SWAZILAND INDUSTRIAL COURT OF APPEAL

Manzini City Council
Appellant

v

Workers' Representative Council
Respondent

Case No. 2/99

Coram	**Justice Sapire**	*President*
	Justices Matsebula and **Maphalala**	*Members*

For Appellant	*Mr. Flynn*
For Respondent	*Mr. Alex Shabangu*

JUDGMENT
(06/08/99)

Sapire P

The Respondent has filed a Notice on which it moves for the striking from the roll of three appeals, which the respondent as Appellant has noted. At the hearing of the motion, the applicant directed argument only to the appeal against the judgment of the 4th February 1998.

In an affidavit filed in support of the application the applicant's attorney attested to the facts upon which the applicant based the motion. In relation to the appeal with which we are now concerned he said,

> "In respect of the judgement of 4th February, 1998 an appeal was noted on 4th May, 1998 and the record in respect thereof was apparently certified by one T S Maziya who signed as Registrar of the Industrial Court on 7th May, 1998. In the premises the appeal in respect of the judgment of the Industrial Court dated 4th February 1998 was lodged out of time and there is in my submission no appeal; which was properly noted in accordance with the provisions of the Industrial Relations Act, 1996 which create and define the nature and extent of the right of appeal to the Industrial Court of Appeal and the power of this court with regard to appeals"

Indeed T S Maziya signed the certificate of correctness attached to the record before the court. Although the words "REGISTRAR OF THE INDUSTRIAL COURT OF SWAZILAND" appear below the line on which that individual has signed, no person of that name occupies that post. T S Maziya is well known to this court, and to all concerned as the Deputy Registrar of the High Court. Clearly there has not been compliance with the strict provisions of the rules relating to the certification of records in so far as the certification required is that of the Registrar of the Industrial Court.

There is however no suggestion that the record is in any way deficient or incorrect. The appeal relates only to the question of law as to whether the Industrial Court has power to vary a consent order. As the court will not have to consider evidence to decide the issue, the record is of little importance. There is no reason why this failure to observe the strict provisions of the rules should not be condoned, and why the appeal should not be heard on the record certified as it is, albeit not by the correct official.

On behalf of the applicant, Mr Shabangu further argued that the Respondent had noted the appeal out of time. The judgment appealed against is dated 4th February 1998. The appeal was noted on 4th May 1998. Section 11(3) of the Industrial Relations Act 1996 provides that an appeal against the decision of the court to the Industrial Court of Appeal shall be lodged within three months of the date of the decision. A month is taken to be a calendar month. Its period is

from the day of commencement to the corresponding day less one in the succeeding month. This means, calculating in accordance with what the parties were agreed was the correct method, that in the instant case the notice of appeal should have been served and filed on the 3rd May 1998, at the latest.. This however was a Sunday.

Respondent argues with reference to the Interpretation Act that the last day of the period was therefor the following day. Applicant argues *au contraire* that the period is only extended to the following day when the period is expressed in days. The wording of the relevant section supports the Respondents contention.

Section 8 of the Interpretation Act , 1970 [1] reads as follows

> *"Computation of time*
>
> 8. *In computing time for the purposes of a law, unless the contrary intention appears –*
>
> (a) *a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happened or the act or thing is done;*
>
> (b) *if the last day of the period is Sunday or a public holiday, which days are in this section referred to as "excluded days", the period shall include the next following day not being an excluded day;*
>
> (c) *when any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards not being an excluded day;*
>
> (d) *when an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time."*

The alleged default is trivial. The deviation if any from the requirements of the statutory provision is minimal. No prejudice whatsoever has been occasioned the Applicant. If necessary, if we had the power to do so, and if the Appeal is arguable with reasonable prospect of success, this is a case where we should condone non-compliance.

[1] Act 21/1970

There would however be difficulty with condonation of the late noting of the appeal. The time for noting the appeal is fixed by statute. The statute makes no provision for the court to extend the period or to condone non-compliance therewith The only conclusion to which it is proper to come is that the legislature intended that the appeal had to be noted within the three months allowed, without the possibility of condonation or extension where the appeal was not timeously noted. Mr Flynn for the Respondent referred us to rule 17, which gives the court power to excuse non-compliance with the rules. This rule refers specifically with non-compliance with the rules. It does not and could not apply in cases of non-compliance with the terms of the statute itself. It is perhaps undesirable that the legislature has seen fit to prescribe a time limit, which the court itself normally imposes, by either rule or practice. This would allow for some flexibility. Where as in this case the statute prescribes the time limit condonation for non-compliance is only available to the extent provided for by the statute itself

