

SOUTH AFRICA / JUDGMENT

Qiniseka Solutions CC v Shaicon Tendering Service (Pty) Ltd and Another (72572/2017) [2021] ZAGPPHC 851 (1 December 2021)

[2021] ZAGPPHC 851

COURT

North Gauteng High Court, Pretoria

BEFORE

Matsemela

CASE / FILE NUMBER

72572/2017

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER: 72572/2017

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED.

DATE:

2/12/2021

In

the matter between

QINISEKA

SOLUTIONS

CC

Plaintiff

and

SHAICON

TENDERING SERVICE (PTY) LTD

First Defendant

GODFREY

THAPELO

SHAI

Second Defendant

JUDGEMENT**MATSEMELA AJ**

- [1] The Court proceedings were scheduled and set down by this Court's Appeals Registrar[1] subsequent to the Defendants having filed a Notice of Appeal[2]. This matter was set down for 15 October 2021. The Notice of Appeal was in regard to the judgement this Court handed down on 20 May 2021[3].
- [2] Defendants' Notice of Appeal was served on the Plaintiff on 11 June 2021[4]. Notice of Intention to Oppose was served on the Defendants' attorneys on 17 June 2021. Since then the Plaintiff refused and did nothing to prosecute the matter further until the Registrar intervened and set the matter down. On 21 September 2021, the Appeals Registrar emailed both parties' legal representatives and indicated that the application for leave to appeal has been uploaded, and will be adjudicated[5] on the 15 October 2021. The correct email addresses of both parties were utilized.
- [3] On 11 October 2021, Heads of Argument were uploaded onto Caselines by Plaintiff's counsel, to which platform the Defendants' attorneys has had access since the trial proceedings. On 12 October 2021, an email was sent by Plaintiffs attorneys to Defendants' attorneys, indicating that the proceedings would be adjudicated on 15 October 2021, and that physical service at Defendants' attorneys' offices was impossible[6]. The Notice of Set Down[7] was served on another firm.

PROCEEDINGS ON 15 OCTOBER 2021:**Application for postponement**

- [4] The Defendants' counsel brought an application for the postponement of the proceedings, citing that the Defendants had insufficient time within which to prepare. Counsel for the Defendant argued that the period from 21 September 2021 to 15 October 2021 was insufficient for the Defendant to prepare for the matter and file Heads of Argument. I

agree with Counsel for the Plaintiff when he argued that it is the Defendant who initiated the appeal proceedings as far back as the 11 June 2011. The Defendants cannot initiate the Appeal proceedings, refuse to prosecute the matter further even when requested by the Plaintiff and allege that they did not have enough time to prepare. I then refused the application for postponement and stood the matter down to allow the Counsel for the Defendant to prepare.

Arguments on the application.

[5] When we resumed the proceedings the Defendants' counsel brought certain argument in respect of the appeal. Counsel for the Plaintiff objected that, these aspects were not canvassed in the Notice of Appeal. The Court agreed with Counsel for the Plaintiff and refused to entertain them. Counsel for the Plaintiff raised the following technical issues which were also raised in its heads of argument:

5.1. That an Application for Leave to Appeal ought to have been instituted within 15 days from the date of judgment, and that the Notice of Appeal was filed out of time. The Plaintiff indicated the issue in his letter Plaintiff's letter dated 17 June 2021 addressed to the Defendants.

5.2. No condonation application was instituted, despite Plaintiff having warned Defendants about the lateness and requesting an application for condonation.

[6] Due to the aforementioned being raised essentially as points in limine, the Defendants in reply again requested for a postponement of the proceedings, in order to rectify these shortcomings.

THE LAW

[7] Application for Leave to Appeal ought to be instituted within 15 days from the date of judgment. Rule 49 of the Uniform Court Rules is clear about the fact that an application for leave to appeal must

precede a Notice of Appeal. Section 17(2) (e) of the Superior Courts Act state that an application for leave to appeal can be either granted or refused. In this case Notice of Appeal was filed out of time. It is also common cause that no condonation application was instituted.

