

SOUTH AFRICA / JUDGMENT

Harrys Tyres (Pty) Limited v Symes and Others (CIV APP FB10/2023) [2024] ZANWHC 75 (13 March 2024) [2024] ZANWHC 75

COURT

North West High Court, Mafikeng

BEFORE

Hendricks JP, Petersen J, Mfenyana J

CASE / FILE NUMBER

CIV APP FB 10/2023

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IN

THE NORTH WEST HIGH COURT, MAFIKENG

HIGH

COURT

CASE

NO: CIV APP FB 10/2023

In

the matter between:

HARRY'S
TYRES (PTY) LIMITED
Appellant
And
SYMES
N.O MARYNA ESTELLE
First Respondent
MEDUPE
N.O TSHEPO
Second Respondent
MOOLLAJIE
N.O ABDURUMAN
Third Respondent

CORAM: HENDRICKS JP et PETERSEN J, MFENYANA J
DATE
OF HEARING
: 16 FEBRAURY 2024
DATE
OF JUDGMENT
: 13 MARCH 2024
FOR

THE APPELLANT /
DEFENDANT : ADV. VOSTER SC
FOR

THE RESPONDENT/
PLAINTIFF : ADV. PRETORIUS

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10h00am on 13 March 2024.

ORDER

Consequently, the following order is made:

- (i) Condonation for the late filing and prosecution of the appeal is refused.
- (ii) The appeal has lapsed.
- (iii) The re-instatement of the appeal is refused.
- (iv) The appellant [Harry's] is ordered to pay the costs of the appeal on a party-and-party basis, to be taxed; which includes the costs of the application for leave to appeal in the court a quo, as well as the costs of the application for leave to appeal in the SCA; and the costs of the application that served before Reid J. Such costs to include the costs consequent upon the employment of Senior Counsel (SC).

HENDRICKS JP

Introduction

- [1] The respondents as plaintiffs instituted an action as joint liquidators of Over-All Road Express (in liquidation) - ("ORE") claiming the setting aside of seven (7) dispositions made in favour of the appellant [Harry's] (defendant in the court a quo) totalling an amount of R1 074 169.14, which was made shortly before ORE placed itself under voluntary liquidation. On 16 September 2021 the court a quo (per Djaje J as she then was) acceded to the request of the respondents (plaintiffs) and ordered that the seven (7) dispositions be set aside, and that the appellant (as defendant) pay the costs of suit.

- [2] Aggrieved by the judgment and order of the court a quo, Harry's lodged an application for leave to appeal, which was dismissed with costs on 23 February 2022. Harry's approached the Supreme Court of Appeal (SCA) with an application for special leave to appeal. On 30 May 2022 the SCA granted leave to appeal to the Full Court of this Division. The cost order of the court a quo in dismissing the application for leave to appeal was set aside and it was further ordered that the cost of the application for leave to appeal in the SCA and in the court a quo, shall be costs in the appeal. If the appellant Harry's did not proceed with the appeal, the appellant was to pay these costs.
- [3] Harry's as appellant filed a 'Notice of Appeal' on 24 June 2022, which was also served on the respondents on even date. The respondents consequently launched an application on 28 July 2023 for a declarator that the appellant's appeal had lapsed. Judgment was handed down on 15 September 2023 by Reid J who ordered that the:

"... appeal [Harry's] to the full court has lapsed ex lege in terms of Uniform Rule 49(6)(a); ... the respondent's application

for condonation on the reinstatement of the appeal in terms of Rule 49(6) and 49(7) is to be considered by the court of appeal to be constituted by a full court; and "the applicants are ordered to pay the costs of the application".

- [4] On 10 November 2023 the respondents sought leave to appeal the cost order of 15 September 2023, which leave was granted by Reid J on 22 January 2024 to the Full Court for adjudication with this appeal. This constituted the cross-appeal. The appellant/applicant now applies to this Full Court for condonation for the late prosecution of the appeal and for the reinstatement of the appeal. This application is opposed by the respondents.
- [5] Insofar as condonation is concerned, it is not for the mere asking. An applicant must explain in detail the cause of the delay for the entire period.

See: *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A).

Van Wyk v Unitas Hospital and Another (CCT 12/07) [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) (6 December 2007)

Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Limited and Others (CCT106/16) [2017] ZACC 15; 2017 (7) BCLR 916 (CC); 2017 (5) SA 9 (CC) (23 May 2017).

