



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case number: **A220/2017**

In the matter between:

TV MATSEPES N.O.

1st Appellant

OA NOORDMAN N.O.

2nd Appellant

and

THE MASTER OF THE HIGH COURT, BLOEMFONTEIN

P FOURIE N.O.

2nd Respondent

SAREL JOHANNES WESSELS

3rd Respondent

ELIZABETH MARIA VENTER

4th Respondent

CORAM: DAFFUE, J *et* LOUBSER, J *et* POHL, AJ

HEARD ON: 29 JULY 2019

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 29 JULY 2019

- [1] On 19 July 2017 appellants filed their notice of appeal against the judgment and orders of Chesiwe, AJ (as she then was) of 10 February 2017, leave to appeal having been granted.
- [2] Appellants' appeal has lapsed insofar as they failed to prosecute the appeal in terms of the rules of court. Having recognised this, an application for re-instatement of the appeal and condonation for the late filing of the record of appeal was eventually filed on 13 November 2018. At that stage Mr FJ Senekal of Senekal Inc was still acting on behalf of the appellants. Although it was intended that Mr Noordman would be a co-applicant in this application, he failed to properly instruct Mr Senekal as a result of which the application papers had to be re-drafted, the effect being that Mr Matsepe became the only applicant for re-instatement of the appeal. Mr SJ Wessels and Me EM Venter, cited as the third and fourth respondents respectively, oppose this application. They filed answering affidavits on 26 November 2018 to which Mr Matsepe did not reply.
- [3] On 28 November 2018 the appellants set down the appeal for hearing by the full bench. Mr Senekal served and filed the notice of set down on behalf of the two appellants, Messrs TV Matsepe and OA Noordman. Hereafter Mr Senekal withdrew as attorney for appellants. He was substituted by MDP attorneys in respect of Mr Noordman. Mr Matsepe did not appoint another attorney to act on his behalf. For all practical purposes Mr Noordman does not feature in the appeal proceedings notwithstanding the fact that his new attorneys came on record as late as 29 March 2019. He has not applied for re-instatement of the appeal. Mr Matsepe

as the only appellant failed to file heads of argument which should have been done by 2 July 2019. Mr Wessels and Me Venter filed their heads of argument on 10 July 2019.

- [4] On 12 July 2019 the secretary, Me Ronel Matthysen, addressed an e-mail on instructions of Van Zyl, J who at that stage would be the presiding judge in the appeal. The e-mail was sent to all the parties and also to Mr Noordman and his new attorney. The parties were requested to file heads of argument as to why the appeal should not be dismissed in terms of s 16(2)(a)(i) of the Superior Courts Act on the basis that the decision sought would not have any practical effect. Neither Mr Noordman, nor Mr Matsepe filed any heads of argument to deal with the issue or at all, save insofar as Mr Matsepe sent an e-mail on 16 July 2019, stating that his co-liquidator would respond, but that they agreed there was no point in proceeding with the appeal.
- [5] Mr Janse van Rensburg submitted in the heads of argument filed on behalf of Mr Wessels and Me Venter that appellants had been removed as liquidators and that they have no *locus standi* to prosecute the appeal. Furthermore, the court held on 6 June 2019 under case number 4528/2018 that the relevant company, Sebal Beleggings (Pty) Ltd, was not in liquidation since 28 April 2016. Therefore, so he submitted, the appeal had become academic and it should be dismissed with costs, such costs to be paid by the appellants personally on an attorney and client scale.
- [6] The application for re-instatement was enrolled for hearing today, but it has not been moved for. Mr Matsepe, the applicant, stated

unequivocally in writing as mentioned that he did not want to proceed therewith. The application shall therefore be struck from the roll.

