

SOUTH AFRICA / JUDGMENT

Western Reefs Primary School v Erasmus Jooste Inc (CIV APP FB 19/2023) [2025] ZANWHC 39 (21 February 2025) [2025] ZANWHC 39

COURT

North West High Court, Mafikeng

BEFORE

Petersen, Reid, Mfenyana

CASE / FILE NUMBER

CIV APP FB 19/2023

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
CASE NUMBER: CIV APP
FB 19/2023
CASE NO: KP530/2018

Reportable:

YES/NO
Circulate
to Judges: YES/NO
Circulate
to Magistrates: YES/NO
Circulate
to Regional Magistrates: YES/NO
In the matter between:-
In
re: Declaratory Application
WESTERN
REEFS PRIMARY SCHOOL
Applicant
in convention
and
ERASMUS
JOOSTE INC
Respondent
in convention
In
re: Reinstatement counter application

ERASMUS
JOOSTE INC
Applicant
in convention
and
WESTERN
REEFS PRIMARY SCHOO
Respondent
in convention
In
re: Appeal
ERASMUS
JOOSTE INC
Appellant
and
WESTERN
REEFS PRIMARY SCHOOL
Respondent
CORAM: Petersen J, Reid J
et Mfenyana J
Date of

hearing: 3 AUGUST 2024
Date

of judgment: 21 FEBRUARY 2025
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 applicant/appellant [Erasmus Jooste Attorneys] is ordered to pay the costs of the appeal on a party-and-party basis on Scale C,
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
the
application for leave to appeal; and the costs of the application that served before Gura J. Such costs to include the costs consequent upon the employment of Senior Counsel (SC).

JUDGMENT

FMM REID J

Introduction:

[1] This appeal lies against an order of this Court dated 13 May 2021, issued under the hand of Gura J in which the claim of Erasmus Jooste Inc against Western Reefs Primary School in the amount of R837,894.76 was struck (the order). The claim is for legal services delivered. Attached to the simple summons were multiple taxed invoices. On the basis that the invoices were

taxed, it constituted liquid documents. Application for a summary judgment was instituted, which application was opposed by Western Reefs Primary School.

[2] Three (3) matters serve before this Court of appeal:

2.1. A declaratory application to declare that the appeal has lapsed. Western Reefs Primary School is the applicant in convention and Erasmus Jooste Inc is the respondent in convention;

2.2. A counter application for the reinstatement of the appeal. Erasmus Jooste Inc is the applicant in reconvention and Western Reefs Primary School is the respondent in reconvention.

2.3. The appeal in which Erasmus Jooste Inc is the appellant and Western Reefs Primary School is the respondent.

[3] For ease of reading, I will refer to Erasmus Jooste Inc Attorneys as “Erasmus Jooste”. In turn, I will refer to Western Reefs Primary School as “Western Reefs”. Adv Pistor SC with Adv Kruger appear on behalf of Erasmus Jooste. Adv D Hewitt appears on behalf of Western Reefs.

[4] This appeal behoooves a two-pronged approach, and this Court is to determine: (a) the reinstatement of the appeal, and

(b) should the appeal be reinstated, the merits of the appeal itself.

[5] It is trite that the abovementioned two processes must be heard simultaneously. The applicant must have the appeal successfully reinstated by means of a condonation application, whereafter the parties will present their respective cases on appeal. The Full Court of this Division has set the principle that both the condonation application for reinstatement and the appeal are to be heard together. See: *Harry's Tyres (Pty) Limited v Symes NO and others* 2024 JDR 1082 (NWM).

- [6] The order was made on the basis that Gura J came to a factual finding that certain documents as requested by Western Reefs during the discovery process exist. On 13 May 2020, Erasmus Jooste was consequently ordered to produce those documents in terms of Rule 35 of the High Court Rules (the Rules). The order reads as follows:

“The Respondent (-Erasmus Jooste-) is hereby ordered to answer and comply with the applicant’s notices in terms of Rule 35(12) and Rule 35(14) within 10 days from the date hereof.”

- [7] I will refer to this order as “the discovery order”.
- [8] Failing discovery of the documents, Western Reefs launched an application to strike the claim of Erasmus Jooste. On 13 May 2021 Gura J proceeded to strike the claim of Erasmus Jooste.
- [9] The notice of intention to appeal against the judgment was filed on 14 October 2021. The application for leave to appeal was opposed by Western Reefs. Leave to appeal to the Full Court was

granted by Hendricks JP on 21 April 2023. The notice of appeal was filed on 15 May 2023.