- [6] The appeal record had to be filed by 10 October 2022, but was only filed on 21 June 2023, more than two (2) years after Djaje J's judgment on 16 September 2021. One must look at the explanation proffered for this inordinately long delay. To this end, Harry's attorney of record Mr. Pienaar, deposed to an affidavit on 15 December 2022. In the said affidavit, it is stated, inter alia, that the cause of the delay was because of the Registrar of this Court delaying the obtaining of the transcription of the evidence tendered. This is not entirely correct. It is the task and duty of the attorney to ensure compliance with the prescripts of the Rules of Court. Only one request was directed by Harry's correspondent attorney to the Registrar before 10

October 2022, which was made on 28 June 2022.

- [7] Furthermore, only two enquiries were made by Pienaar with the correspondent attorney on 16 August 2022 and 02 September 2022 respectively, regarding the transcription of the evidence tendered in the court a quo. This, in the words of counsel for the respondents, was wholly inept. I am in full agreement with this contention.
- [8] There is no explanation as to what steps were taken between 28 June 2022 and 15 August 2022 to procure the transcription of the evidence from the Registrar. Further, no evidence is proffered by Pienaar setting out the steps taken, either by him or the correspondent attorney, to obtain the transcription of the evidence from the Registrar for the periods between 17 August 2022 until 1 September 2022, and from 3 September until 24 October 2022 and 26 October 2022 until 3 November 2022.
- [9] Harry's, through Pienaar has not heeded the warning of the SCA that: "A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out."

See: *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) at paragraph [6]).

- [10] In the absence of any cogent explanation, it can be accepted that nothing was done by Harry's attorneys of record and the correspondent attorney during the aforesaid time periods; clearly showing a lack of diligence and culpable remissness on their part. Pienaar and the correspondent remained supine during the relevant time. The director of Harry's also does not depose to an affidavit setting forth any enquiries Harry's itself may have made with its attorneys on the status and prosecution of the appeal. It is trite that even Harry's cannot hide behind the remissness of its attorneys.
- [11] Pienaar apportions blame on the correspondent attorney for not diligently dealing with the follow-up on the transcription of the evidence tendered in the court a quo. However, this cannot exonerate him from liability. Nothing prevented him from making the necessary inquiries himself from the Office of the Registrar.
- [12] It remains unexplained why Pienaar did not take charge of the situation. Pienaar cannot avoid the negligence of the correspondent who is the attorney's chosen agent for whose conduct Pienaar, as principal, was responsible. Pienaar cannot escape his own negligence and supine attitude and remissness which is clearly evident in this matter.
- [13] In *SA Express Ltd v Bagport (Pty) Ltd* 2020 (5) SA 404 (SCA) the prosecution of the appeal was beset by numerous delays for which the appellant's attorney attempted to lay the blame at the door of his correspondent. The court was of the view that the attorney had himself appointed the correspondent and could not escape the consequences of his agents' negligence. The primary obligation to produce a proper record and file it timeously lay with

him. It must furthermore have been clear to him from an early stage that his correspondent was as out of his depth as he was, yet he continued to rely on the correspondent's advice. The attorney's negligence lay in the fact that he did not acquaint himself with the Rules of the court; did not have even the most rudimentary understanding of what had to be done; relied on the correspondent who also proved himself to be unqualified to do the work; and steadfastly failed or refused, until it was too late, to engage the services of people who knew what to do and could do the job. The conclusion was inescapable that the attorney was grossly negligent throughout. The attorneys' explanation was not reasonable and all that it did was to establish his negligence. The SCA found that the present case was the type of case in which condonation should be refused irrespective of the prospects of success and irrespective of the fact that the blame lay solely with the attorney: the breaches of the rules had been flagrant and continual.

- [14] To make matters worse for Harry's, the correspondent attorney, who is blamed by Pienaar has not even deposed to an affidavit explaining the delay and his negligence. Pienaar's affidavit is devoid of a satisfactory explanation for the delay in prosecuting Harry's appeal. Pienaar did not even request the liquidators' attorneys for an extension of time in respect of the prosecution of the appeal and the filing of the appeal record.
- [15] In addition, the application for condonation has also not been brought without delay. The need for condonation was present in the mind of Pienaar since 7 November 2022, yet the application was only brought on 9 January 2023. No explanation is proffered for this delay.
- [16] Harry's delay in diligently and properly prosecuting its appeal results in prejudice to the liquidators' and body of creditors', not only financially but also their interest in the finality of the judgment, which could not be executed upon. There must be finality in litigation. Harry's delay has clearly prejudiced the liquidators and body of creditors' rights and interest in the judgment and the finality thereof.

