IN THE SUPREME COURT OF SW`AZILAND

Civil Appeal case No: 21/11

In the matter between:

USUTU PULP COMPANY **APPLICANT**

AND

SWAZILAND AGRICULTURAL AND PLANTATION WORKERS UNION **RESPONDENT**

In re:

Swaziland Agricultural And Plantation Workers Union **Appellant**

And

Usutu Pulp Company **Respondent**

Neutral citation: *Usutu Pulp Company v Swaziland Agricultural & Plantation Workers Union (21/11) [2012] SZHC 104 (30 April 2012)*

CORAM: **M.C.B. MAPHALALA, J**

For Applicant Attorney Zweli Jele
For Respondent Attorney Zweli Shabangu

Summary

Civil Procedure – appeal noted out of time- no application to note appeal out of time – no application for extension of prescribed time periods – record on appeal filed out of time – application for condonation not filed timeously – no prospects of success on appeal – application for condonation dismissed – appeal deemed to have been abandoned and is accordingly dismissed.

JUDGMENT
30 APRIL 2012

---

[1] There are two applications in this matter; in the main application, an order is sought declaring that an appeal noted by the respondent on the 29th April 2011 has been abandoned and dismissing the appeal. In the counter – application, the respondent seeks an order granting it leave to apply for condonation for the late filing of its Notice of appeal as well as the late filing of the record of appeal.

[2] In the main application, the applicant alleged that on the 10th February 2011, the High Court upheld an application for review instituted by the applicant against the respondent and the respondent appealed this decision. The appeal was noted by the respondent on the 29th April 2011 against the judgment of the High Court. The applicant argued that the appeal was noted out of time and not within four weeks of the judgment as required by Rule 8 (1); it further argued that the respondent did not seek leave of court for the late filing of the Notice of appeal. The appeal should have been noted on or before 10th March 2011.

[3] Similarly, the applicant argued that the respondent has also failed to file the record of proceedings in accordance with the provisions of Rule 30 which require that the record should be filed within two months of the date of notice of the appeal; the record should have been filed on or before 30th June 2011. It further argued that no condonation for late filing of the record has been sought. The applicant argued that in terms

of the provisions of Rule 30 (4), the appeal is deemed to have been abandoned in the absence of an application for extension of time as required by Rule 16.

[4] The main application is opposed by the respondent, and it has filed an Opposing Affidavit in which it has responded to the allegations made; the Opposing Affidavit further sets out allegations in support of a counter-application for condonation for the late filing of the Notice of Appeal and the record on appeal.

[5] The respondent concedes that the Notice of Appeal was filed out of time; it further concedes that an application for condonation for the late filing of the Notice of Appeal was not filed simultaneously with the Notice of Appeal. The respondent further concedes that the record on appeal was filed out of time.

[6] The respondent explained that the reason for non-compliance with the Rules was lack of funds partly caused by the money expended in legal challenges launched on the retrenchment of a vast number of its membership in 2010 because of the closure of the applicant; and, partly caused by the fact that its only source of funding is from subscriptions from its membership, the majority of whom had been retrenched owing to the economic depression. The respondent argued that their attorneys

did not want to prosecute the appeal because they were still owed outstanding fees; furthermore, their attorneys felt that they did not have the capacity to prosecute the appeal since the matter was complex and that senior counsel who is a specialist on this area of law had to be engaged. It was also recommended that before the appeal could be noted, counsel's opinion on the prospects of success should be sought.

[7] The respondent started mobilising funds and, that on the 20th April 2011, it managed to raise funds for counsel's opinion; however, the funds were not sufficient for Counsel to prepare the Notice of Appeal, and, the campaign to raise more funds continued. Seeing the delay in securing funds, their attorneys drafted the notice of appeal with a view that it would be settled by Counsel once sufficient funds had been secured; financial institutions declined to assist since the respondent could not furnish security for the loan.

[8] The respondent also argued that their attorney advised them that he could not file the record of on appeal in the absence of funds to instruct Senior Counsel because the court would enrol the appeal for the November 2011 session; their attorney advised that this would require him to appear before court to apply for a postponement which could be opposed by an experienced legal team led by senior counsel as it had been the case with the previous two appearances in the court *a quo* as

well as at the Industrial Court. Their attorney had further advised that if the application failed, a costs order would be issued against them including costs of counsel and possibly certified costs; and that this would worsen their financial problems since the court *a quo* had granted a costs order against them in addition to their attorney's fees which had not been settled.

