IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT. PRETORIA)

CASE NO: A90/2007
DATE: 2009-02-24

In the matter between

KP SEABI T/A SEABIT & ASSOCIATES Appellant
And

SASFIN BANK LIMITED Respondent

J U D G M E N T

SOUTHWOOD. J: The appellant appealed against a judgment granted 20 against him in the Magistrate's Court and applied for a date for the hearing of the appeal. On 25 August 2008 the Registrar addressed a notice to the attorneys of both parties to advise them that the matter had been enrolled for hearing on 24lh February 2009. The notice states clearly and unambiguously that the attorneys are informed that the appeal has been placed on the roll for hearing on 24 February 2009 and the appellant's attorney was requested to give notice of the set down to the respondent and the Clerk of the Court as required by Rule 50(5).

The appellant's attorney did not give notice of set down to the respondent's attorney in terms of the rule. It also appears that when applying for the allocation of a date for hearing, the appellant failed to deliver the necessary copies of the appeal record to the respondent's attorney. The matter was allocated to two judges and as known to the members of the court the respondent's attorney addressed letters to the appellant and his attorney from 20 January 2009 to 20 February 2009 in 10 connection with the prosecution of the appeal and the hearing of this matter on 24th February 2009. The respondent's attorney requested that the appellant's attorney furnish copies of the record and requested the appellant's heads of argument. Quite clearly the respondent's attorney did not wish to incur wasted costs if the matter was not proceeding.

On 16 February 2009 the presiding judge requested his Registrar to make enquiries from the appellant's attorneys as to whether heads of argument had been filed or not and what the appellant intended to do about filing heads of argument. The relevant letter reads as follows:

"The Presiding Judge, Judge BR Southwood has

requested me to address you as follows:

(1) On 16 February 2009 Judge Southwood requested me to establish whether the appellant in the above matter had filed heads of argument as there were no heads of argument with the record and the respondent had filed heads of argument on 10 February 2009. (The date stamp on the respondent’s heads of argument

indicates that the respondent served its heads of argument on you in February 2009.);

(2) I confirm that on 16 February 2009 at about 09:00 I telephoned you to enquire about the whereabouts of the appellants heads of argument;

(3) I confirm that you advised me as follows:

(i) In August 2008 the Registrar notified you that the appeal had been enrolled for hearing on Tuesday 24 February 2009;

(ii) You have not delivered a notice of set down and the appeal is therefore not on the roll;

(iii) Because the appeal is not on the roll you have not delivered heads of argument;

(iv) You do not intend to file heads of argument for the hearing on 24 February 2009;

(4) I confirm that I shall send a copy of this letter to the respondent's attorney of record."

Neither the appellant nor the appellant's attorney responded to this letter. No heads of argument have been filed for the appellant and there is no appearance for the

appellant today.

The respondent's counsel has appeared and addressed the court on the basis of the correspondence which his attorney addressed to the appellant's attorney between January and February and he has pointed out that despite this correspondence there has been no reaction from the appellant or his attorney. It is also noteworthy that neither the appellant nor his attorney saw fit to indicate to the court in a letter or by means of counsel at this hearing why there would be no compliance with the various requests addressed to the appellant.

Rule 50(5) requires that upon receipt of an application for a date for the hearing the Registrar shall assign a date of hearing and that he should not do so until the provisions of sub-rule 7(a) (b) (c) have been duly complied with. The Registrar must give the applicant written notice of the date of hearing whereupon the applicant must forthwith deliver a notice of set down and, in writing, give notice thereof to the Clerk of the Court from which the appeal emanated. The rule does not stipulate what has to happen if no notice of set down is delivered or what the consequences will be. Mr Ngrini who appears for the respondent has referred to paragraph DC of the practice manual which deals with appeals and points out that the manual makes it clear that an appellant is not entitled to elect whether he will proceed with the appeal on the date allocated by the Registrar. He certainly cannot do this with impunity which is what the appellant apparently thinks in this case.

There is no question of this court disposing of the appeal on the merits. The appropriate order seems to be the order that which is made where an appellant fails

to deliver heads of argument for the hearing of an appeal. In *AC Building Services CC v PB and A Personnel Consultants* 1992 (2) SA 50 (T) the court dealt with such situation and struck the matter from the roll with costs. The learned author of Harms, *Civil Procedure in the Supreme Court* refers to the case with the comment that an appellant's failure to file heads of argument may amount to an abandonment of the appeal and the court may then strike the matter from the roll.

In the present case there is a grey area between what the rule 10 requires and what is said in the practice manual. For present purposes it is not necessary to resolve that. This seems to me to be a case where the matter has been properly enrolled by the Registrar but the enrolment process has not been completed by an appellant who apparently is ignorant of the practice manual, or was ignorant of it until it was drawn to his attention. The appellant's conduct and/or the conduct of his attorney in prosecuting this appeal require censure. It is unacceptable that an appellant obtains a date for the hearing and then ignores the procedures which are necessary to have the matter disposed of on appeal and it is unacceptable and unprofessional for an attorney to not reply to letters 20 addressed to him. Within a fairly short space of time a number of letters relating to the appeal were addressed to him which he seems to have ignored. That is contrary to what is required of an attorney. It is a discourtesy to the court for the matter to be left like this. It is a waste of the court's time. It is a waste of a court and of the time of two judges who could be employed elsewhere. In my view all these factors justify a special costs award even if it was not provided for in the agreement between the parties. Mr Ngrini asks for a costs order on the scale as between attorney and client and in my view that is justified by the circumstances which I have set out in this judgment. I make the

following order:

1. The appeal is struck from the roll;

2. The appellant is ordered to pay the costs of the appeal on the scale as between attorney and client.

MAKGOKA. AJ: I agree

COURTADJOURNS