[8] In *Atholl Developments (Pty) Ltd v Valuation Appeal Board for the City of Johannesburg* 2015 JDR 0674 (SCA), the court of Appeal although for different reasons, says the following in paragraph 11

[9] As the appeal is directed at the reasons as opposed to the substantive order of the court below, there is no proper appeal before us.[8] It must follow that the appeal must be struck off the roll.

[10] The principle discussed above, is also applicable here. The proceedings were set down for the 15 October 2021 by the registrar. This was due to the fact that notice of appeal and notice to oppose having been filed the Defendants did nothing to prosecute the matter further. The appeals registrar was compelled to set the matter down so that it can be adjudicated and brought to finality.

[11] The Defendants attempted to proceed with the application to appeal on 15 October 2021, thus clearly demonstrating their intention

to proceed with a futile process. The Defendants ought to have withdrawn the Notice of Appeal, but failed to do so.

[12] Having said that I therefore come to the conclusion that there was no application for appeal before me. If no such application for

leave to appeal was before this Court on 15 October 2021, and no granting or refusing was possible.

[13] I agree with counsel for the Plaintiff when he argues that there cannot be an application for postponement because there was no application for leave to Appeal before the Court. I therefore come to the conclusion that the proceedings which are before this Court (not being application for leave to appeal) cannot be postponed, as it would result in incorrect procedure.

[14] The defective Notice of Appeal is the only document serving before this Court and therefore, ought to be struck out.

COST OF 15 OCTOBER 2021

[15] On 17 June 2021, the Plaintiff's attorney addressed a letter to the Defendants' attorney indicating that:

- (a) the notice of appeal was defective, in that the notice of appeal was late
- (b) that the grounds in the Notice of Appeal stand to fail.
- (c) Punitive costs ie de bonis propriis would be requested for the severely abortive process that was filed[9].

[16] Notice of intention to oppose was served on the Defendants' attorneys on 17 June

2021. A letter from Plaintiff's attorney was addressed to the Registrar of this Court on 9 July 2021, setting out that the notice to appeal was served, that it was opposed and that no further communication was forthcoming about the hearing thereof[10].

[17] On the 15 October 2021 there were court proceedings and physical appearances as both parties were duly represented on the day. This is albeit in respect of a defective notice of appeal. There was also a warning about a de bonis propriis order that will be sought in the letter of 17 June 2021alternatively against the Defendants on a punitive scale.

[18] It is my view that, as this Court strikes out the notice of appeal, punitive costs should be awarded against the Defendants' legal attorney, Mr Mashele, due to the hopelessly defective notice of appeal, and having been warned about such defects timeously.

[19] The Plaintiff has been dragged to Court in respect of a fatally flawed Notice of Appeal, which defects the Plaintiff pointed out to the Defendants. The Plaintiff ought not be out of pocket for the conduct and litigation brought about by the Defendants.

I therefore make the following Order

- (i) The matter is struck from the roll

(ii) Punitive costs are awarded against the Defendant the said costs to be paid de bonis propriis by Mr Mashele

MOLEFE MATSEMELA

Acting Judge of the Gauteng Division of the

High Court, Pretoria

Delivered: 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 e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 1 December 2021.

Date of hearing: 15 OCTOBER 2021

Date of Judgment: 1 December 2021

For the Plaintiff Adv Keijser

Instructed by

EW Serfontein and Associates

For the Defendant Mr Mashele

Instructed by

Mashele Attorneys

[1] Caselines 00001-32

[2] Caselines 00001-2

[3] Caselines 00001-1

[4] Caselines 00001-5

[5] Caselines 00001-1

[6] Caselines 00001-27

[7] Caselines 00001-25

[8] Rule 49(4) of the Uniform Rules of Court reads: 'Every notice of appeal and cross - appeal shall state.- (a) what part of the judgment or order is appealed against; and (b) the particular respect in which the variation of judgment or order is sought.'

[9] Caselines 00001-36

[10] Caselines 00001-27

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2021/851.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/qiniseka-solutions-cc-v-shaicon-tendering-service-pty-ltd-and-others-unknown-topic-agpphc-2021>

Prepared on 13 October 2026 · Esheria