[9] In August 2011 the respondent was promised financial assistance when the judicial crisis which saw the boycott of courts by attorneys was resolved; and, that when the Law Society suspended the boycott on the 19th November 2011 their allies immediately released funds on the 21st November 2011. The respondent alleged that it immediately instructed their attorney to engage Senior Counsel and further move an application to the Supreme Court for condonation for the late filing of the appeal as well as the record on appeal; their Attorney undertook to lodge the application on or before the 25th November 2011.

[10] The respondent argued that it has never been its intention to abandon the appeal; and that the lack of resources remains a challenge to the Constitutional right of every citizen of this country including the unemployed and the poor, to unlimited access to courts in order to attain justice. The respondent argued that the affected membership was retrenched in 2005 and are now unemployed and cannot afford legal

fees. The respondent further argued that it would be a travesty of justice if the applicants, in the circumstances, would be denied the opportunity to prosecute their appeal.

[11] The respondent argued that the case was important not only in respect of the amount involved of E2 268 214.00 (two million two hundred and sixty eight thousand two hundred and fourteen emalangeni) but the number the twenty three workers who were retrenched. It further argued that it had good prospects of success on appeal on the basis that the court a quo erred in law and misconstrued its powers by holding that it could set aside and substitute its decision for that of the Industrial Court on the basis that its decision to rectify the Collective Agreement was not approved by evidence. It was argued that section 11 of the Industrial Relations Act of 2000 enjoined the court not to strictly adhere to the rules of evidence and procedure if by doing so would result in a miscarriage of justice.

[12] It was further argued that the Industrial Court in the exercise of its discretion, has the power to make any order which would provide fairness and equity and harmonious industrial relations; and that this includes a finding made by the court that the parties concluded a valid Common law collateral Agreement in terms of which the parties agreed to revive the terms and conditions contained in the Collective

Agreement which expired on the 31st March 1997. It denied that the collateral agreement was a circumvention of the Industrial Relations Act of 1996 which provides that such agreements to have a binding effect should be registered with the Industrial Court.

[13] The respondent argued that the Collateral Agreement which was concluded by the parties on the 26th June 1997 revived the terms and conditions of the Collective Agreement which continued to regulate the relationship between the parties.

[14] In its replying affidavit the applicant decried the fact that the respondent filed its application for condonation of both the late noting of the appeal and the late filing of the record on the 26th November 2011 being the day before the main application was to be heard. It was argued that the applicant could not properly deal with the application which together with the annexures numbered some 126 pages. However, it did concede that this court, after hearing preliminary arguments, granted an application for the matter to be postponed to enable the applicant to file a replying affidavit as well as to deal with the counter-application.

[15] The applicant argued that where a party seeks the indulgence of a court for having failed to comply with its Rules, not only must the party provide sufficient and satisfactory grounds for having failed to comply

with the rules of court, and demonstrate that it has good prospects of success, but it must also show that it has brought its application as soon as it became aware of its non-compliance. It argued that the counter-application should be dismissed because the respondent did not apply for condonation in respect of the late noting of the appeal in April 2011 when it purported to note the appeal.

[16] The applicant argued that the respondent has not satisfied the test for condonation because in the first place it has not put up a satisfactory explanation for the delay. The applicant argued that the reason put by the respondent that it only received funds on the 21st November 2011 and that it could only lodge the record on the 24th November 2011 is implausible; it argued that the respondent is well-established and that it is the largest trade union in the country and active in a number of agricultural industries which include three sugar mills. The applicant further argued that the respondent had failed to substantiate allegations of lack of funds with reference to the failure to furnish bank statements, to the application as well as correspondence and other documentation.

[17] The applicant reiterated that the respondent's appeal has no prospects of success. It argued that the issue before the Industrial Court was whether an agreement concluded by the parties in 1995 applied to a retrenchment that took place in 2005 when that agreement had lapsed in March 1997.

