



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

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

2024.09.30

DATE


[Redacted signature]
SIGNATURE

CASE NO: 40024/2018

In the matter between: -

BOTLHALE MOLEMA

First Applicant

LESEDING ACCOUNTING SERVICES

Second Applicant

VS

LETHAMAKGA BUSINESS ENTERPRISES CC

Respondent

JUDGMENT

MABUSE J

- [1] This is an application for leave to appeal by the Applicants. It is opposed by the Respondent.

THE PARTIES

- [2] The parties are as follows:

[2.1] The First Applicant is Botlhale Molema, an adult male employed by the Second Applicant at the Second Applicant's registered place of business.

[2.2] The Second Applicant, Leseding Accounting Services CC, is a Close Corporation, duly Its registered place of business is 2964 Block B, Mabopane.

[2.3] The Respondent, Lethamakga Business Enterprise CC, is a Close Corporation, duly registered as such in terms of the close corporation laws of this country, with its registered place of business at 29 Block M, Soshanguve.

- [3] The purpose of this application is to secure leave of this court to appeal, in terms of section 17(1)(a)(i) of the Superior Courts Act 10 of 2013 (the Act), against the summary judgment that was granted in favour of the Respondent by default on 20 May 2021. The grounds on which leave is sought have been fully set out in the application for leave to appeal. As that application forms part of these papers, I need not, for that reason, repeat them in this judgment.

THE BACKGROUND

- [4] The background is as follows:

- [4.1] By combined summons issued by the registrar of this Court, on 12 March 2018, the Respondent claimed from the Applicants, a refund of the sum of R1,112,200.00. It was alleged by the Respondent in the particulars of claim that the sum of R1,112,200.00 represented a total sum of various amounts that the Respondent had, over a period, paid to the Applicants, an accounting firm, with specific instructions that those amounts should be paid over to the South African Revenue Service ("SARS"). It was further alleged by the Respondent that the Applicants failed to carry out the respondent's instructions in that the Applicants failed to forward those amounts to SARS. It is briefly for that reason that the Respondent claims a refund of the said amount from the Applicants.
- [4.2] A copy of the combined summons was served on the Applicants on 14 June 2018 at the Applicants' principal place of business. It was handed to a Mr Bothale Molema, the manager; and seemingly, the First Respondent.

- [4.3] On 28 June 2018, the Applicants indicated their intention to resist the Respondent's claim. They delivered a notice of intention to defend for that purpose.
- [4.4] On 19 July 2018, the Respondent delivered on the Applicants, through the Applicants' then attorneys, a notice of intention to apply for summary judgment. That application for summary judgment was enrolled for hearing on Thursday, 4 October 2018. It was against the First and Second Applicants jointly, alternatively against the First Defendant, further alternatively against the Second Defendant, severally.
- [4.5] Those were the days during which the Plaintiff or Applicant who applied for a summary judgment had to comply with the provisions of Rule 32(2) of the Uniform Rules of Court (the Rules). At that stage the Rule 32(2) was still unamended. Then the rule stated that:
- "32(1) where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only-*
- (a) on a liquid document.*
 - (b) for a liquidated amount in money.*
 - (c) for delivery of specified movable property, or*
 - (d) for ejectment.*
- together with any claim for interest and costs."*
- [4.6] For various reasons, the Application for summary judgment was postponed. Again, on 18 January 2019, the Respondent delivered a notice of set down of the application for summary judgment and enrolled it for 30 April 2019. On 26 April 2019, a few days before the date on which

the application was to be heard, and in terms of rule 32(3) of the Rules, the Applicants' new attorneys of record, Messrs. Mthembu Sibiya Attorneys, delivered an affidavit in which the Applicants resisted the Respondent's application because of which the matter could not proceed on 30 April 2019.

[4.7] Ultimately, in terms of the notice of set down dated 25 September 2020, the application for summary judgment was enrolled for hearing on 20 May 2021. In the papers, there is an affidavit by a certain Julie-Anne Pretorius ("Ms Pretorius"), a female attorney in the employ of the Respondent's attorneys, Messrs Hack, Stupel & Ross, which deals with how the notice of set down dated 25 September 2020 was served. In paragraph 2 of the said affidavit, the said Ms Pretorius states that:

- "1. On the 13th of August 2020, our firm's messenger attempted to serve the notice of set down for the 10th of September 2020 on the Defendant's attorney's offices.*
- 2. He was however told to serve the notice of set down by email as the Defendant's attorney was not going into the office and was working from home. The notice of set down was therefore served electronically.*
- 3. Due to the fact that the Defendant's attorney has consented to electronic service, therefore, the notice of set down for 20 May 2021 was served electronically on the 9th of October 2020."*

[4.8] On 20 May 2021 the matter came up for hearing. Both Applicants were in default of appearance after they had been duly served with a notice of set

down. The Respondent's counsel duly applied for summary judgment was duly granted by default in favour of the Respondent on 20 May 2021.

