THE HIGH COURT OF SWAZILAND

JABULANE SIMELANE

Applicant

And

COMMISSIONER OF POLICE et al

Respondents Civil Case No. 755/2000

Coram: S.B. MAPHALALA-J

For the Applicant: MR B. MAPHALALA

For the Respondents: MR. D. V. DLAMIN

(Attached to the Attorney General's Chambers)

JUDGMENT

(03/02/2005)

[1] Serving before court is an application brought under a Certificate of Urgency for an order *inter alia,* that (he appeal filed by the Respondents in this matter be and is hereby discharged as having lapsed or deemed to have been abandoned by the Respondents; directing and compelling the Respondents to comply with the court order issued in this matter on the 6lh July 2004, within seven days hereof; and costs.

[2] The Applicant was a police officer under the Commissioner of the Royal Swaziland Police who dismissed him from the force in November 1997, being aggrieved with this decision he moved an application before this court for an order to *inter alia,* to review and set aside the decision of the 5lh Respondent confirming the decision of the 1st Respondent in dismissing the Applicant from the Royal Swaziland Police as a police officer.

[3] The matter came before Masuku J who delivered his judgment on the 6lh July 2004, in favour of the Applicant where, amongst other things, directed the Respondents to re-instate and/or employ the Applicant as a police officer; set aside the decision of the Respondents dismissing the Applicant from the police service as of no legal force and effect and further directed that Applicant be paid his full salary with effect from November 1992 to date of the said judgment.

[4] On the 6th August 2004, the Respondents being dissatisfied with the judgment by Masuku J filed a notice of appeal.

[5] The case for the Applicant in the present application in that notwithstanding (he lapse of the requisite period as envisaged by the Court of Appeal rules, (he Respondents have failed to prepare the record on appeal and lodge it with the Registrar of the High Court for certification as correct. The Court of Appeal rules provide expressly that if an Appellant fails to submit the record for certification 'within the time provided by the said rules, the appeal shall be deemed to have been abandoned.

[6] The relevant rule being Rule 30 (1) to (4) reads as follows:

30. (1) The Appellant shall prepare !he record on appeal in accordance with sub-rule (5) and

(6) hereof and shall within 2 months of the date of noting of the appeal lodge a copy thereof with the Registrar of the High Court for certification as correct.

(2) if the Registrar of the High Court declines so to certify the record he shall return it to the Appellant for revision and amendment and the Appellant shall rclodge it for certification within 14 days after receipt thereof.

(3) Thereafter the record may not be relodged for certification without the leave of the Chief Juslice or the Judge who presided at the hearing in the court a quo.

(4) Subject to Rule 16(1), if an Appellant fails to note an appeal or to submit or resubmit the record for ccrlificalion within the time provided by this Rule, the appeal shall be deemed to have been abandoned.

[7] The application is opposed by the Respondents as evidenced by the answering affidavit of the Assistant Commissioner Lydia S. Dlamini which advances two possible defences to the application. The first issue raised therein is that the Founding affidavit of the Applicant has not fully addressed the peremptory requirements of Rule 6 (25) (a) and (b), especially the requirements of Rule 6 (25) (b) regarding why he claims he cannot be afforded substantial relief at a hearing in due course. At paragraph 9 it is averred that none of the reasons given by the Applicant in his paragraph 5 render the matter urgent.

[8] The second defence which is more substantial is found in paragraph 2.8 thereof and reads as follows:

"2.8 With regard to the relief sought in prayer 2 of the Notice of Application, I am duly advised and I do verily believe that the Applicant has not given reasons why it should be this Honourable Court which should discharge and or declare the appeal by the Respondents to have been abandoned when the fact of the delay in filing the record with the Registrar is well known to the Applicant's Counsel and the fact that the Respondents are not completely shut out as they may still move an application for condonation for the late filing of the record before the Court of Appeal."