It was argued that the Industrial Court was not entitled to uphold respondent's claim on the basis of an alleged collateral agreement because such an agreement had not been pleaded by the respondent. It was argued that the finding of the court a quo was correct that once a collective agreement lapses due to effluxion of time, it is unlawful and invalid and cannot be rectified; it was further argued that the only crisp issue for determination in this matter is whether a court could rectify a collective agreement that had lapsed. It was further argued that the court a quo correctly came to the conclusion that it has the power to substitute the decision of the Industrial court once it had found that it erred in law. It was further submitted that it is trite law that the court which hears a matter on review does have the power to substitute the decision of the earlier court.

[18] The respondent has filed a further affidavit to the replying affidavit. It noted that the applicant in its replying affidavit stated that it had released the judgment amount from Nedbank allegedly because the respondent has not filed an appeal. The respondent argued that the money was released after the appeal had been noted on the 29th April 2011; and that it only became aware of the release of the judgment amount on the 25th November 2011. It was also argued that the release of the money to the applicants after the appeal had been noted was done in breach of paragraph 6 of the Agreement between the parties which provides that

none of the parties shall encumber, utilize or seek the withdrawal of the funds without the express agreement and the joint signatures until a final judgment has been issued and that the amount shall be released to the party in whose favour the final judgment is granted.

[19] It is common cause that the Industrial Court issued a judgment in favour of the respondent in the amount of E2 268 214.00 (Two million two hundred and sixty eight thousand two hundred and fourteen emalangeni) in respect of the twenty three employees for outstanding terminal benefits; since the applicant filed review proceedings in respect of the judgment, the parties concluded an agreement on the 27th July 2011 in terms of which a joint bank account was opened at Nedbank Swaziland account No. 0200472696, branch code 360164, Swazi Plaza in Mbabane. The money was subsequently deposited into that account which was interest bearing.

[20] The respondent concedes that it is still one of the largest Unions in the country in terms of its membership but argued that its membership has dwindled drastically owing to the retrenchments that have taken place in the Agricultural Industry due to economic recession; it was argued that the respondent depended entirely on monthly membership contributions for its funding, and which are largely expended towards operating costs

inclusive of rental for offices, salaries and legal costs to defend the rights of the membership.

[21] It was further argued that the closure of the applicant in 2010 caused huge retrenchments which inturn deprived the applicant of the monthly contributions. The applicant has annexed its bank statement from Nedbank in Mbabane for the period covering 5th April 2011 to 1st December 2011 with a credit balance of E12 902.41 (Twelve thousand nine hundred and two emalangeni forty one cent). It also annexed a bank statement of its National Executive Committee covering the period of 1st April to 30th November 2011 with a accredit balance of E6 068.38 (Six thousand and sixty eight emalangeni thirty eight cents). The respondent has also attached a written proposal for funding to Woodwork International, an international union to which it has affiliated; the proposal was made in September 2009.

[22] It was argued that the issue for determination before the Industrial Court was whether the court could rectify clause 29.03 (a) of the Collective Agreement which had lapsed in March 1997; and that it was common cause that the parties concluded an agreement to extend the life of the collective agreement until a new one had been concluded. It was also argued that section 50 (1) (c) of the Industrial Relations Act of 1996 prescribed the life of a Collective Agreement to a maximum of two

years; and that the said provision was directive and not mandatory so as to prohibit the parties from concluding an agreement to extend the life of the collective agreement. To that extent the respondent argued that its appeal had good prospects of success.

[23] It was further argued that after the expiry of the collective agreement on the 26th June 1997, the parties concluded the collateral agreement extending the life of the collective agreement until the parties concluded a new one; and, that the parties continued to regulate their relationship in terms of the collective agreement until the applicant closed shop in 2010.

[24] It is common cause that the respondent brought an application at the Industrial Court in June 2010 for an order declaring the respondent's members who were applicant's employees who took compulsory redundancy on the 31st January 2010 to be entitled to payment of all benefits set out in Article 29.03 (a) to wit '1-6' of the Collective Agreement concluded between the parties on the 25th April 1995; they further sought an order directing the applicant to pay the balance of the benefits of the retrenched employees.