See: *Miles Plant Hire (Pty) Ltd v Commissioner for the South African Revenue Service* 2015 JDR 1023 (SCA) at paragraphs [23] and [24]).

Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie 1969 (3) SA 360 (A) at 363A;

Cairns' Executors v. Gaam 1912 AD 1 81 at 193;

Meinjies v H D Combrinck (Edms) Bpk 1961 (1) SA 262 (A) at 264A;

Kgobane and Another v Minister of Justice 1969 (3) SA 365 (A) at 369E;

Mbutuma v Xhosa Development Corporation Ltd 1978 (1) SA 681 (A) at 686F-687A;

Ferreira v Ntshingila 1990 (4) SA 271 (A) at 281 1).

[17] The authorities are clear that in cases of flagrant breaches of the Rules, especially where there is no acceptable or satisfactory explanation advanced therefore, as in casu, it is unnecessary for the court to assess the prospects of success and condonation should not be granted, whatever the merits of the appeal might be. This applies even where the blame lies solely with the attorney.

See: P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A) at 799D-E;

Rennie v Kamby Farms (Pty) Ltd 1989 (2) SA 124 (A) at 131 H-132A;

Ferreira v Ntshingila 1990 (4) SA 271 (A) at 281J-282A;

Tshivhase Royal Council and Another v Tshivhase and Another: Tshivhase and Another v Tshivhase and Another [1992] ZASCA 185; 1992 (4) SA 852 (A) at 859E-F;

Blumenthal and Another v Thompson NO and Another [1993] ZASCA 190; 1994 (2) SA 118 (A) at 1211-122B;

Darries v Sheriff, Magistrate's Court, Wynberg and Another 1998 (3) SA 34 (SCA) at 41 D;

AYMAC CC v Widgerow 2009 (6) SA 433 (W) at 451J-452G). It should be remembered that the prospects of success itself is never conclusive in applications of this sort.

Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein, and Others 1985 (4) SA 773 (A) at 789C).

[18] Lastly, in applications such as this, the affidavit should set forth briefly and succinctly such essential information as may enable the court to assess the prospects of success. This was not done in the present case, rendering the application defective.

See: Rennie v Kamby Farms (Pty) Ltd 1989 (2) SA 124 (A) at 131 E-F;

Darries v Sheriff, Magistrate Court Wynberg and Another 1998 (3) SA 34 (SCA) at 41 B-C;

Mulaudzi v Old Mutual Life Assurance co (South Africa) Ltd and Others 2017

(6) SA 90 (SCA) paras [25] and [26]).

[19] The paucity of the explanation and the failure to account for the full period of all the delays renders the application wholly unworthy of consideration. Similarly in this case, the extent of the delays demonstrates that Harry's is not serious in pursuing the appeal. The information adduced is so scant to consider the present application for reinstatement and condonation. The extent of the delay is unacceptably excessive. Coupled with this is the fact that the complete failure by Harry's to explain the delay, has resulted in there being no need to consider the prospects of success. There has been an inordinate delay since the appeal was noted on 24 June 2022, with the upshot that the appeal record was only filed a year later, resulting in a 20-month delay since noting the appeal to date. The attempt to explain the delay is wholly inadequate if regard is had to what is required by the case law.

[20] In a Full Court judgment in this Division, Quantibuild (Proprietary) Limited vs Ngaka Modiri Molema District Municipality, CIV APP FB 12/2019, delivered on 08 December 2022, the deeming provisions in terms of Rule 49 (6)(a) are dealt with comprehensively.

I deem it prudent to quote paragraph [17] to [20] insofar as the deemed lapsing of the appeal is concerned.

