CIVIL APPEAL NO.19/97

In the matter between:

FAIZEL LATIFF APPLICANT

and

SWAZILAND MILLING (DIVISION OF

SWAKI INVESTMENTS CORPORATION LTD RESPONDENT

CORAM : KOTZé J P

: SCHREINER J A

: STEYN J A

FOR THE APPLICANT :

FOR THE RESPONDENT :

JUDGEMENT

Schreiner J A:

Rule 8(1) of the Rules of this Court provides:

"8(1) The notice of appeal shall be filed within four weeks of the date of the judgement appealed against.

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

The applicant was the losing party in an action in the High Court. The written judgement was delivered on the 19th May 1995. Any notice of appeal should have been filed before the 17th June 1995. This was not done. More than two years later on the 8th August 1997 an application was filed on behalf of the applicant for an order giving leave to appeal from the judgement.

When the appeal commenced counsel for the applicant referred to the record of the trial and submitted that it revealed a reasonable prospect of success and that the Court should consider the

questions of whether there was negligence on the part of the applicant and the sufficiency of the explanation given by him against the background of a good prospect of success in any appeal. Neither the Court nor the respondent were in possession of copies of the record. There was doubt as to when a copy of the record found its way into the appeal record but it is clear that the legal advisers of the respondent made efforts to find the record but were unable to trace it. After

consideration the Court accepted copies of the record but directed that argument should proceed on the other aspects of the application. The Courts have said on numerous occasions that the prospects of success on appeal are not irrelevant to the ultimate decision as to whether or not condonation should be granted. However there are often cases where the explanation for the failure to comply with the Rules of Court are so unsatisfactory and the reasons for delay in making an application for condonation are so defective that the prospects of success play no part in supporting the application.

This seemed to the Court prima facie to be such a case and the Court required argument on the question of condonation to proceed on the other aspects of the case. If it should be felt after argument that the prospects of success could play a part in the decision of the application the matter would have to be postponed to permit argument on this matter. It has not proved to be necessary because the Court is of the view that even if the prospects of success were very good indeed the correct course would be to dismiss the application.

The applicant says that a few days after the judgement he was told by his attorney, a Mr. Simelane, that judgement had been given against him by Mr. Justice Dunn and he immediately instructed Mr. Simelane to note an appeal. Mr. Simelane said that he would file the notice of appeal and asked for the deposit of a further sum of E8,000 for the purposes of the appeal. This amount was paid but the date of payment is not mentioned. A notice of appeal was apparently filed on the 31st June 1995. It was not stamped as having been received by Court on that date. It does not appear upon what date the applicant realised that the Rules of Court had not been complied with and how it came about that the notice of appeal which was filed with the Court did not bear the date of filing.

The applicant says that after payment of the additional sum of E8,000 he telephoned Mr. Simelane

regularly concerning the progress of the appeal. Mr. Simelane told him that he would let the applicant know as soon as a date for the appeal had been allocated. The applicant continued to telephone his attorney and, during May 1996 a year after the judgement; he spoke to him and explained to him that he found it strange that "almost a year had passed without any progress being made in the matter." His affidavit continues:'

"Mr. Simelane gave various reasons for this delay, inter alia, he explained that the Courts were on strike at some stage. He explained that a new Chief Justice had to be appointed which appointment caused a delay in the Court proceedings; that the Court started late after the December/January recess in 1996 and he once again assured me that he would notify me as soon as a date for the appeal had been allocated. I accepted his explanations, being a layman in law and waited for him to contact me."

At about the same time as this telephone conversation "a Rule 45" was served on the applicant but this was explained to him by Mr. Simelane as "normal Court procedure" and there was nothing to be concerned about. Whether a "layman in law" would speak airily about "a Rule 45" being served upon him gives rise to some doubt as to the lack of knowledge of the applicant because the use of such terminology indicates acquaintance with certain branches of the law of procedure. Furthermore the applicant's alleged bland acceptance of the attorney's assurance that there was really nothing to worry about when he receives a notification in the terms of Form 20 under Section 45 of the Rules is asking too much of this Court to believe. However even, if he did believe it, it could only have been through the grossest negligence on his part. Here is an official letter directing the attachment and taking into execution of the applicant's movable property and the realisation of the property by public auction, and the application accepts his attorney's

assurance that he need not worry about it. In addition further steps in the execution process were taken in Court and he does nothing.