- [10] In the absence of any further steps taken in pursuance of the appeal, the appeal is deemed to have lapsed on 10 August 2023 in terms of Rule 49(6)(a).
- [11] On 27 October 2023 Western Reefs delivered an application seeking a declaratory order that the appeal had lapsed. This application was opposed by Erasmus Jooste and a counter application was launched, seeking the reinstatement of the appeal, and that the appeal be upheld. This is the application and counter application before this Court.
- [12] It bears mentioning that no application for leave to appeal has been lodged against the discovery order of Gura J dated 13 May 2020. That order remains in effect.

Issues

to be determined

- [13] The following issues are before this Court:

13.1. The reinstatement of the appeal.

13.2. Should the appeal be reinstated, the merits thereof.

- [14] The crux of the reinstatement of the appeal, would turn on the question whether the explanation given by Erasmus Jooste would muster “good cause” as stipulated in Rule 49(6)(b).
- [15] At the heart of the appeal (should it be reinstated) lies the question, whether the documents and the answers that Erasmus Jooste provided to Western Reefs in relation to the documents, is sufficient for due compliance with the discovery order.

Arguments and legal position

[16] Rule 49(6) deals with the lapsing and possible reinstatement of an appeal and provides that:

“(a) Within 60 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 10 days after the expiry of the said period of 60 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.

(b) The court to which the appeal is made may, on application of the appellant or cross-appellant, and upon good cause shown, reinstate an appeal or cross-appeal which has lapsed.”

[17] Adv Pistor SC argues for Erasmus Jooste that the appeal should be reinstated, and that good cause has been shown by Erasmus Jooste to condone the late filing of the appeal.

[18] The term “good cause” has been established to mean that the party who shows good cause:

18.1. Has a reasonable explanation for the delay; and

18.2. Has prospects of success in the main proceedings.

[19] Adv Pistor SC argues that there are two explanations for the delay in pursuing the appeal, namely:

19.1. After the leave to appeal was granted, a letter was written to obtain the record of the argument before Gura J, but the computer “crashed”, leading to the understanding that the record could not be reconstructed.

19.2. In January 2024, Senior Counsel advised that it was not necessary to have the argument that was presented in court transcribed. Upon receiving this advice, Erasmus Jooste proceeded with steps to have the appeal enrolled.

[20] On 25 March 2024 the Registrar allocated a date for the appeal to be heard.

Reinstatement of the appeal

[21] Consideration of the reinstatement of an appeal deemed to be lapsed is at the discretion of the appeal court. The appeal court will typically weigh several factors, including:

21.1. The length of the delay: A shorter delay with a reasonable explanation is more likely to result in reinstatement than a long and unexplained delay. In casu Erasmus Jooste must provide a reasonable explanation for the delay from 14 October 2021 (the date of the filing notice of intention to appeal) and 15 May 2023, being the date of the filing of the appeal.

21.2. The reasons for the delay: A plausible and well-supported explanation (such as technical or administrative issues) can mitigate the impact of the delay.

The explanation proffered by Erasmus Jooste is essentially that they labored under the impression that a transcribed recording of the argument before Gura J was necessary to be included in the record and only became aware that it need not be, after being advised to that effect by Senior Counsel.

21.3. Prospects of success in the merits of the case: The court will assess the strength of the appellant's case and the potential for success on appeal. Adv Pistor SC argues that the court order will have a permanent effect on Erasmus Jooste and refers to the school's continued indebtedness to Erasmus Jooste. He argues that the school does not deny receiving services from Erasmus Jooste, but that the amount is disputed. The argument is that, if this Court declares the appeal lapsed, this Court will close the doors of the court to Erasmus Jooste on a claim of which the merits are positively captured in liquid documents, but the quantum remains disputed.

21.4. In addition to the abovementioned, the potential for prejudice to the other party is also to be considered: If the respondent is significantly disadvantaged by the reinstatement, the appeal may be dismissed. It is argued that Western Reefs will suffer financial prejudice should the appeal be reinstated, as well as prolonged litigation and the lack of legal certainty.

[22] In the matter of Ngaka Modiri Molema District Municipality v Quantibuild (Proprietary) Limited (CIV APP FB12/2022; 3352/2019)

[2024] ZANWHC 101 (12 April 2024) the following was held by the Full Court of this Division:

[10] The Municipality contended that the appeal, although deemed to have lapsed in terms of Rule 49(6)(a), should not be declared to have lapsed. This Court is implored to condone the non-compliance with the Rules of Court, which is premised solely on the lack of diligence and negligence on the part of the attorneys of the Municipality, for its failure to comply with the requirements for the timeous prosecution of the appeal, to put up security for costs, to file a power of attorney, and to file a completely compliant record of appeal. Furthermore, in the event that this Court pronounces that the appeal has lapsed, then in that regard, the Municipality contends that this Court should grant an order reinstating the appeal.

