

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION: MTHATHA**

CASE NO. 2244/2010

LUNGISILE JOSEPH SALIWA

Applicant

and

MEC FOR LOCAL GOVERNMENT &

TRADITIONAL AFFAIRS

1st Respondent

INKOSI ZWELIDUMILE NDARALA

2nd Respondent

NDARALA TRADITIONAL COUNCIL

3rd Respondent

JUDGMENT

KUNJU AJ:

[1] The applicant calls for the support of this court and urges it to find that the appeal in this matter has lapsed.

[2] In that quest he has couched his relief in this fashion:

2.1 that the respondents' appeal to the full bench of the above Honourable court against the judgment of the Honourable Nhlangulela DJP delivered on 2 April 2015 be and is hereby declared to have lapsed; and

2.2 directing the respondent to pay wasted occasioned by the noting of the appeal including costs of the application for leave to appeal. (underlining is mine).

[3] In the main proceedings Nhlangulela DJP decided the headmanship dispute of Keilands Administrative Area in favour of the applicant.

[4] The application is located on the provisions of rule 49(6)(a) of the Uniform Rules of Court (the Rules).

[5] The applicant in the main application sought and obtained an order in the following terms:

5.1 That the first respondent be and is hereby directed to consider the applicant's request for recognition as Inkosana of Keilands Administrative Area No.41 in the District of Cofimvaba.

5.2 That the first respondent pays the costs of this application.

[6] Dissatisfied with the judgment and the order delivered on 2 April 2015 the first respondent launched an application for leave to appeal against the said Judgment and or order on 23 April 2015.

[7] The application for leave to appeal was ultimately heard on 2 December 2015, on which date the applicant was granted leave to appeal to the full court of this

division on 28 January 2016.

[8] On 28 September 2016 the respondents launched an application for late noting of an appeal in terms of rule 49(2) of the rules.

[9] A purported notice of appeal pursuant to the granting of leave to appeal was delivered only on 24 February 2017, over a year after the leave to appeal had been granted.

[10] It appears that the respondent in that application (Lungisile Joseph Saliwa) delivered his answering affidavit on 07 October 2016.

[11] The said application is pending and as pointed out above the respondent has opposed the application. As argued by the applicant in this matter no replying affidavit has been delivered by the respondents in that application. To my mind nothing turns on that as the rule regulating the delivery of a replying affidavit is not couched in peremptory terms.

[12] Despite the fact that there is no appeal as yet to the full court, the applicant on 23 June 2017, (that is after the application for extension of time for late noting of an appeal was issued) instituted this application.

[13] Emerging from the above, the following issues fall to be determined in this application, namely:

- 13.1 is there an appeal yet to the full bench of this court; and
- 13.2 was the appropriate route for the applicant (Mr Saliwa) not to ensure that the condonation application for the late noting of the appeal is set-down and finalised.?

[14] The instant application is founded on the provisions of rule 49(6)(a), which provides thus:

“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 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”

[15] In my view, rule 49(6)(a) becomes applicable as soon as an appeal is noted. In this matter no appeal has been noted and in appreciation of that fact the respondents launched an application for condonation. Such condonation application is also opposed by the applicant in this application. The opposition signals refusal to accept the late noting of an appeal. That can only be the essence of opposition to the late

noting of the appeal application.

[16] If no appeal was timeously noted the application to the effect that such appeal has lapsed does not pass muster. The appeal can only be said to have lapsed if it had been noted. Prayer one to this application is premised on the incorrect position that there was an appeal issued to the full court. The reality of the matter is, legally speaking, no such appeal is in existence. Otherwise there would be no application for condonation for the late noting of an appeal.

[17] I am of the view that the order granting a litigant leave to appeal is not in and by itself a notice of appeal. Similarly, the alleged notice of appeal which is, correctly so, not acknowledged by the respondents as existing is not properly before court. In the context of this matter what would have brought the appeal into being would have been the timeous noting thereof.

[18] For all the above reasons, I am of the view that:

- 18.1 in the absence of a proper notice of appeal, an application in terms of rule 49(6)(a) is inappropriate; and
- 18.2 to the extent that a determination is not made as yet on the respondents' application for late noting of an appeal, this application was launched prematurely.

[19] The respondents would ordinarily have been entitled to costs of this application, but for the reasons that follow I am of the view that in exercise of my discretion they should be deprived of such costs. The reasons are:

- 19.1 the failure to deliver notice of appeal in time is their fault;
- 19.2 in this matter on 18 July 2017 they were directed to deliver their answering affidavits by Brooks J not later than 3 August 2017, but the affidavit was delivered only on 7 August 2017 without any explanation for failure to comply with a court order having been given; and
- 19.3 no heads of argument were delivered by the respondents as required by paragraph 8(h) of the Joint Rules of Practice for the High Court of the Eastern Cape.

[20] For all the reasons stated above, I make the following order:

- 20.1 The application in terms of rule 49(6)(a) of the Uniform Rules of Court is dismissed.
- 20.2 There is no order as to costs.

V K KUNJU

JUDGE OF THE HIGH COURT (ACTING)

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Matter heard on:

26 April 2018

Matter delivered on:

08 May 2018