His next step is in February 1997 when he appoints Mr. Mazibuko to replace Mr. Simelane. Mr. Mazibuko, although he accepts the mandate, does not last long and then bows out with the excuse that he had represented the plaintiff in various other matters in the past which would result in conflict of interests. Whether Mr. Mazibuko would have acted as the attorney for the applicant for two months without discovering that no appeal had been validly noted is also strange. Mr. Flynn for the respondent pointed out numerous apparent derelictions on the part of this firm which delayed the matter further. Miss van Nieuwenhuizen who argued well for her client was unable to remove any impression that the record firm had not acted with due diligence.

Neither representatives of the first or second local attorneys whose actions were prima facie culpable if the applicant is to be believed filed affidavits explaining their part in the failure to comply with the Rules of Court and to take steps to rectify such failure over a very long period. It is true that it is not unlikely that the attorneys would have refused because it seems improbable that an innocent explanation could have been forthcoming. In paragraph 15 of his affidavit the applicant states that he endeavoured to obtain an explanation from Mr. Simelane as to why the notice of appeal was never served and filed in terms of the Court of Appeal Act but to date no explanation has been forthcoming. This is not an approach to Mr. Simelane to make a comprehensive affidavit concerning his actions while acting as the attorney for the applicant. It would, however, have been preferable for both the attorneys involved to have been approached and their reactions to a request to make an explanatory affidavit concerning the relevant matters recorded.

Then Mr. Z. Omar, a member of a South African firm, is employed. From his correspondence in May/June 1997 it is apparent that he has doubts as to whether the necessary steps had been taken to regularise any defects in the steps taken (or not taken) to appeal. Mr. Omar's letters to Masina Mazibuko and Company contain a number of requests to the local firm to check that everything had been done from a procedural point of view; disclaims any expertise in the procedural law of Swaziland relating to civil appeals and leaves this aspect of the matter to Masina, Mazibuko and Company, and later, Sipho Nkosi and Partners another local firm.

The apparent resurrection of the steps leading to the appeal in the first half of 1997 would, one would have thought, have led to the immediate setting down of condonation proceedings for the session of the Court of Appeal in the second half of that year but this was not to be. Mr. Motsa, a member of S.A. Nkosi and Company, filed an affidavit saying that Counsel's services could not be secured for the relevant period and that the respondent was not in a position to file opposing papers in time "due to the uncertainty which existed as to when the Court of Appeal was to convene." In the final result therefore a simple application for condonation has come before the Court of Appeal nearly three years after the expiry of the period laid down by the Rules. Even if it is accepted that the fault was in the first instance due to the applicant's attorney there was in my view no reason for the applicant not appreciating that his attorney had been guilty of the

grossiest default and of failing to ensure that his agent acted in compliance with the Rules of Court.

It has been said on many occasions that it is not open to a litigant merely to place blame on his attorney for a failure to comply with the Rules of Court. There may be cases where a Court will grant relief to a lay litigant if the cause of default was negligence on the part of his attorney, but

generally this is not so. In FERREIRA VS NTSHINGILA 1990(4) SA 271(A) AT 281 FRIEDMAN A J A @ D - E said:

"Negligence on the part of a litigant's attorney will not necessarily exonerate the litigant. See SALOOJEE AND ANOTHER NND VS MINISTER OF COMMUNITY DEVELOPMENT 1965(2) SA 135(A) AT 141. See also FEVBRO FURNISHERS (PTY) LTD VS REGISTRAR OF DEEDS, BLOEMFONTEIN AND OTHERS 1985(4) SA 773(A) at 787 G - H where Hoexter J A referred to:

"the oft repeated judicial warning that there is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered.

An attorney instructed to note an appeal is in duty bound to acquaint himself with the Rules of Court in which the appeal is to be prosecuted."

The matter was recently dealt with by this Court in UNITRANS SWAZILAND LTD VS INYATSI CONSTRUCTION LIMITED, SWAZILAND COURT OF APPEAL delivered on the 7th November 1997.

This seems to be a case where the default of the attorney was so gross that even if the appellant had been entirely guiltless (which he was not) the sins of the attorney should be visited upon the appellant.

It is true that the respondent's attorney showed little interest in the proceedings and seems to have sat back and let time pass. But, of course, he was entitled to do this knowing that as each day passed without action the probability of a successful application diminished. In the result the delay has been grossly excessive, there has been negligence on the part of the appellant and his attorneys and even if the prospects of success in the appeal were very good indeed it would be contrary to the interest of the administration of justice to accede to the present application.

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The application is dismissed with costs.

SCHREINER J A

I agree:

KOTZé J P

I agree:

STEYN J A

Delivered on.....day of April 1998.

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