



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: NO.	
(2) OF INTEREST TO OTHER JUDGES: NO.	
(3) REVISED.	
2025-01-20	
<u>DATE</u>	<u>SIGNATURE</u>

Case Number: 31562/2018

In the matter between:

ABSA BANK LIMITED

Applicant

and

MAROTEX (PTY) LTD (IN BUSINESS RESCUE)

First Respondent

THE COMMISSIONER OF THE SOUTH AFRICAN

REVENUE SERVICES

Second Respondent

NATALIE SMIT

Third Respondent

CITY OF TSHWANE LOCAL AUTHORITY

Fourth Respondent

THE BODY CORPORATE OF HARMONY VILLAGE

Fifth Respondent

WERNER CAWOOD

Sixth Respondent

JC BEER

Seventh Respondent

LN NDZIBA N.O.

Eighth Respondent

MM NDZIBA

Ninth Respondent

LN NDZIBA

Tenth Respondent

JAN JACOB VAN ZYL DE VILLIERS N.O.**(previous BRP)**

Eleventh Respondent

THE COMPANIES AND INTELLECTUAL PROPERTY**COMMISSION**

Twelfth Respondent

DL HARDING

Thirteenth Respondent

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 20 January 2025.

(previous BRP)**JUDGMENT****THE COMPANIES AND INTELLECTUAL PROPERTY****COMMISSION****POTTERILL J****Introduction**

[1] The applicant, ABSA Bank Ltd [ABSA], is seeking leave to bring this application against the First Respondent, Marotex (Pty) Ltd [Marotex]. Furthermore, that the resolution whereby Marotex adopted business rescue proceedings, and the business rescue proceedings of Marotex be set aside. An order is also sought that the business rescue plan adopted in the business rescue of Marotex be set aside and that Marotex be placed in final winding-up.

[2] No heads of argument were filed on behalf of any of the respondents, but at the hearing there was representation for the eighth, ninth and tenth respondents. The representative was permitted to argue on the law; i.e. *res iudicata* and whether the appeal lodged against the judgment of Teffo J had lapsed.

Background facts

[3] On 24 May 2016 ABSA had brought an application seeking an order that the business rescue proceedings of Marotex be set aside and be converted into a winding-up order. My sister Hughes J dismissed the application, but ordered the removal of the then joint business rescue practitioners [Case number 31562/2018].

[4] On 21 May 2018 under case number 31562/2018 ABSA brought an application [the main application] again seeking to set aside Marotex's adopted business rescue plan and a final winding-up order of Marotex. Marotex filed a notice in terms of Rule 30(2)(b) giving notice to ABSA to withdraw the enrolment of this application. The cause of complaint was that the application for liquidation constituted an irregular step in that the matter was *res iudicata*. ABSA did not withdraw the application. Condonation was also sought for the late filing of a Rule 30 application contemplated in terms of Rule 30(2) on the grounds that the matter is *res iudicata*. Marotex did not file an opposing affidavit to the liquidation application.

[5] Teffo J delivered a judgment on 5 June 2020 and ordered as follows:

"1. The application in terms of Rule 30 is dismissed.

2. The opposing respondents are ordered to pay the costs of the application.

3. The main application is postponed *sine die*.

4. The opposing respondents are ordered to file their answering affidavits to the main application as well as an affidavit, if any, in response to the allegations made in the report of the new BRP's report and the applicant's supplementary founding affidavit within 15 days of this order.
5. The applicant is ordered to file its replying affidavit within 15 days of the service of the opposing respondents' answering affidavit and their responses to the report of the BRP to it.
6. The matter can then be enrolled for hearing."

[6] Pertaining to *res iudicata* the Court found as follows:

"[20] Having regard to the legal principles, I conclude that the issue of *res iudicata* is a merits issue. It can only be raised as a substantial defence and not as an irregular step under Rule 30(1). It is a matter of substance and not form as it does not emanate from the use of the Rules of Court. A substantive application purporting to be under Rule 30, is in my view, not a competent method of raising the special defence of *res iudicata*."