[7] It is necessary to emphasise that even if a re-instatement of the appeal was applied for and granted, the appeal was doomed to fail. The decision sought on appeal would have no practical effect for several reasons, to wit:

- (1) appellants sought and obtained an *interim* interdict against the Master of the High Court cited as first respondent in application 567/2017 as well as in this appeal in order to prevent the Master from removing them as liquidators in the estate of Sebal Beleggings pending an application to review and set aside the Master's decision of 20 January 2017 to remove them as liquidators of Sebal Beleggings, which application for an interdict was settled insofar as the Master agreed not to proceed with their removal pending finalisation of the review application – Mr Wessels and Me Venter were not cited as respondents in application 567/2017, but appellants' co-liquidator was cited as second respondent;
- (2) the anticipated review application instituted under case number 5081/2017 was finalised on 20 May 2019 in terms whereof appellants' application to set aside the Master's decision was dismissed with costs – Mr Wessels and Me Venter intervened in the review application contrary to what transpired in application 567/2017;
- (3) on 6 June 2019 Mbhele, J granted a declaratory order on application by Me Venter in terms whereof it was declared that Sebal Beleggings had not been in liquidation since 28 April

2016, the effect hereof being that appellants were not liquidators of Sebal Beleggings when they applied for the *interim* interdict against the Master and review of the Master's decision;

- (4) on 10 February 2017 Chesiwe, AJ granted relief on an urgent basis in application 567/2017 to Mr Wessels and Me Venter who relied on rule 6(12)(c) and 6(8) for urgently anticipating the return date on the basis that the *interim* interdict against the Master was granted in their absence – she ordered appellants to obtain written consent from Sebal Beleggings' creditors for the appointment of Matsepe Attorneys to act on their behalf, to supply the liquidators' written mandate to Matsepes to act on their behalf and to obtain the Master's consent for Matsepes to act on behalf of the appellants, but as mentioned *supra*, this application for an interdict has been settled with the Master;
- (5) when Me Venter and Mr Wessels applied for the order on 10 February 2017 they were not even parties to the application and although they intended to obtain consent to intervene, no order was ever granted to that effect in application 567/2017 – rule 6(8) is clear: it stipulates that any party against whom an order was granted ex parte may anticipate the return date – it is common cause that no order was granted against them on 3 February 2017;
- (6) even if appellants would be successful in their appeal, the outcome would have no practical effect: the interdict has been settled and the review application has been finalised.

- [8] The only issue that needs to be considered is the costs of the appeal. Me Venter and Mr Wessels intended to intervene as third and fourth respondents in application 567/2017, but this never materialised. No order was ever granted in that regard. They were cited as such by appellants in the notice of appeal, but notwithstanding that I decided to refer to them by their names herein. It is debatable whether they have any *locus standi* to oppose the appeal and entitled to any costs, either as claimed, or at all.
- [9] In my view Me Venter and Mr Wessels, who were not parties in the interdict application 567/2017 had no right to apply for the orders granted in their favour. Their unprocedural action in flagrant disregard of the rules of court caused Chesiwe, AJ to incorrectly grant orders in their favour. Instead of abandoning the orders, at least at the time when appellants and the Master settled the interdict application, they decided to oppose the appeal and even asked for a punitive costs order. In my view it would be just and equitable to order that each of the parties shall be responsible for their own costs.
- [10] Adv D Hattingh appeared today for the appellants on the instructions of Matsepes Inc. She confirmed that the matter became moot, but submitted that no costs should be awarded against appellants who acted in good faith throughout. Adv F Janse van Rensburg insisted on a costs order in favour of his clients. He submitted that the court should not consider the events leading to the orders granted by Chesiwe, AJ, but concentrate on what transpired thereafter. He argued that

appellants should at best for them not have proceeded with the re-instatement application once the appeal had lapsed. I do not agree. It was the flagrant disregard of the rules of court by Me Venter and Mr Wessels that caused the orders in their favour and eventually triggered the appeal. Both parties are to be blamed for the fact that this matter dragged out over two and a half years.

Orders

[11] Consequently the following orders are made:

1. The application for re-instatement of the appeal is struck from the roll.
2. Each of the parties shall be liable for the payment of their own costs.

J P DAFFUE, J

I concur

P LOUBSER, J

I concur

L POHL, AJ

On behalf of Appellants : Adv D Hattingh
Instructed by : Matsepes Attorneys
BLOEMFONTEIN

On behalf of Respondents : Adv FG Janse van Rensburg
Instructed by : Willers Attorneys
BLOEMFONTEIN