[9] The above defence is further substantiated in paragraphs 5.2, 5.4, 5.5, 5.6 and 5.7 of the said answering affidavit. The essence of which is that "even though it is correct that the failure to prepare and file a record for appeal within the time provided for by the Court of Appeal Rules renders the appeal to be deemed abandoned, an Appellant who wishes to prosecute his/her appeal is not completely shut out. He/she may still approach the court with an application for condonation for the late filing of the record", (as per paragraph 5 - 6)

[10] In argument before me Mr. Maphalala who appeared for the Applicant contended that Rule 30 (1) of the Court of Appeal Rules is peremptory and does not allow for any other construction. He cited a number of South African decided cases including the case of Vivier vs Winter 1942 A.D. 25 at 26 where the Appellate Division in the judgment by De Wet CJ in considering a similar rule being Rule 6 in South Africa. In that case the Appellant had noted an appeal but had failed to furnish security in terms of Rule 7. The Respondents applied to the Appellate Division for an order that "the appeal be discharged with costs". Counsel sought to justify the application and form of relief claimed on the grounds that there was no express provision in Rule (or elsewhere in the rules) that on failure to comply with its requirements an appeal would lapse and that it was always open for an Appellant to apply for

condonation under former Rule 12. Thus, so it was argued, it was necessary to apply for the order sought. This contention was rejected. The court (per De Wet CJ) held that:

"Though ihe rules do not say specifically that on failure to comply with the provision of Rule 6 the appeal would lapse, it is clear that this is implied ..."

"There was therefore no necessity for the Applicants to come to this court and there will be no application before us".

[11] Mr. Maphalala furlhcr referred me to the case of United Plant Hire (Ply) Ltd vs Hills and others 1976 (2) S.A. 697 which embraced what was said in Vivier vs Winter (supra) and also what was said in Bezuidenhout vs Dippenaar 1943 A.I). 190. hi Ihe latter case an Appellant was similarly remiss in not complying with the security requirements of former Rule 7 and had in addition failed to file copies of the record limeously in terms of former Rule 6. The Appellant applied for various forms of relief, inter alia, that he be given leave to sue in forma pauperis and that the time for entering into security be extended. The court held that condonation could be granted if the merits of the case justified but, following Vivier vs Winter (supra) observed that:

"When the present petition was filed the appeal had already lapsed, as the Applicant had failed to enter into security in terms of Ride 7 for the Respondent's costs of appeal within the prescribed period of three months".

[12] Counsel for the Applicant further cited the case of Court vs Standard Bank of S.A. Ltd; Court vs Bester N.O. and others 1995 (3) S.A. 123 which dealt extensively with the factors to be considered in

an application for condonation in order to revive a lapsed appeal; i.e. prospects of success, the Respondent's interest in the finality of the judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice (per Holmes JA in Federated Employers Fire & General Insurance Co. Ltd and another vs Mckenzie 1969 (3) S.A. 360 (1) at 362 F - G) .

[13] Mr. Dlamini for the Respondents advanced per contra arguments. A number of defences have been put forth. Firstly, (he Respondents avers that the matter is not urgent in that the Applicant's Founding affidavit does not fully address the requirements of Rule 6 (25) (a) and (b) of the Rules of court. Heads no. 2 and 3 thereof expands on this argument. To this end the court was referred to the cases of Humphrey H. Hemvood vs Maloma Colliery and another Case No. 1623/93 (per Dunn J); H P. Enterprises (Pty) Ltd vs Nedbank (Swaziland) Ltd, Case No. 788/99 (per Sap ire CJ) and the case of Megalith Holdings vs RMS Tibiyo (Pty) Ltd and another (Pty) Ltd and another, Case No. 199/2000 (per Masuku J).

[14] The second submission for the Respondents is that they are alive to the fact that the time for the filing of the record on appeal has come and gone and that they are now constrained to seek an order condoning the non-compliance with the rules of the Court of Appeal. To buttress this argument the court was referred to the South African case of H.B. Farming Estate (Pty) Ltd and another vs Legal and General Assurance Society Ltd, 1981 (3) S.A. 129 at 134 B - C.

'[15] The thrust of this argument mentioned immediately above is that even if their appeal can be said to have lapsed, it can still be revived on application before the Court of Appeal in accordance with the provisions of Rule 17 of the Court of Appeal Rules.

[16] Rule 17 of the Court of Appeal Rules (hereof provides that: "The Court of Appeal may on application and with sufficient cause shown, excuse any party from compliance with any of these rules and may give directions in matters of practice and procedure as it considers just and expedient".

[17] To support this position Counsel for (he Respondents cited the case of Schmidt vs Theron and another, 1991 (3) S.A. 126 at 727 (A - F) which is an authority dealing with the lapsing of an appeal and the ability on application to revive such lapsed appeal.