“[17] In terms of Rule 49(6)(a) if written application to the Registrar for the hearing of the appeal is not timeously made, the appeal “shall be deemed to have lapsed”. This begs the question how the deeming provision in Rule 49(6)(a) is to be interpreted. In Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd t/a Crown River Safari 2018

(4) SA 206 (SCA) at paragraphs [29] to [34], Navsa JA, writing for the Court, provides a useful exposition on how deeming provisions in legislation has been and is to be interpreted, where he stated as follows:

“[29] At the outset it is necessary to have regard to how deeming provisions in legislation, have been dealt with in case law and by commentators. Bennion Statutory Interpretation 3 ed 1997 says the following about deeming provisions at 735:

‘Deeming provisions in Acts often deem things to be what they are not. In construing a deeming provision it is necessary to bear in mind the legislative purpose.’ (My underlining.)

The first sentence of the quote is demonstrated by the facts in Mouton v Boland Bank Ltd 2001 (3) SA 877 (SCA). In that case the court was dealing with a deeming provision contained in the Close Corporations Act 69 of 1984, relating to the reregistration of a close corporation. The deeming provision there in question read as follows:

‘The Registrar shall give notice of the restoration of the registration of a corporation in the Gazette, and as from the date of such notice the corporation shall continue to exist and be deemed to have continued in existence as from the date of deregistration as if it were not deregistered.’ (Emphasis added.)

That provision deemed something to be what in fact was not so, namely, that the close corporation was never deregistered.

[30] An exposition of types of deeming provisions and how they should be construed is to be found in the decision of this court in S v Rosenthal 1980 (1) SA 65 (A). Trollip JA said the following at 75G-H:

‘The words “shall be deemed” (“word geag” in the signed, Afrikaans text) are a familiar and useful expression often used in legislation in order to predicate that a certain subject-matter, eg a person, thing, situation, or matter, shall be regarded or accepted for the purposes of the statute in question as being of a particular, specified kind whether or not the subject-matter is ordinarily of that kind. The expression has no technical connotation. Its precise meaning, and especially its effect, must be ascertained from its context and the ordinary canons of construction.’

[31] The court in Rosenthal went on to explain:

‘Some of the usual meanings and effect deeming provisions can have are the following. That which is deemed shall be regarded or accepted (i) as being exhaustive of the subject-matter in question and thus excluding what would or might otherwise have been included therein but for the deeming, or (ii) in contradistinction thereto, as being merely supplementary, ie, extending and not curtailing what the subject-matter includes, or (iii) as being conclusive or irrebuttable, or (iv) contrarily, thereto as being merely prima facie or rebuttable. I should add that, in the absence of any indication in the statute to the contrary, a deeming that is exhaustive is also usually conclusive, and one which is merely prima facie or rebuttable is likely to be supplementary and not exhaustive.’

...

[33] The court in Rosenthal, at 76B-77A, had regard to *R v Haffejee & another* 10945 AD 345, ... At 352-353, Watermeyer CJ, in considering the meaning and effect of deeming provisions, with reference to English case law, said the following:

‘It is difficult to extract any principle from these cases, except the well-known one that the Court must examine the aim, scope and object of the legislative enactment in order to determine the sense of its provisions...

[34] From what is set out above, it follows that a deeming provision must always be construed contextually and in relation to the legislative purpose...”

(my emphasis)

[18] Of importance to note is that there is no application before this Court by the respondent seeking a declaratory order that the appeal has lapsed. This is despite the fact that the respondent knew as far back as 17 May 2022, when it was served with the notice of set down, that there was non-compliance with Rule 7(2), 49(13)(a) and 49(7)(d) of the Uniform Rules of Court.

[19] In *Genesis One Lighting (Pty) v Bradley Lloyd Jamieson and Others* (3212/2019) [2021] ZAGPJHC 862 (23 July 2021), the central issue in the matter was whether the respondents’ appeal had lapsed.

At paragraphs [33] to [38], Gilbert AJ provides a useful exposition in this regard where the following is said:

[33] Rule 49(6)(a) expressly provides that if written application to the Registrar for the hearing of the appeal is not timeously made, the appeal “shall be deemed to have lapsed”. Accordingly, the consequence of a failure to comply with rule 49(6)(a) is a deemed lapsing of the appeal. Should there be a dispute about this, then the court can be approached for the appropriate declaratory relief as to whether the appeal has lapsed or not.

[34] In contrast, as pointed out by the respondents, non-compliance with rule 49(7)(a) relating to the filing and furnishing of an appeal record does not contain a similar provision that there is a deemed lapsing of the appeal. Rather, rule 49(7)(d) provides that:

“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.”