[25] It is common cause between the parties that the Collective Agreement between the parties which was concluded on the 25th April 1995 lapsed

by effluxion of time on the 26th June 1997. The respondent's members were retrenched or declared redundant by the applicant effective from the 31st January 2010. The respondent argued that when its members were paid their terminal benefits, they were paid outside of the provisions of Article 29.03 of the Collective Agreement in that the applicant refused to pay them the special payment referred to in Article 29.03 (a) (3) of the Collective Agreement. Article 29 thereof deals with benefits payable to members of the respondent upon termination of their services by reason of death, retirement or redundancy.

[26] The respondent argued that on the 26th June 1997 the parties agreed that the Collective Agreement concluded between the parties on the 25th April 1995 shall remain in force until a new collective agreement is concluded and registered with the Industrial Court.

[27] The application was opposed by the applicant on the basis that the affected members have not been identified, that the extension agreement concluded on the 26th June 1997 was invalid partly because it was not registered with the Industrial court in terms of section 50 (2) of the Industrial Relations Act and partly because it provided for an indefinite period contrary to the provisions of section 55 (1) (c). The applicant further argued that clause 29.03 (a) of the Collective Agreement applies to voluntary retrenchment and that employees retrenched on the 31st

January 2010 were not compulsorily retrenched; hence, clause 29.03 (a) was not applicable. It further argued that in any event, the Collective Agreement was no longer in force in January 2010.

[28] In its further affidavit the respondent stated that the employees which were retrenched on the 31st January 2010 are identifiable and are known by the parties; he further argued that clause 29.03 (a) is applicable to compulsory retrenchment, and that the Collective Agreement was still in force in January 2010.

[29] The Industrial Court recognised that the Collective Agreement expired on the 31st March 1997; however, it further recognised that the parties continued to use "the document" to regulate their conduct and working relationship. The court concluded that such evidence was not denied by the parties.

[30] The Industrial Court heard oral evidence by witnesses for the respondent who participated in the negotiation meetings on what was agreed between the parties; it had regard to written records of the Minutes of the meeting held on the 19th March 1993 and the draft Collective Agreement; the respondent argued that the evidence showed that the intention of the parties was that clause 29.03 (a) should refer to compulsory retrenchment. The court observed that the evidentiary

burden shifted to the applicant to prove that there were other meetings or documents executed by the parties in which article 29.03 (a) was changed to appear as it does in the final document. The court concluded that the document does not correctly reflect the intention of the parties, and, that the document must be rectified. The court held that the retrenched workers were entitled to be paid in terms of Article 29.03 (a) 1-6 of the Collective Agreement.

[31] Paragraph (a) of Article 29.03 of the Collective Agreement was rectified to read "Compulsory Redundancy/Retrenchment", and it was further ordered that the applicant should pay the twenty three employees all outstanding benefits in terms of article 29.03 (a) 1-6 of the Collective Agreement as well as costs of suit.

[32] In paragraph 26 of his judgment His Lordship Justice Nkonyane stated the following:

> **"Rectification of a written contract will be allowed by the court if the mistake consists in the failure of the written document to record the true contract between the parties. The applicant must therefore prove on a balance of probabilities that the written contract records a version of the agreement that is in accordance with what was actually agreed upon."**

[33] The judge referred to the book of Christie R.H. on "the Law of Contract, 4th edition pp 382 -386, the case of *Shoprite Checkers (PTY) Ltd v. Bumpers Schwarmas CC and Others* 2002 (6) SA 2002 (C), and the case of *Tesven CC and Another v. South African Bank of Athens* 2000 (1) SA 268 (SCA).

[34] He quoted the case of Meyer v. Merchants' Trust Ltd 1942 AD 244 at 253 where De Wet CJ stated the following:

> **"….proof of an antecedent agreement may be the best proof of the common intention which the parties intended to express in their written contract, and in many cases would be the only proof available, but there is no reason in principle why that common intention should not be proved in some other manner provided such proof is clear and convincing."**

[35] It is common cause that the applicant subsequently instituted review proceedings before the High Court in respect of the judgment of the Industrial court. His Lordship Justice Stanley Maphalala correctly reviewed and set aside the judgment of the Industrial Court. His Lordship concluded correctly that once the Industrial Court found that the 1995 Collective Agreement had lapsed by effluxion of time, it ought to have dismissed the respondent's application; and that it was a mistake for the court to have considered another agreement in place between the

parties, which arose through the conduct of their continuing to implement the terms of the 1995 Agreement even though it had lapsed.