...

[19] An appeal that has lapsed (or deemed to have lapsed) can be resurrected via a

successful application for condonation and re-enrolment. It is trite that insofar as condonation is concerned, that the test for

determining whether condonation should be granted or refused is the interests of justice. In *Turnbull-Jackson v Hibiscus Court Municipality and Others* 2014

- (6) SA 592 (CC) at paragraph 23 the Constitutional Court referred to certain “factors” which the Court seized with adjudicating an application for condonation should consider. The following was stated in this regard by the Constitutional Court:

“Factors that the Court weighs in that enquiry include: the length of the delay; the explanation for, or cause of the delay; the prospects of success for the party seeking condonation; the importance of the issues that the matter raises; the prejudice to the other party or parties; and the effect of the delay on the administration of justice. It should be noted that although the existence of prospects of success in favour of the party seeking condonation is not decisive, it is a weighty factor in favour of granting condonation.”

(See *Brummer v Gorfil Brothers Investment (Pty) Ltd and Others* [2000] ZACC 3; 2000

- (2) SA 837 (CC) at para 3 read with *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008

- (2) SA 472 (CC) at para 20).

- [20] The Constitutional Court in *Turnbull-Jackson* at paragraph 26 re-affirmed the trite principle that (within limits):

“Courts are reluctant to penalise litigants for the tardiness of their legal representatives. I do not read this Court’s pronouncement in Ferris to say that this long-standing principle no longer avails. It is more a question of what the facts of a given case dictate. Courts have made it clear though that in a fitting case the fault of a legal representative will be imputed to the litigant. In the oft-cited decision in Saloojee the Appellate Division said:

“There is a limit beyond which a litigant cannot escape the results of his attorney’s lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. ... The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship.”

- [21] It is trite that “good cause” must be shown to exist on the merits of the matter for the requisite

condonation to be granted.

See: *Melane v Santam Insurance Co Ltd* 1962

- (4) SA 531 (A).

Madinda v Minister of Safety and Security [2008] ZASCA 34; 2008

- (4) SA 312 (SCA).”

- [23] In *P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) the Appellate Division (as it was then known) emphasised that, in certain instances, condonation ought not to be granted irrespective of what the prospects of success are.
- [24] This Court is to exercise its judicial discretion in determining whether the appeal should be reinstated, balancing the interests of justice with the need for finality in litigation.

Analysis

- [25] The disputed documents are individual and detailed invoices specifying the exact nature of the services rendered to Western Reefs. These detailed charges form the basis of the invoices attached to the simple summons and appears to be separate documents in addition to the invoices attached to the summons.
- [26] Adv Pistor SC argues that the strong prospects of success should compensate for a lack of detailed explanation of the delay. He argues that:
- 26.1. The discovery order did not consider all relevant documents.
- 26.2. In the Rule 35(1) notice, general discovery was not addressed.
- 26.3. He stresses that the court should have dealt with the matter as if it was handled in an action procedure, and not as a disciplinary matter. The reference to a disciplinary matter is made due to the allegations of Western Reefs that Erasmus Jooste did not comply with the Rules of the Attorneys Profession if they did not keep a record of the details of the legal services rendered.
- [27] Adv Pistor SC further argues about the proper interpretation of Rule 35(1) and emphasises the significance of Rule 35(11) and Rule 35(14) for document production. He asserts that Erasmus Jooste had complied with the discovery order, but that Western Reefs was not satisfied with the documents thus provided.
- [28] The discovery order required compliance with Rule
35. Adv Pistor SC argues that the documents, or information provided by Erasmus Jooste, does comply with a proper interpretation of the discovery order. Adv Pistor SC further argues that Western Reefs should have been satisfied with the documents provided as that was the only documents that Erasmus Jooste has at its disposal.
- [29] In analysis of whether good cause has been shown to reinstate the appeal, this Court considers that the litigant, Erasmus Jooste, is a firm of attorneys. The litigant is not a lay person who is completely dependent of, and subject to, advice from its legal team.