[35] Although rule 49(7)(d) does not refer to the “appeal” as lapsed but rather “the application” as lapsed, the application referred to is the application for a date for the hearing of the appeal in terms of rule 49(6)(a), the lapsing of which would have the effect as the appeal itself having lapsed.

[36] One interpretation of rule 49(7) is that upon a failure of a party to timeously file and furnish the record, the appeal lapses, as is the position with non-compliance with rule 49(6)(a). If this is correct, then the court when approached under rule 49(7) would be confirming that the appeal has lapsed.

[37] An alternate interpretation of rule 49(7) is that if the appellant fails to file or furnish the record, the appeal is not deemed to have lapsed (in contrast to rule 46(6)(a)) but the court can then be approached for an order to effectively decide whether the

appeal has lapsed rather than confirming what would already have been a deemed lapsing of the appeal. This would enable the court to take into account a variety of factors in deciding whether to grant an order that the appeal has lapsed.

[38] One of those factors may be whether by the time the application in terms of rule 49(7)(d) is heard there is a compliant appeal record

and the appellant has launched an application for the appeal court to consider in due course as envisaged in rule 49(7)(a)(ii)

condoning its failure to have timeously filed and furnished that record. Rule 49(7)(a)(ii) expressly provides that an appellant

who fails to timeously file and furnish the record can apply for condonation for the omission. The condonation application will be considered by the appeal court at the hearing of the appeal. Rule 49(7)(c) further provides that the Registrar after delivery of the copies of the record shall assign a date for the hearing of the appeal or for the application for condonation and appeal, as the case may be. It is clear that it is for the appeal court to consider the condonation application. Accordingly, a court faced with an application in terms of rule 49(7)(d) for an order that the appeal has lapsed may decline to an order that the appeal has lapsed provided that there is an application for condonation that will serve before the appeal court in course.

(my emphasis)

[20] Having regard to the approach to be adopted when dealing with a deeming provision as espoused in *Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd* and the useful exposition in *Genesis One Lighting (Pty) v Bradley Lloyd Jamieson and Others*, the alternate interpretation of Rule 49(7) that if the appellant fails to file or furnish the record, the appeal is not deemed to have lapsed (in contrast to Rule 46(6)(a)), but the court can then be approached for an order to effectively decide whether the appeal has lapsed, rather than confirming what would already have been a deemed lapsing of the appeal is to be preferred. This would enable the court to take into account a variety of factors in deciding whether to grant an order that the appeal has lapsed.”

[21] The judgment and order in *Quantibuild* preceded the application before Reid J, and the court per Reid J was duty bound to follow *Quantibuild* based on the principle of stare decisis. The order by Reid J that the appeal is deemed to have lapsed ex lege in terms of Rule 49(6)(a) is indeed correct, albeit in the wrong forum and it is therefore a nullity. The rationale of the respondents seeking such an order before a single judge, whilst an appeal is pending, is questionable. Particularly, when the deeming provision kicks in ex lege. It is not for a single judge in an application such as this to pronounce on an appeal that must serve before a Full Court consisting of three (3) judges. That Reid J must have been aware that the condonation application as well as the application for the reinstatement of the appeal, ought to be dealt with by the Full Court,

is evident from the second paragraph of the order granted, which reads:

“The respondent’s application for condonation on the reinstatement of the appeal in terms of Rule 49 (6) and Rule 49 (7) is to be considered by the Court of Appeal to be constituted by a full court” [sic].

[22] The application before Reid J was therefore an exercise in futility. Reid J ought not to have entertained the application and should simply have removed it from the roll, perhaps with a directive that it be dealt with by the Full Court in line with paragraph 2 of the order which was handed down. To this end, the judgment of Reid J is quoted extensively on this aspect and it reads thus:

“[6] My understanding of the applicants’ case is that a declaratory order is sought to the effect that the appeal has lapsed, whilst acknowledging that the full court which will hear the appeal, will decide whether to condone the non-compliances of the Uniform Rules before determination of the appeal.”

“[19] The parties are ad idem that the notice of the appeal has lapsed ex lege in terms of Rule 49(6)(a).

[20] The respondent, who is the appellant in the appeal, has filed two (2) applications for condonation, namely:

20.1. for the late filing of the power of attorney as required by Rule 7

(2) with an application that the appeal be reinstated in terms of Rule 49(6)(b); and

20.2. the appellant has filed an application for condonation to reinstate the appeal in terms of Rule 49(7)(a)(ii).

