

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Appeal Case number: A72/2021

Case number: 4303/2020

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

DOLLAVIL BOERDERY (PTY) LTD

Applicant

And

MATTHYS JOHANNES JONKER

1st Respondent

PETRONELLA MARGARETHA JONKER

2nd Respondent

HEARD ON: 13 APRIL 2023

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 26 June 2023 at 12h00.

[1] On 20 November 2020 the applicant obtained an eviction order against the respondents in terms of which the respondents were ordered to vacate the applicant's farm known as The Farm Van Niekerksrus 554 in Bothaville with immediate effect.

[2] Following the eviction order, the respondents obtained leave to appeal the said order to the full bench of this Division on 4 June 2021 and subsequently filed their notice to appeal on 23 June 2021. Since then the respondents have not taken any further steps to prosecute the appeal and it is in that regard that the applicant has launched this application seeking an order on the following terms:

"1. Confirmation that the appeal under the abovementioned case number has lapsed and same be dismissed alternatively struck, with costs;

2. That the respondents pay the costs of this application on a punitive scale."

[3] It is the applicant's case that in terms of Uniform rule 49(6) (a) the respondents were required to apply for the assignment of the date for the hearing of the appeal within 60 days after delivery of a notice of appeal however, as at the date of the hearing of this application approximately sixteen (16) months has elapsed since the respondents delivered their notice to appeal. On 23 February 2023, a month after the respondents were served with this application they filed an application for the reinstatement of the appeal (the reinstatement application) without an application for condonation. The reinstatement application does not revive the appeal it remains lapsed until the reinstatement application is heard and determined in favour of the respondents.

[4] In support of his submissions, counsel for the applicant referred to *Figures & CO (Pty) Ltd and Others v Urban Real Estate (Pty) Ltd*¹ wherein it is confirmed that '*...the effect of non-compliance is that the appeal is deemed to have lapsed...*'

[5] The applicant contends that it is prejudiced by the delay as the eviction order remains suspended by these pending proceedings.

[6] At the hearing, the applicant conceded that the relief sought for the dismissal of the appeal is not competent. It was however argued by counsel that the appeal

¹ 2022 JDR 1567 (GJ) para 7.

ought to be struck off with costs on a punitive scale to enable the applicant to obtain its costs including the costs of opposing the application for leave to appeal and opposing the consequent appeal.

[7] On the other side, the fact that the appeal is deemed to have lapsed due to the inaction on the part of the respondents is not disputed. Based on this fact, the respondents argue that it was not necessary for the applicants to have launched these proceedings to seek a declaratory order in that regard.

[8] The application is opposed on the grounds that the respondents have since filed a declaratory application which if determined in favour of the respondents would render the institution of these proceedings void as it relates to the validity of the second respondent's purported resignation as the director of the applicant and the subsequent appointment of the deponent of the applicant's founding affidavit as the director. Furthermore, the respondents' reinstatement application is yet to be heard and if granted it would render any decision relating to these proceedings superfluous.

[9] The respondents thus submit that the appropriate order in these circumstances would be for the dismissal or a postponement of the applicant's application pending the outcome of the declaratory and reinstatement applications.

[10] According to the respondents, the applicant is not entitled to costs let alone on a punitive scale for the reason that, the applicant has conceded that the order sought for the dismissal of the appeal is incompetent. The applicant is also not entitled to the remainder of the orders sought therefore costs should stand over for determination at the appeal hearing.

[11] I am in agreement with the respondents' contentions. Having regard to the facts of this matter, I am of the view that the issue of whether the applicant is entitled to the order it seeks has been resolved by the applicant's own concession that: the appeal is deemed to have lapsed when not enrolled for hearing within 60 days after delivery of a notice of appeal. The deeming provision has the effect that the appeal is

defunct and can only be reinstated if the applicant invokes the provisions of sub-rule (6)(b).

[12] The applicant's reliance on *Figures & CO* is also on point. This authority also confirms that the suspension of the order which is subject to the appeal is terminated when the appeal lapses with the result that the applicant is entitled to put the order into effect.² Based on this reasons, I am not persuaded that the applicant is prejudiced by the lapsed appeal. It is also important to note that in terms of rule 49(6) (a), the applicant was also entitled to set down the appeal within 10 days after the expiry of the 60 days and also seek the costs where appropriate.

[13] An application for the striking off of the appeal is in my view, not legally sound as such an application can only be heard by the court to which the appeal is made including the order in respect of the costs pertinent to the appeal.

[14] I have come to a conclusion that no proper case has been made out for the granting of the order sought by the applicant.

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

(1) The application is dismissed.

(2) The costs shall stand over for determination at the hearing of the appeal and/or reinstatement of the appeal.

N.S. DANISO, J
Honourable Justice

APPEARANCES:

Counsel on behalf of Applicant: Adv. Zietsman (SC)

Instructed by: Theron Jordaan & Smit Inc. C/O Phatsoane Henney Inc.

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² See para 11.

Counsel on behalf of Respondents: Adv. JE Kruger

Instructed by:

Moolman & Pienaar Inc.

C/O Rosendorff Reitz Barry

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