IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

In the matter between:

UNITRANS SWAZILAND LIMITED Appellant

and

INYATSI CONSTRUCTION LIMITED Respondent

Kotze P.

Browde JA.

Tebbett JA.

JUDGMENT

7TH NOVEMBER 1997

The Appellant brought an action against the Respondent in the High Court in which the Appellant sought damages against the Respondent for the alleged repudiation by the Respondent of a contract entered into between the parties. The action was dismissed with costs. In attempting to pursue its right to appeal against that judgment the Appellant failed to comply with the Rules of this Court and as a result was constrained to seek an order condoning such non-compliance. Because, prima facie, the non-compliance was of a very serious nature and because the application for condonation was opposed,

counsel were invited to argue the application only, on the hypothetical basis that the Appellant had reasonable prospects of success on the merits of the appeal.

In considering whether to grant condonation the Court, in the exercise of its discretion must, of course, have regard to all the facts. Amongst those facts are the extent of the non-compliance, the explanation therefor and the Respondent's interest in finality.

See HB Farming Estate (Pty) Limited and Another v Legal & General Assurance Society Ltd 1981 (3) SA 129 at 134B-C) .

In essence the Court must be concerned with what is fair to both sides.

The respects in which the Appellant failed to comply with the rules relating to an appeal from a judgment in the High Court are as follows:

(i) A copy of the written judgment was obtained by the Appellant's attorney on the 17th January 1996.

3 Rule 8(1) of the Rules provides that:

"The notice of appeal shall be filed within 4 weeks of the date of judgment appealed against:

Provided that if there is a written judgment such period shall run from the date of delivery of such written judgment."

With that rule in mind the notice of appeal should have been filed, on the Appellant's version of the facts, not later than 14 February 1996.

The notice of appeal which, we understand, was settled by counsel and prepared by the Appellant's attorney was ready for filing only on 23 February 1996 but was in fact not filed until 7 March 1996.

Appellant's attorney has stated on oath that she handed the notice of appeal to a clerk for filing on the 23rd of February and that she thought that her instructions were carried out. While that statement can be accepted without qualification it must be observed that already on 23 February 1996 the filing was about 9 days overdue.

(ii) After receipt of the notice of appeal on 7 March 1996 the Respondent's attorney, Mr Dunseith, addressed a letter to the Registrar of the Court,

a copy of which was sent to the Appellant's attorney, pointing out that the notice of appeal had been delivered substantially out of time, and that in terms of Rule 8 of the Appeal Court Rules the Registrar was obliged not to accept the notice of appeal for filing until leave to appeal out of time had been obtained. This letter was not responded to by the Registrar until 12 December 1996 and was not responded to at all by the Appellant or its attorney. It follows that it must be accepted that as early as 8 March 1996 the Appellant was apprised of the need to make an application for condonation regarding the late filing of the notice of appeal.

(iii) Rule 30(1) of the Rules provides that:

"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."

Putting it as mildly as one can in relation to the conduct of the Appellant and its attorney little effort was made to comply with this rule. The attorney must have been well aware that the record was required to be prepared by the 7th of May at

the latest. She had received a written memorandum from senior counsel on or about the 4th of April 1996 which was clearly to the effect that the Appellant's prospects of success on appeal were good.

Despite this there was a long delay before any thought seemed to have been given to preparation of the record. For instance in her affidavit the Appellant's attorney, referring to the memorandum from senior counsel, says "thereafter, the said Managing Director and the accountant of the Applicant from time to time required further information from me in order to assess all implications involved in the appeal and to take a decision. One aspect of particular concern, of course, was the costs implications."

What exactly is meant in the context by the phrase "from time to time" is not clear but a clue is to be found in the next statement made by the Appellant's attorney namely –

"During this period the possibility of a settlement arose and an offer was made to the Respondent via its attorney. That was on or about the 7th of June 1996."

It will be seen that "this period" encompasses all the time from the 4th of April 1996 (the date of the receipt of counsel's opinion) to the 7th of June 1996 (when the offer of settlement was made) . It is in our view hopelessly insufficent to attempt to account for that lapse of time by saying that the Appellant

was assessing the implications involved in the appeal. If that warranted condonation the rule regarding the preparation of the record could be regarded as pro non scripto since every appellant would want to assess "implications involved in the appeal and to take a decision".

The reference to the "possibility of a settlement" was made, so it seems, in order to explain, partially at least, the apparent inactivity during the months of April and May. If that was the purpose of mentioning the "settlement" it is somewhat disingenuous. In his affidavit Mr Dunseith says the following in relation to the offer of settlement:

"The deponent raised the possibility of a settlement in early June 1996 for the first time, when the time for filing the record had already expired. The offer was confirmed in

writing on 7th June 1996, and rejected within a few days thereafter by telephone communication between the parties' attorneys."

It is obvious from those facts, which were not challenged and which must be accepted for present purposes, that the question of a possible settlement does not explain at all the delay during the months of April and May. It cannot in fact be taken into account as a mitigating factor in relation to the conduct of the Appellant's attorney.