[23] Rule 49(6)(b) in its express wording specifies which court should deal with the application for the reinstatement of appeal. There cannot be any ambiguity that the court of appeal, which will be the full bank [sic] that will be constituted to hear the appeal, is the correct court to deal with the condonation applications. The meaning of the words "The court to which the appeal is made may, on application of the appellant... and upon good cause shown, reinstate an appeal which has lapsed does not leave room for any other interpretation.

[24] Rule 49(6) expressly determines an appeal to have become lapsed ex lege but with the proviso that condonation can be granted by the court that hears the appeal and the appeal can then be reinstated.

[27] The wording of Uniform Rule 49(7) echoes that of Uniform Rule 49(6) and it clearly specifies that it is the court "that is to hear the appeal" is the court to hear the application for condonation for failure to comply with the Uniform Rules. This will be the full bank [sic] court of appeal constituted to hear the appeal.

[28] The above Rules and case-law underscores that it is a well-established practice that the court that hears the appeal, is the court that considers the condonation applications on the reinstatement of the appeal.

[33] The application seems to me to be an exercise in futility, on the following basis:

33.1 A declaratory order that the respondent's application for a date for the hearing of its appeal, dated 15 August 2022, is declared

to have lapsed pursuant to Uniform Rule 49(7)(d) of the Uniform Rules of Court, is a position ex lege and not in dispute between the parties; and

33.2 A declaratory order that the respondent's appeal to the full court has lapsed in terms of Uniform Rule 49(6)(a), cannot be granted

since the court of appeal will consider the applications for condonation and reinstatement of appeal.

[34] On this basis, I respectfully hold the view that this application has no legal basis and should be dismissed.

[23] There is also the cross-appeal relating to the costs order by Reid J. In her judgment under the heading "costs", the following is stated:

"[35] The normal order is that the successful party is entitled to its costs.

[36] However, this application is unique in that the respondent agrees that the appeal has lapsed ex lege in terms of Rule 49(6) and the applicants order in that regard can be granted.

- [37] It is further unique in that the applicants concede that, irrespective of the order that this court makes, the appellant would remain entitled to set down the appeal for the applications for condonation and reinstatement of the appeal is to be heard by the court that hears the appeal.
- [38] On the basis of the above, I regard this as a situation where a deviation of the normal standard rule in adjudication of costs would be justified.
- [39] The application should not have been brought as it lacks legal substance. As such, the applicants should be ordered to pay the costs of the respondent.”
- [24] Paragraph [36] of the judgment of Reid J clearly indicates that Harry’s (as the respondent) agrees that the appeal has lapsed ex lege in terms of Rule 49(6) and that the applicants order in the regard can be granted. Reid J nevertheless granted a cost order against the respondents (as applicants before her) on the basis that “the application should not have been brought as it lacks legal substance”. This is in contradiction to the pronouncement that the appeal to the Full Court had lapsed ex lege in terms of Uniform Rule 49(6)(a), which in the submissions on behalf of the respondents, indicate that they were substantially successful. That being the case, so it was further submitted, they are entitled to be awarded the costs in their favour. At worst, it should have been ordered that each party should pay its own costs. This Court should therefore interfere with this cost order.
- [25] Insofar as the costs of the appeal are concerned, it should follow the result and be awarded in favour of the successful litigants, the respondents, on a party-and-party basis, to be taxed. This should include the costs of the application for leave to appeal in the court a quo as well as the SCA. Furthermore, the costs order in the application that served before Reid J must be set aside and granted in favour of the respondents (the liquidators). Because of the importance of this case to the parties, and the magnitude thereof, the employment of Senior Counsel (SC) was indeed

warranted.

Order

[26] Consequently, the following order is made:

(ii) The appeal has lapsed.

(iii) The reinstatement of the appeal is refused.

(iv) The appellant [Harry’s] is ordered to pay the costs of the appeal on a party-and-party basis, to be taxed; which include the costs of the application for leave to appeal in the court a quo, as well as the costs of the application for leave to appeal in the SCA; and the costs of the application that served before Reid J. Such costs to include the costs consequent upon the employment of Senior Counsel (SC).

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA,

NORTH WEST DIVISION, MAHIKENG

I agree.

A.H PETERSEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

S MFENYANA

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