[36] His Lordship further held correctly that the respondent could not rely on the 1997 agreement because it was concluded outside the Industrial Relations Act and, that the employees could not become entitled to the terms and conditions created in the alleged agreement.

[37] On the 10th February 2011, His Lordship gave judgment in favour of the applicant in which he reviewed and set aside the judgment of the Industrial Court. The respondent appealed the judgment of the court a quo on the 29th April 2011; however, it is common cause that the appeal was noted out of time and not in terms of Rule 8 of the Court of Appeal Rules of 1971. The Rule provides the following:

> **"8. (1) The notice of appeal shall be filed within four weeks of the date of the judgment appealed against:**
>
> **Provided that if there is a written judgment such period shall run from the date of delivery of such written judgment:**
>
> **And provided further that if the appellant is in gaol, he may deliver his notice of appeal and copy thereof within the prescribed time to the officer in charge of the gaol, who shall thereupon endorse it and the copy with the date**

of receipt and forward them to the Registrar who shall file the original and forward the copy of the respondent.

(2) The Registrar shall not file any notice of which is presented after the expiry of the period referred to in paragraph (1) unless leave to appeal out of time has previously been obtained."

[38] It is also common cause between the parties that the respondent failed to obtain leave of Court to file out of time as required by Rule 8 (2). Furthermore, the respondent failed to file the Record of proceedings as required by Rule 30. The rule provides the following:

"30. (1) the appellant shall prepare the record on appeal in accordance with sub-rules (5) and (6) hereof and shall within two months of the date of noting of the appeal lodge a copy thereof with the Registrar of the High Court for certification as correct….

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

(9) Upon receipt of the Record, the Registrar shall transmit one copy thereof to the Judge President who will thereupon assign a date for the hearing of the appeal not less than six weeks ahead and notify the Registrar thereof. Upon receipt of such notification the Registrar shall immediately inform the parties to the appeal of such date."

[39] The applicant seeks an order declaring that the appeal noted by the respondent on the 29th April 2011 has been abandoned for non-compliance with Rule 8 and 30 of the Court of Appeal Rules of 1971. The respondent has also filed a Counter-application for condonation of the late noting of the appeal as well as the late filing of the record on appeal; the respondent in its counter-application has conceded that the appeal was filed out of time, and, that the application for condonation was not filed simultaneously with the appeal or immediately after the appeal. The respondent has also conceded that the Record was also filed out of time.

[40] The application of Rule 30 (4) is subject to Rule 16 (1) which provides the following:

> "16. (1) The Judge President or any judge of appeal designated by by him may on application extend any time prescribed by these rules:
>
> Provided that the Judge President or any such judge of appeal may if he thinks fit refer the application to the Court of Appeal for decision.
>
> (2) An application for extension shall be supported by an affidavit setting forth good and substantial reasons for the application and where the application is for leave to appeal the affidavit shall contain grounds of appeal which prima-facie show goods cause for leave to be granted.

40.1 In terms of section 145 and 146 of the Constitution, the final court of appeal in this country is now the Supreme Court; and, it is no longer the Court of Appeal. Furthermore, in terms of section 142 and 145 of the Constitution, the Chief Justice is now the head of the Judiciary; he performs the functions which were previously done by the Chief Justice as well as the Judge President; the latter appellation has been abolished with regard to the highest court in the land. It is now used to refer to the Senior Judge of the Industrial Court who inturn reports to the Chief Justice as head of the Judiciary; and, his decisions are reviewable by a single judge of the High Court. In addition, he doesn't sit on the Industrial Court of Appeal. Three judges of the High Court constitute the Industrial Court of Appeal."

[41] The respondent did not apply for extension of time in terms of Rule 16. However, as indicated in the preceding paragraphs, the respondent lodged a counter-application for condonation. Rule 17 of the Court of Appeal Rules provides the following:

> **"17. The Court of Appeal may on application and for sufficient cause shown, excuse any party from compliance with any of these rules and may give such directions in matters of practice and procedure as it considers just and expedient."**

[42] *His Lordship Justice Majiedt AJA* in the case of *Minister of Agriculture and Land Affairs v. CJ Rance (PTY) Ltd* 2010 (4) SA 109 (SCA) at para 36 quoting *Schreiner JA* in *Silber v. Ozen Wholesalers (PTY) Ltd* 1954 (2) SA 345 (A) at 352 H-353A stated that the expression 'good cause"

and "sufficient cause" are synonymous and mean that "the defendant must at least furnish an explanation of his default sufficiently to enable the court to understand how it really came about, and to assess his conduct and motives."