The Appellant's attorney does not state in her affidavit when she finally obtained instructions to prosecute the appeal. What she does say is that she "duly" instructed a candidate attorney employed by her firm to obtain the tapes of the record and to arrange for them to be transcribed. She does not say when that happened but she does state in her affidavit that the typed transcript was delivered to her offices during the last week of August of 1996. It was then sent to the Registrar of the High Court for certification.

(iv) Thereafter there appear to have been several problems relating to the record in the offices of

the Registrar, none of which was attributable in any way to the conduct of the attorney. However, despite a session of this Court in October 1996, the Appellant's attorney made no effort at that session to ask for condonation of the late filing of the record which by then was about six months overdue. In his opposing affidavit to the application for condonation Mr Dunseith states that when the record had not been filed by the 34th April 1996 the Respondent assumed that the appeal had been abandoned. In this regard Rule 30(4) of the Rules provides:

"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 he deemed to have been abandoned."

It was argued before us by Mr Klevansky who appeared on behalf of the Respondent that while Rule 16(1) gives the Appellant an opportunity of applying for an extension of time, if that is not done before the time has elapsed for the submission of the record, the appeal is deemed to have been abandoned and cannot then be revived. Mr Wise, on behalf of the Appellant, has submitted on the other hand that the application for the

extension of time can be made after the "deeming" has come into effect and has referred us to several decided cases in support of that submission. In Bezuidenhout v Dippenaar 1943 AD 190 the Court considered a petition for condonation for the late filing of an application for leave to appeal in forma pauperis. When the petition was filed, the appeal had already lapsed in terms of the Rules. In that regard Centlivres J.A. (as he then was) said the following.

"Whatever the position might have been if the applicant had applied for leave to this Court before the prescribed period of three months had elapsed, it seems to me that, in view of the fact that the appeal has already lapsed, the Court should not grant the applicant any form of relief if it is satisfied that there is no reasonable prospect of the appeal succeeding. "

It was argued by Mr Wise that this indicates clearly that had there been good prospects of success, the application for condonation would have been allowed despite the "lapsing" of the appeal. There are cases in the same vein dealing with the "lapsing" of an appeal and the ability on application to revive such lapsed appeal.

See, for example, Schmidt v Theron & Another 1991 (3) SA 126 (C) at 127A-F.

Mr Wise has also pointed to Rule 17 which provides that:

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

Counsel submitted that that provision clearly indicates that no matter what the non-compliance may be and what effect it might have, it can always be excused by the Court in order to prevent any injustice.

This is an interesting debate but because of the view that we have taken of the matter, it is not necessary to decide the full implications of Rule 30(4) read with 16(1) and 17 for the purposes of this judgment.

As has already been pointed out, some of the delays which occurred in relation to the certification of the record were not the fault of the Appellant or its attorney. Nevertheless it

must have become obvious to the Appellant's attorney that it was necessary to apply without delay tor condonation of the late filing of the Notice of Appeal and of the preparation of the record if only because of Mr Dunseith's letter of 8 March 1996. 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.

See Moraliswani v Mamili 1989 (4) SA 1 at 9E-F; and Commissioner for Inland Revenue v Burger 1956 (4) SA 446 (A) in which at 449G Centlivres CJ said, "whenever an appellant realises that he has not complied with a Rule of Court he should, without delay, apply for condonation".

The need for an early application for condonation applies a fortiori where the non-compliance is of long standing. I have already referred to the Appellant's failure to seek condonation during the session of this Court held during October 1996. There is a further unexplained failure to apply

for condonation during the April 1997 session. It is abundantly clear, therefore, that far from remedying the fault immediately the Appellant has made the application for condonation only some 18 months after receipt of the letter from Mr Dunseith pointing out the initial non-compliance with the Rules of Court.

We also have before us an application for condonation regarding the late filing of the volumes containing the exhibits and the Appellant's heads of argument. Although this application was not

argued before us we wish merely to make reference to the fact that the exhibits were not filed in time partly because the person chosen by Appellant's attorney to prepare the record and to cause a copy thereof to be sent to Mr Wise had not been involved in the trial and therefore did not know that a very wide range of exhibits had been handed in at the hearing. For that reason, on his own showing, the professional assistant concerned was under the mistaken belief that he had sent a comprehensive and complete record to counsel when in fact he had not. The failure to brief the professional assistant properly is merely another example of a somewhat casual approach to the Rules of Court by the Appellant's attorney.

We have come to the conclusion that it would be unfair to the Respondent in this case were we to overlook the flagrant disregard for the rules exhibited by the Appellant irrespective of the Appellant's prospects of success on the merits of the matter.

See in this regard SA Allied Workers Union (In Liquidation) and Others v De Klerk N.O. and Another 1992 (3) SA (AD) at p. 4F-G.

Blumenthal and Another v Thompson N,O. and Another 1994 (2) SA 118 (AD) at 121 in fin 122(b).

The decision to dismiss the application for condonation has not been arrived at without some sympathy for the Appellant and its attorney. Nonetheless this is a matter of serious principle and our view is encapsulated in what was said by Steyn CJ in Saloojee & Another v The Minister of Community Development 1965 (2) SA 135 (A) at 141C-E namely:

"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 of this Court. Considerations

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

In the result the application for condonation is dismissed with costs.

KOTZÉ P. BROWDE JA

TEBBUTT JA