[4.9] On 17 September 2021 the Applicants launched an application for rescission of the summary judgment granted in favour of the Respondent on 20 May 2021. This application for rescission was heard by Madam Justice van der Schyff on 29 August 2023 but was dismissed with costs. The rules of Court do not provide for setting aside of the summary judgment. According to the history of the Rules of Court, the former Cape and Transvaal Courts had rules that provided for the setting aside, in certain circumstances, of summary judgment. Those provisions have, however, now been repealed.

[5] On 31 October 2023, the Applicants launched the current application for leave to appeal. On 29 November 2023, the Respondent gave notice that it would oppose the application. Subsequently, the Respondent delivered its notice in terms of Rule 6(5) of the Rules. In terms of the said notice, there is no condonation application before the court and there is therefore no application for leave to appeal before Court for the following reasons:

[5.1] there is no application for leave to appeal before court; and

[5.2] secondly, the right to apply for leave to appeal has lapsed.

[6] The granting of a summary judgment in the Superior Courts has the effect of a final judgment. The summary judgment is appealable.

- [7] In the application for rescission of the summary judgment, the Applicants had sought rescission on the basis that a notice of set down for 20 May 2021 was not received by it, even though such notice of set down was served electronically. Madam Justice van der Schyff, having referred to the Rules relating to service of Court documents, particularly Rule 4A which corresponds with Rule 44(1)(a) of the Act, found that there was proper service by electronic email of the notice of set down for the 20th of May 2021, on the Applicant.
- [8] Relying on the judgment of this Court in **De Beer v Absa Bank 25071/2012 [2016] ZAPPHC 325**, she found that, where, in a summary judgment application the Defendant had filed an opposing affidavit, the mere fact that the Defendant was not present when the summary judgment application was heard, did not mean that the application was granted in the absence of the Defendant within the meaning of Rule 42. So, the contention by the Appellants in the application for rescission that the summary judgment was granted by default, lacks legal basis.
- [9] In her judgment, Van der Schyff J remarked in paragraph [12] that *“the Respondent also avers that the application for rescission is the wrong procedure”*. Accordingly, the Applicants were warned, at that stage, that it had followed a wrong procedure to attack the granting of the summary judgment.
- [10] Again the Applicant had been warned in the Respondent's affidavit, dated 22 October 2021, in which the Respondent opposed the application for rescission that the rescission application of the summary judgment was not competent. This point of law that the Respondent's counsel raised in his heads of argument was

that the summary judgment was final and thus *res judicata*. Therefore, an application for leave to appeal was required. Therefore, the Applicants were supposed to launch an application for leave to appeal within 15 days after 20 May 2021. Instead, the Applicants proceeded with an application for rescission despite having been warned that an application for rescission of a summary judgment was not competent.

- [11] In terms of the Rules, a summary judgment, being a final judgment, the Applicants required an application for leave to appeal. Rule 49(1)(b) states that:

"49(1)(b) When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within 15 days after the date of the order appealed against Provided further that the Court may, upon good cause, extend the aforementioned period of 15 days."

If a party to launch fails its or her or his application for leave to appeal within the period set out in Rule 49(1)(b) of the Rules, the right to file such leave to appeal lapses, unless the Court grants the applicant an extension.

- [12] It was pointed out by Adv Jacobz, counsel for the Respondent that, *in casu*, the Applicants correctly delivered their application for leave to appeal on 31 October 2023. The said application, which evidently was brought more than 15 days after 20 May 2021, was not accompanied by any application for condonation for its late filing. The last paragraph of the said application for leave to appeal states that:

"Wherefore the Applicants ask that leave to appeal and condonation for the late filing of the application be granted and that costs in the application be costs in the appeal."

- [13] The Applicants asked for condonation for the late filing of the application for leave to appeal without having brought a substantial application for condonation. The right to appeal had lapsed. It can only be revived on application for condonation filed at the same time with the application for leave to appeal. Only once condonation is granted may the leave to appeal be launched. See in this matter ***Myeni v Organisation Undoing Tax Abuse NPC 2021 JDR O 258 (GP)*** where the Court stated as follows in paragraph [26]:

*"The application for leave to appeal in the present matter has lapsed. In order for the application for leave to appeal to be revived, condonation will have to be granted by the SCA. Until such time, there is no application as contemplated by Section 18(5) of the Superior Courts Act, and the electable consequence that Section 18(4) is not competent. We further held the view that, although the landlord** delayed in filing the application for leave to appeal to the SCA is negligible, having read the principal judgment of the court a quo, and the judgment in the application for leave to appeal, the prospects of the appellant succeeding with the condonation application to the SCA are rather slim."*

The principle set out in the above paragraph is that an application for leave to appeal must be launched within the period set out in the Rules of court. Where that has not been done the right to appeal lapses. A party who wishes to revive the lapsed right of appeal must only do so after applying for condonation. The

right of appeal may only be granted after the court has heard and granted the condonation.