- [30] The delay in consulting senior counsel for 10 months is another key issue. The argument that the documents do not exist was not raised initially, and Gura J made a finding that this point came up only as an afterthought in the striking-out application. Moreover, Erasmus Jooste did not appeal the first judgment made by Gura J (the discovery order), nor did they file an affidavit at the time. The appeal was only initiated on 10 August 2023, but by then, the appeal had already lapsed.
- [31] The date the appeal is deemed to have lapsed is 10 August 2023. Only then did Erasmus Jooste institute an application for condonation and reinstatement of the appeal. The total time to be considered in the condonation application, is 26 weeks. The cardinal question is: Was the misunderstanding that the argument before Gura J had to be transcribed, a justifiable misunderstanding for a law firm?
- [32] A counter application was filed on 10 April 2024, but it was devoid of any explanation for the delay, or application for condonation. This filing occurred 6 months after the relevant time frame. Erasmus Jooste also provided a weak explanation for the delay in the appeal, as well as for reinstating the declaratory application. According to Rule 49(6)(a), the appeal had lapsed, and the court should consider this delay of 6 months.
- [33] The only explanation provided was that Erasmus Jooste was under the wrong impression as to what was to form part of the appeal record. Adv Hewitt argues that the explanation is not a reasonable explanation, or a justifiable misunderstanding, in consideration thereof that Erasmus Jooste is a firm of attorneys which ought to be aware of which documents should be contained in an appeal record. I agree. This is not a sufficient explanation. Considering this, I hold the view that the reinstatement should be dismissed.
- [34] This Court is mindful that the striking of a claim is a draconian step. It closes the door to a litigant and the claim cannot be resuscitated. Striking is only to be resorted to where the striking is justified in the circumstances of the matter. The disputed documents, be it they in existence or not, are documents that the attorneys' firm had to keep in relation to accounting for their fees to their client. In addition, taxed invoices are liquid documents, and a query of the charges had to be raised at the Taxing Master.
- [35] An attorney is obliged to keep a careful record of its accounting to its client. Gura J found that if Erasmus Jooste complied with its responsibilities, one of the obligations being accounting, then the documents do factually exist. Gura J quoted the rule of the Law Society, in coming to the factual conclusion that the documents do exist.
- [36] Erasmus Jooste claims that they have complied with the discovery order and that they discovered all the documents that they have. They are essentially saying that the documents that are requested, do not exist.

Findings

- [37] In my view, the establishment of good cause would have to consider that Erasmus Jooste is an attorneys' firm and should have known better than to be under the impression that the court record of the legal argument needs to be transcribed. Since the claim is more than R800,000.00, one would expect the attorneys' firm to be pro-active and drive the appeal. The first question is: Would justice be executed in closing the doors of court to Erasmus Jooste on this claim, based on their negligence in filing a record?
- [38] Justice is a double-edged sword. Inasmuch as Erasmus Jooste may have made a mistake and stand to possibly lose R800,000.00, Western Reefs is entitled to legal certainty.
- [39] The summons was issued on 30 November 2018. The litigation between the parties, up to now, includes numerous interlocutory applications that range from Rule 30 applications to declaratory order applications. After a period of more than 4 years, and a substantive amount of money paid for the litigation, this matter calls for legal certainty to be reached.
- [40] In as far as Erasmus Jooste stand to lose R800,000.00, the dispute arose from the specified claims, on documents that are to be kept, as required by the Legal Practice Law Society. They could not produce the documents in terms of Rule 35(12) and Rule 35(14) to substantiate their claim. Their lackadaisical approach in this litigation process cannot be ignored. The fact remains that Erasmus Jooste is an attorneys' firm and should have known better. The sorrow for their misfortune sprouts from their own inaction.
- [41] Based on the above, I find that Erasmus Jooste failed to establish good cause to have the appeal reinstated. The appeal has lapsed ex lege and Western Reefs is entitled to a declaratory order to that effect.

[42] The reinstatement of the appeal is consequently refused.

Costs

- [43] The trite principle in litigation is that costs follow the result. The successful party is entitled to its costs.
- [44] The legal arguments in this matter involve the interpretation and application of complex legal principles. The extent of factual evidence contained in the 3 applications before this Court are voluminous and entails an excess of 2,000 pages. In my view, the use of senior counsel is justified.
- [45] I find no reason to deviate from these established principles in relation to costs, and Erasmus Jooste should pay the costs of Western Reefs.

Order

[46] Consequently, the following order is made:

- (i) Condonation for the late filing and prosecution of the appeal is refused.

(iv) The appellant [Erasmus Jooste Inc Attorneys] is ordered to pay the costs of the appeal on a party-and-party basis on Scale C, 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; and the costs of the application that served before Gura J. Such costs to include the costs consequent upon the employment of Senior Counsel (SC).

FMM REID

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION MAHIKENG

I agree.

AH PETERSEN

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