, in the *Jyoti* judgment this was dismissed. The other cases and available remedies referred to in *Jyoti*, such as the striking of the appeal for the failure to file a complete appeal record timeously or the failure to file a power of attorney were exercised by the court of appeal, not a single judge.

[21] This brings me to the question of whether this court sitting as a motion court with a single judge is the appropriate forum to hear the application for the lapsing of an appeal or whether this is a determination that should be made by the appeal court consisting of

three judges. It is settled law that when the prospects of success have to be canvassed, then the correct forum is the bench that will hear the appeal.[4] H wever where an application does not involve a consideration of the merits, this is not the sole domain of the appeal court and a single motion court judge would have the competence and jurisdiction to entertain such an application.[5]

[22] MCG contends that it not necessary to traverse the merits of the appeal and therefore this court is competent to hear the application for the lapsing of the appeal. A claim based on a failure to prosecute an appeal has no bearing on the prospect of succeeding in the final appeal.

[23] I am not convincec that this is correct. In both the affidavits filed with the applications for a trial date, Du Preez stated that an application for condonation for the late filing of the record would be made at the hearing of the appeal. All that is required in Rule 49(7) is an *"indication that an application for condonation of the omission is made at the hearing of the appeal"*. Any application for condonation invariably involves a consideration of the merits. If there are no prospects of success there is little point in granting condonation.

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[4] *Lipschitz NO v Saambou-Nasionale Bouvereniging* 1979 (1) SA 527 (T); *Meyer v Dowson and Dobson Ltd* 1967 (4) SA 628 (T)

[5] *Nawa and Others v Mar.kala and Another* 2008 (5) SA 275 (BH); *Jyoti supra*

[24] As was stated in *Motsamai v Read and Another*[6] which was quoted with approval in *Nawa and Others v Marakala and Another*[7]

> *"It is much better for all parties concerned to let these matters, which are really all part of the proceedings on appeal, come before the Full Court of appeal rather than before a single Judge, who may by his refusal to grant relief, finally decide the issue between the parties. The Full Court can then, especially where there is argument on the merits, combine the hearing of the appeal with that of the application and so save costs."*

[25] In my view it is the appeal court when it hears the application for condonation that should determine whether the appeal has lapsed taking into consideration all the factors. This will include the impact of Chespak's failure to file the record in the extended period allowed for in terms of Rule 49(7), as well as the prospects of success on appeal.

[26] In respect of MCG's alternative claim for the dismissal of the appeal, this is not the domain of a single judge. The dismissal of an appeal is only warranted once the merits have been taken in to account, not on procedural issues alone. This is the preserve of the appeal court.

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[6] 1961 (1) SA 173 (O)

[7] 2008 (5) SA 275 (BH)

[27] In the result, I make the following order:

The application is dismissed with costs.

C Nicholls

C NICHOLLS

JUDGE OF THE HIGH COURT

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