- [14] Mr Sibiya, who appeared for the Applicant, contends that after the application for rescission was dismissed on 29 August 2023, on 26 September 2023 the Applicants, through their attorneys, wrote a letter to the Respondent's attorneys and asked for an extension of time within which to launch their application for leave to appeal. On 5 October 2023, the Respondent's attorneys, responded and granted the Applicants an extension of time until 31 October 2023. The application for leave to appeal was served on the Respondent's attorneys on 31 October 2023. The Applicants were surprised when the Respondent indicated its intention to oppose the said application. Mr Sibiya is of the view that where parties have agreed in terms of Rule 27(1) of the Rules, a party that desires to appeal does not need to file an application for condonation. That was incorrect.
- [15] The agreement that the Applicants' attorneys had reached with the Respondent's attorneys did not revive the Applicants' right to appeal. To revive the lapsed right of appeal, the Applicants were required to make a substantial application for condonation. In the absence of such condonation, the lapsed right of appeal may not be revived. As matters stand, there is no application for condonation for the late filing of the application for leave to appeal and as a result there is no application for leave to appeal before this court. I am fortified, in this regard, by what the Court stated in *Panayiotou v Shoprite Checkers (Pty) Ltd and Others* 2016 (3) SA 110 (GJ) where the Court stated as follows:

*"[13] The failure to serve notices of appeal or court records within the prescribed periods is commonplace. The result of such failures is that the appeals lapse and require condonation to revive them. In **Schmidt v Theron & Another 1991 (3) SA 126 (C) at 129H – 130G**, it was held:*

'Rhodie denied that his application for condonation was activated by the present application. He added that he had acted in utmost good faith throughout, that it was never his intention to cause any delay in the pursuance of the appeal and that the first and second respondents were totally blameless, and he personally and unequivocally accepted full responsibility for all that had taken place.

I think it is quite clear from a number of authorities that a failure to comply with the provisions of Rules 5 and 6 of the Appellate Division Rules causes an appeal to lapse. See Vivier v Winter; Bowkett v Winter 1942 AD 25 and 26; Bezuidenhout v Dippenaar 1943 AD 190, United Plant Hire (Pty) Ltd v Hills and Others 1976 (2) SA 697 (D) at 699H, Moraliswani v Mamili 1989 (4) SA 1 (A) at 8B - C.

Indeed Rule of Court 5(4) specifically provides - and I quote from Rule 5(4)bis (b): 'If an appellant has failed to lodge the record within the period prescribed and has not within that period applied to the respondent or his attorney for consent to an extension thereof, and given notice to the Registrar that he has so applied, he shall be deemed to have withdrawn his appeal.'

The appeal having so lapsed, an application for condonation in terms of Appellate Division Rule 13 is required if an appellant who has failed to comply with the Rules wishes to revive or reinstate it. As stated by Kumleben J in the United Plant Hire case supra at 699H, in reference to the two cases to which I have also

referred, viz *Vivier v Winter* and *Bezuidenhout v Dippenaar*: 'Thus, in these two cases it was held:

- (a) that, although not expressly so stated in the former Rules, an appeal lapses on failure to comply with the requirements of either the former Rules relating to the lodging of copies of the record or security for the costs of an appeal;
- (b) that an appellant may nevertheless apply for condonation in terms of the former Rule 12 even after an appeal has lapsed (strictly speaking in such a case it may be more accurate for an appellant to apply for condonation of non-compliance with a particular Rule and for enrolment or reinstatement of the appeal).'

'I emphasize the word 'reinstatement'. And in the *Moraliswani v Mamili* case *supra* Grosskopf JA, referring to the cases that I have cited above, and adding to them also the cases of *Waikiwi Shipping Co Ltd v Thomas Barlow & Sons (Natal) Ltd* **1981 (1) SA 1040** (A) at 1049B - C and *S v Adonis* **1982 (4) SA 901** (A) at 907F - G which both deal with the related subject of an appellant's failure to file the record in time, said:

'Indeed, there is strong authority for the proposition that failure to comply with Rule 6 causes an appeal to lapse and that condonation by this Court is needed to revive it.'

I emphasize again the words 'needed to revive'.

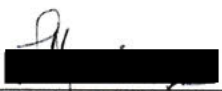
The position therefore is that in the present case the appeal has lapsed. No condonation in terms of the Appellate Division Rule 13 has been granted and

accordingly the order made by this Court on 22 October 1990 is no longer suspended in terms of Supreme Court Rule 49(11). (See ***Herf v Germani* 1978 (1) SA 440 (T) at 449G.**) Appellant is therefore entitled to the order sought in prayer 1(a) and (b) of the notice of motion. It is the type of order envisaged by the Appellate Division in *Vivier v Winter* (supra at 26)."

Therefore, there is no application for leave to appeal which this Court must determine. The Applicant's application is therefore defective and stands to be dismissed, with costs.

[16] Accordingly, I make the following order:

[1]. **The application for leave to appeal is hereby dismissed, with costs.**



PM MABUSE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the Applicants:

Mr. Sibiya

Instructed by:

KBT Incorporated

c/o Serabele NL Attorneys

On behalf of the Respondent:

Adv. A Jacobz

40024/18

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JUDGMENT

Instructed by:

Hack, Stupel & Ross

Date heard:

12 September 2024

Date of Judgment:

26 September 2024