[7] The application before me flows from the Rule 30(2)(b) notice of Marotex that the matter was *res iudicata* as the appeal against Teffo J's judgment was still pending and that the setting down of the main application to be heard was an irregular step.

[6] Pertaining to *res iudicata* the Court found as follows:

Has the appeal lapsed?

[8] Due to Marotex seeking leave to appeal but not enrolling the application, ABSA set down the application for leave to appeal. On 25 August 2021 leave to appeal was granted. A notice of appeal was uploaded to Caselines on 15 March 2022, with the Appeals Registrar invited on Caselines on 23 May 2022 under case number A31562/18.

[7] The application before me flows from the Rule 30(2)(b) notice of Marotex that the matter was *res iudicata* as the appeal against Teffo J's judgment was still pending and that the setting down of the main application to be heard was an irregular step.

[9] On 6 June 2022 the attorney for Marotex filed an affidavit in terms of Uniform Rule 49(7)(a)(ii) wherein he explained that in terms of this Rule Marotex is proceeding to apply for a date for the appeal to be heard despite the copies of the record not being filed. The attorney's associate did not make head way in obtaining the record and he then took over and discovered that the matter was presided over by two justices other than Teffo J. He on 11 May 2022 requested the transcribed records on an urgent basis. He made full payment for the transcription on 21 May 2022. He made follow-ups on 26 May and 30 May 2022. A date application form was uploaded onto Caselines. On 9 June 2022 the Registrar posts the following on Caselines: "Kindly upload NOTICE OF APPEAL in Word format." Marotex did not upload the document in Word as requested.

[10] In terms of Rule 49 the date to upload the notice of appeal for the hearing of the appeal was 21 September 2021. If one accepts that the attorney for Marotex was unaware of the uploaded judgment in the application for leave to appeal and was only aware of it on 15 March 2022 then Marotex had to apply for a date by no later than 1 June 2022.

[11] No further steps were taken. ABSA's attorneys on 18 May 2022 wrote a letter to the attorneys of Marotex enquiring whether they would be complying with the Registrar's request. The response of 18 May 2022 was that it was unaware of the note of the Registrar, but would make an enquiry.

[12] On 6 June 2023 the attorney for ABSA followed up again as to the status of the appeal and was informed that the attorney has not received the record, but is following up with the transcribers.

Argument on behalf of ABSA

[13] No further steps were taken. ABSA's attorneys on 18 May 2022 wrote a letter to the attorneys of Marotex enquiring whether they would be complying with the Registrar's request. The response of 18 May 2022 was that it was unaware of the note of the Registrar, but would make an enquiry.

[13] On behalf of ABSA it was argued that the appeal had in fact lapsed on 21 September 2021. The record before Teffo J does not consist of evidence; it was an opposed motion and thus consists of only the filed papers and argument. A record can accordingly be compiled by Marotex. As the appeal had lapsed, there is no suspension of the court order dismissing Marotex's Rule 30 application and the liquidation application should be entertained.

Argument on behalf of Marotex

[14] On behalf of Marotex it was submitted that no record is forthcoming and it may be lost. Without the record the appeal can simply not proceed. The Gauteng Transcribers have simply not provided the record and enrolling the main application is an irregular step.

Decision on whether the appeal has lapsed

[15] It is common cause that the application for leave to appeal was granted to a Full Court on 25 August 2021. On the date of this hearing no court date has been obtained by Marotex; 31 October 2024. Even if this Court accepts that the attorney apparently only received the judgment on the application for leave to appeal on 15 March 2022 then in terms of Rule 49(6)(a) Marotex had to apply for an appeal date within 60 days. In terms of Rule 49(7)(a)(ii) Marotex filed an affidavit on 6 June 2022 that it was applying for a date without the record and that condonation would be sought at the hearing for the late filing of the record. On 9 June 2022 a date application is uploaded, but not in Word format as requested by the Registrar. There is accordingly no application for a date before the Registrar of Appeals; i.e. non-compliance with Rule 49(6)(a).