[43] At paragraph 39 *His Lordship* stated that "condonation must be applied for as soon as the party concerned realises that it is required". *His Lordship Heher JA* in the case of *Madinda v. Minister of Safety and Security* 2008 (4) S.A. 312 (SCA) at para 10 stated the following:

> **"….Good cause looks at all those factors which bear on the fairness of granting the relief between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many such possible factors become relevant. These may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the *bona fides* of the applicant, and any contribution by other persons or parties to the delay and the applicant's responsibility therefor."**

[44] *Kotse JP* who delivered the unanimous judgment of the Court of Appeal of Swaziland, as it then was, in the case of *Unitrans Swaziland Limited and Inyatsi Construction Limited* Appeal case No. 9/96 at pages 11-12 stated the following:

"The courts have often held that whenever a prospective appellant realises that he has not complied with a Rule of court, he should, apart from remedying his fault immediately, also apply for condonation without delay…."

[45] *His Lordship Ebrahim JA* delivering the unanimous judgment of the Supreme Court of Swaziland in the case of *Okh Farm (PTY) Ltd v. Cecil John Littler N.O. and Four Others* Appeal Case No. 56/08 at page 15 stated the following:

"as a rule, an applicant who seeks condonation will need to satisfy the court that the appeal has some chance of success on the merits….A court will not exercise its power of condonation if it comes to the conclusion that on the merits there are no prospects of success, or if there is one at all, the prospects of success are so slender that condonation would not be justified."

[46] The respondent has shown a flagrant disregard of the Rules of this court. Not only has it filed the Notice of Appeal out of time; it has also failed to obtain leave to appeal out of time; it has also failed to file the Record on Appeal as required by Rule 30. The respondent has also failed to apply to court in terms of Rule 16 (1) for the extension of the times prescribed by the Rules. Worse still, the respondent has failed to apply for condonation at the earliest possible opportunity when it realized that condonation was required.

[47] The explanation given by the respondent that it did not have funds, whilst appreciated, cannot justify the naked disregard of the Rules and the laxity of its Attorney. It was incumbent upon the Attorney on accepting instructions to have all the necessary papers filed timeously whilst the respondent was soliciting funds to instruct Senior Counsel. If the Attorney did not wish to proceed with the appeal for lack of funds, he should have withdrawn his services and allow the respondent to engage another Attorney; it is possible that there would be experienced Attorneys who could handle the appeal without the need for senior counsel.

[48] It was unfortunate for respondent's Attorney to hold onto the file and doing nothing whilst the time progressed with the full knowledge that the respondent did not have the funds. *Steyn CJ* in the case of *Saloojee and another v. the Murder of Community Development* 1965 (2) SA 135 (A) at 141 C-E stated the following:

> **"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. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity."**

[49] In my considered view, there are no prospects of success on appeal in this matter. It is common cause that the Collective Agreement

concluded in March 1995 lapsed by effluxion of time; hence, a non-existent Collective Agreement could not be rectified. Furthermore, the Agreement concluded between the parties on the 26th June 1997 is invalid and unenforceable against the applicant because it was concluded outside the provisions of section 50-52 of Industrial Relations Act of 1996; these provisions state that a Collective Agreement to be valid and binding has to registered with the Industrial Court. They further provide that it is only upon such registration that its terms and conditions are deemed to be those of the individual contract of employment of the relevant employees within the industry. These statutory provisions are also reflected in sections 55-58 of the current Industrial Relations Act No. 1 of 2000.

[50] In the circumstances, I make the following orders:

(a) The appeal noted by the respondent on the 29th April 2011 against the judgment of the court *a quo* delivered on the 10th February 2011 is deemed to have been abandoned, and it is therefore dismissed.

(b) The counter-application lodged by the respondent for condonation for the late noting of the appeal and the late filing of the record on appeal is hereby dismissed.

(c) No order as to costs.

_____

M.C.B. MAPHALALA

JUDGE OF THE HIGH COURT