See *Evert v Minister for Railways and Harbours* [2]

The headnote reads as follows

> "A plaintiff suing the Railway Administration at common law must allege and prove that he has given notice in terms of section 64 of the Railways and Harbours Control and Management Consolidation Act, 70 of 1957, and that he has acted within the time limit prescribed by that section. The only way in which that can be circumvented is by way of the proviso to sub-section (3) which gives an applicant the right to apply for condonation of any failure to carry out these terms. It is not necessary that the Railway Administration should specially plead prescription; the plaintiff in such a position must make a substantive application to Court for condonation".

See also

Suid-Afrikaanse Spoorweë en Hawens v Van Den Berg en 'n Ander [3]

The need for condonation for late filing of the notice of appeal does not arise. On a correct interpretation of the section, more especially the provisions of sub section (b), we uphold the contentions of the Respondent. There is no justification for extending the provisions of sub section (a) which refers to a period of days from the happening of an event, to the provisions of

[2]1960 (3) SA 841 (T)
[3]1983 (1) SA 964 (A)

sub section (b), which refers to any period whether expressed in days or not. The notice of appeal was according filed timeously.

The third ground, upon which the applicant makes this application, is that the Respondent has not timeously prosecuted the Appeal. The Respondent has admitted that it filed and served the record after the prescribed period, in which it should have been done, had elapsed. Again only, a matter of days is involved. Respondent's attorney has in an affidavit explained the reasons for the delay, which gave rise to the default. Although the reasons are less than convincing, we are satisfied that there is sufficient merit in the Appeal, for us in the interests of equity and justice, to overlook the deficiencies in this regard.

In this respect, the Respondent is in breach of a rule of court, and the court has the power in terms of Rule 17 to condone non-compliance with the rule.

Turning now to the Respondent's (i.e. the appellant's) prospects of success, it seems to us that it is very arguable that the Court *a quo* came to an incorrect conclusion of law in holding that it could not entertain the application to vary the order made by consent. It seems that what the Respondent is seeking is rectification of the agreement, which was "made an order of court " by consent to reflect the true intention of the parties.

It would not be unreasonable to argue that, it was not the intention of the parties to the agreement that any of the persons who were represented by the applicant, and who were the beneficiaries of the award provided for in the agreement, should be paid more than their entitlement. Such entitlement would have to be calculated on the objectively viewed correct facts applied to the agreed formula for assessing the amounts payable.

. For the purposes the appeal the court would have to assume that it was common cause that the calculations made by the parties and reflected in the schedules were in some instances based on incorrect facts. It would follow that the figures in the original schedules represent, in some instances, mistakes common to the parties. If the Respondent were able to show that it was entitled to rectification of the agreement by substitution of the schedules which reflect the correct for those compiled in error common to the parties, such rectification would be ordered. The court a quo seems to have placed too much emphasis on the respondent's lack of vigilance and

attention. The considerations referred to in *Humphrys v Laser Transport Holdings Ltd and Another*[4] do not appear to have been given sufficient attention. Part of the headnote reads

> "In a case concerning the rectification of a contract on the grounds of mistake, the unreasonableness of one party's conduct cannot be regarded as relevant when the parties are ad idem about the terms of their agreement. Nor will a Court refuse rectification merely because the mistake of the innocent party was careless and therefore not reasonable when the other party was aware of the mistake but fraudulently remained silent in order to secure a better bargain"

As was said in *Benjamin v Gurewitz* [5]:

> 'The broad underlying principle of the doctrine of rectification is that in contracts regard must be had to the truth of the matter rather than to what has been written, and the mistake must yield to the truth.'

That the agreements are incorporated in an order of court does not clothe them with any special sanctity so that the remedy of rectification is no longer available. The variation of the court order would be just such rectification.

Because of the substantial prospect of success on appeal and because the default of the respondent in the prosecution of the appeal, in so far as the certification and filing of the record are concerned, is so trivial and inconsequential, we condone respondent's breaches of the rules. The application to remove the Appeal from the roll is refused. The question of costs is reserved for the court hearing the Appeal.

The parties if they are so minded, to continue with this protracted and bitterly fought litigation, may set the appeal down for hearing on a date to be arranged with the Registrar.

S W Sapire P

[4] 1994 (4) SA 388 (C) A

[5] 1973 (1) SA 418 (A) at 426D

I Agree J Matsebula J

I Agree S Maphalala J