[16] As for the record, because there is no affidavit from Marotex, excepting the Rule 49(6)(a) and the averments in the Rule 30(2), there are simply no facts set out as to what has transpired pertaining to the obtaining of the record between 30 May 2022 and the date of this hearing. The averment in the Rule 30(2)(b) notice is that numerous

requests have been made, but the Gauteng Transcribers have failed to do so. I disregard the submission from the bar that the record of proceedings before Teffo J is lost.

[17] I find it disturbing that no action has been taken by Marotex to prosecute this appeal. The fact that the record cannot be obtained in an opposed motion is not the death of the appeal. An affidavit could have been filed with the record compiled with the papers before Teffo J and condonation could be sought to proceed on those papers alone. There is no *viva voce* evidence that the Full Court has to have regard to. The Full Court will be in a position to entertain the appeal.

[18] No affidavit with facts is before me as to what the attorney on behalf of Marotex did between 30 May 2022 and October 2024. This leads to the conclusion that for more than two years this appeal has not been actively prosecuted.

[19] I find that the appeal has lapsed. This leads thereto that Teffo J's judgment and order stands and is not suspended. I cannot usurp the orders of Teffo's judgment and entertain the main application. I do remark *obiter* that I agree that *res iudicata* cannot be raised procedurally; only substantively. However, Teffo J's order afforded Marotex 15 days to file an answering affidavit to the main application as well as an affidavit, if any, in response to the allegations made in the report of the new BRPs' report and ABSA's supplementary founding affidavit. ABSA was afforded 15 days to serve a replying affidavit to Marotex's affidavit. These orders, because the appeal has lapsed, stands.

[20] As for costs. The history of this matter reflects that liquidation is sought due to the business rescue not coming to fruition. I do not express my opinion on the merits of the main application as the matter according to Teffo J's order is not yet ripe for hearing. I do however remark, as in the other matter I presided over, that the law is not a game and waiting two years to prosecute an appeal to avoid the main application

from proceeding is frowned upon. Secondly, no heads of argument were filed and thirdly no facts were under oath placed before me as to what further steps were taken to prosecute the appeal. The 8th, 9th and 10th respondents must carry the costs.

[21] I accordingly order as follows:

1. The respondents are ordered to comply with order 4 of Teffo J's judgment within 15 days of the date of this order i.e. file an answering affidavit to the main application on the merits.
2. The applicant is ordered to comply with order 5 of Teffo J's judgment.
3. If the respondents do not file an answering affidavit within 15 days, the applicant may set down the main application as is, or supplemented.
4. The eighth, ninth and tenth respondents are to pay the costs jointly and severally on scale A.

[21] I accordingly order as follows:

S. POTTERILL
JUDGE OF THE HIGH COURT

1. The respondents are ordered to comply with order 4 of Teffo J's judgment within 15 days of the date of this order i.e. file an answering affidavit to the main application on the merits.
2. The applicant is ordered to comply with order 5 of Teffo J's judgment.
3. If the respondents do not file an answering affidavit within 15 days, the applicant may set down the main application as is, or supplemented.
4. The eighth, ninth and tenth respondents are to pay the costs jointly and severally on scale A.

S. POTTERILL

CASE NO: 31562/2018

HEARD ON: 31 October 2024

FOR THE APPLICANT: ADV. M.P. VAN DER MERWE SC

INSTRUCTED BY: Tim du Toit & Co Inc.

FOR THE 8TH, 9TH AND 10TH RESPONDENTS: ADV. M. NDZIBA

INSTRUCTED BY: GM Tjiane Attorneys Inc.

CASE NO: 31562/2018

DATE OF JUDGMENT: 20 January 2025

HEARD ON: 31 October 2024

FOR THE APPLICANT: ADV. M.P. VAN DER MERWE SC

INSTRUCTED BY: Tim du Toit & Co Inc.

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DATE OF JUDGMENT: 20 January 2025