



SWAZILAND COURT OF APPEAL

Afri-Craft (Pty) Ltd

Appellant

v

Tubecom Africa (Pty) Ltd

1st Respondent

Deputy Sheriff (Manzini)

2nd Respondent

Appeal Case 27/98

Coram

Leon JA Steyn JA Tebbutt JA

For The Appellant

Mr. Mavuso

For The Respondents

The applicant applied for:

- 1) *The condonation of applicant's delay in filing the Court record in terms of Rule 30(1) of the Rules;*
- 2) *The condonation of the applicant's delay in filing the heads of argument in terms of Rules 31(1) of the Rules. Applicant's former attorney said he had only recently been seized of the matter and that no opportunity existed for the applicant to acquaint himself with the facts of the matter so as to be*

applicant requested an opinion as to the prospects of success in an appeal. Moreover, he failed to use the time available to him to evaluate his prospects of success in any manner whatsoever.

There is no evidence or averment that applicant has reasonable grounds for success on appeal.

JUDGMENT

30th September 1998

Steyn JA: This is an application for leave to appeal against a judgment of the High Court delivered on the 20th July 1998. The application was dismissed with costs at the time of the hearing for the following reasons: -

he applicant applied for:

- 1) The condonation of applicant's delay in filing the Court record in terms of Rule 30(1) of the Rules;
- 2) The condonation of the applicant's delay in filing the heads of argument in terms of Rules 31(1) of the Rules.

When the matter was called the learned presiding Judge pointed out to Counsel that the application could well be fatally flawed. This was because there was no evidence or even an allegation that the appellant had a reasonable prospect of success in respect of any appeal he wished to prosecute.

Mr. Mavuso who appeared for the applicant conceded that this requirement was both necessary and absolute. He said however, that, in the particular circumstances of this case, the Court should come to his assistance. Applicant's former attorney said he had only recently been seized of the matter and that no opportunity existed for the applicant to acquaint himself with the facts of the matter so as to be able to assert that reasonable prospect of success existed.

The answer to this plea *ad misericordiam* is to be found in the applicant's own papers. He says that the first time he knew of the judgement against him was on the 2nd of September 1998, when a writ of execution was issued and served pursuant to the judgement I have referred to. His then attorneys handed the judgement to him on the 3rd September. Applicant requested an opinion as to the prospects of success in an appeal. He was advised by his attorneys of record, that is his

present legal advisors, that they would have to have obtained copies of the pleadings and a transcript of the record, “in order to fully access the prospects of success on appeal.”

It follows that for close to four weeks, applicant and his legal advisors had an opportunity to obtain either the record itself, the exhibits (the matter significantly determined on written documentation) and/or other evidential material via applicant’s former attorneys in order to enable them to be able to “more fully access” his prospects of success.

No explanation has been forthcoming why this was not done. It is therefore no answer to seek to remedy the serious deficiency in these proceedings for applicant to refer to and seek to rely upon the negligence of his former attorneys. It is true that they failed to advise him of the fact that the judgement had been given against his company on the 20th July. He was, however, well aware as from the 2nd of September, that judgement had been given against him and took no steps in order to determine whether or not there were prospects of success on appeal. Moreover, he failed to use the time available to him to evaluate his prospects of success in any manner whatsoever.

I should also point to the fact that in terms of the provisions of Rule 16(1) the applicant could have applied to the Judge President of the Court of Appeal or any Judge of the Court of Appeal for an extension of the time prescribed by the Rules. He also failed to do so.

In these circumstances, it was clear that:

- 1) There is no evidence or averment that applicant has reasonable grounds for success on appeal.
- 2) There is no acceptable explanation as to why such allegation or evidence was not placed before us.

For these reasons we held that the application was fatally flawed and it was accordingly refused, with costs.

J.H. STEYN JA

I agree : R.N. LEON JA

And so do I : P.H. TEBBUTT JA

Delivered in open Court on 30th September 1998.