[18] It is the Respondents further contention that fundamental fairness and justice requires that the Respondents be given an opportunity to be heard on appeal so that the Court of Appeal may have the occasion to look at the record and the application for condonation and make an order as it seems just. Further that the need for an early application for condonation for non-compliance applies a fortiori where the non-compliance is of long standing. In the instant case, the non-compliance is only for a period of two months and it is submitted that is not too long a lime. For this proposition the court was referred to the case of Commissioner of Inland Revenue vs Burger 1956 (4) S.A. 446.

[19] The above are the questions for determination in the present application and I shall address them ad seriatim as they appear in Respondents Heads of Argument. Before doing that I wish to mention en passant that it is common cause between the parties that the time limits as required by the relevant rules of the Court of Appeal for the filing of the record on appeal has come and gone and this has been conceded by the Respondents in argument and also on affidavit.

[20] On the issue of urgency it appears to me that it would merely be for academic purposes to address this matter further. The point of urgency was argued together 'with the merits and the court reserved judgment on all the issues. The fact of the matter is that the matter was enrolled as an urgent matter on the 24,h December 2004, where the merits were dealt with. A ruling either way at this juncture does not advance this case. In any event, on my assessment of the averments contained in the Founding affidavit I am of the considered view that the requirements of Rule 6 (25) (a) and (b) have been met in casu.

[21] The appeal having so lapsed, an application for condonation is terms of Rule 17 of the High Court Rules is required if an Appellant who has failed to comply with the rules wishes to revive or reinstate it. As stated by Kumlcben J in the United Plant Hire case (supra) at 699 II, in reference to the two cases cited by Counsel for the Applicant viz Vivier vs Winter and Bezuinhout vs Dippenaar:

"Thus, in these two cases it was held:

a) That, although not expressly so stated in the former Rules, an appeal lapses on failure to comply with the requirements of either the former Rules relating to the lodging of copies of the record or security for the costs of an appeal;

b) That an Appellant may nevertheless apply for condonation in terms of the former Rule 12 even after an appeal has lapsed (strictly speaking in such a case it may be more accurate for an Appellant to apply for condonation of non-compliance with a particular Rule and for enrolment or reinstatement of the appeal)".

[22] In the case of Moraliswamini vs Mamili 1989 (4) S.A. 1 (A) at 8 B - C Grosskopf JA referred to Vivier vs Winter (supra) Bezuinhout vs Dippenaar (supra); and added to them also the cases of Waikiwi

Shipping Co. Ltd vs Tliomas Barlow & Sons (Natal) Ltd 1981 (I) S.A. 1040 (A) at 1049 B - C and S vs Adonis 1982 (4) S.A. 901 at 907 F - G which both deal with the related subject of an Appellant's failure to file the record in lime: The learned Judge said;

"Indeed there is strong authority for the proposition that failure to comply with Rule 6 causes an appeal to lapse and that condonation by this court is needed to revive it".

[23] The position therefore is that in the present case the appeal has lapsed and this is common cause. No condonation in terms of Rule 17 has been moved before the Court of Appeal in terms of the Rules. The Respondents in casu it appears are still • contemplating launching the said application for condonation before the Court of Appeal, in terms of the Rules of that court. In the interim, it would appear the Applicant is entitled to the order sought in view of the preremptory nature of the rule as enunciated by the Appellant Division in Vivier vs Winter (supra) when considering a similar Rule in South Africa. In the absence of an application of a stay of execution pending the outcome of the condonation before the Court of Appeal this court is enjoined to accede to the order sought by the Applicant, (see Schmidt vs Theron and another (supra) cited by Mr. Dlamini for the Respondents in his arguments).

[24] Further, in the present case the Respondents have not applied for an extension in terms of Rule 16 (1) of the Appeal Court Rules which provides inter alia, that the Judge President or any Judge of Appeal designated by him may on application extend any time prescribed by these rules.

[25] Rule 16 (2) provides further that an application for extension shall be supported by an affidavit

setting forth good and substantial reasons for the application. Respondent failed to utilize Rule 16 when the prescribed period expired on the 6th October 200-1.

[26] Further the case cited by Mr. Dlamini that of Commissioner of Inland Revenue vs Burger (supra) is not applicable to the facts of this case before the High Court. It might have relevancy before the Court of Appeal when it considers a proper application for condonation for non-compliance. In that court that is where the period of non-compliance will come to the fore and other factors I have mentioned earlier on in this judgment.

[27] In the result, for the afore-going reasons the application is granted in terms of prayer 2, 3 and 6 of the Notice of Motion.

S.B. MAPHALALA

JUDGE