

IN THE COURT OF APPEAL OF SWAZILAND

Appeal Case No.31/98

In the matter between:

HEZEKIEL MTHEZUKA MAGAGULA

Vs

SWAZILAND GOVERNMENT

CORAM: LEON, J P

STEYN, J A

TEBBUTT, J A

FOR APPELLANT Mr. J. Magagula

FOR DEFENDANT Mr. L. Maziya

JUDGMENT (25/11/99)

LEON, J P

When this case was called today, counsel for the appellant made an application for condonation of the appellant's failure to lodge the record within the time prescribed by the Rules of Court. That application was not opposed by counsel for respondent. In support of the application the appellant relies upon an affidavit which he puts up indicating to some extent, but not properly, some excuse for the delay but only for part of the delay. The delay in this case is in fact 9 months and at its best for the appellant it may be that there is some explanation for a delay of a few weeks. Not only that but there is nothing whatever said in the affidavit about whether or not there are any prospects of success on appeal whatever. The affidavit is

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completely silent on the topic. As a matter of principle it is quite clear that in an application for condonation it is necessary for an appellant to show that there are prospects of success on appeal and to allege that circumstance. In *HERBSTEIN and VAN WINSEN* the civil practice of the Supreme Court of South Africa, 4th edition, at page 901 the following is stated:-

"As a rule the applicant for leave must allege, and the court before it grants the application will have to be satisfied, that the appeal has some chance of success on the merits."

That is not only a statement which appears from *HERBSTEIN and VAN WINSEN* but is in fact a recognised and tried principle which has always been applied in cases of this kind. Reference may usefully also be made to the case of *Melane v Santam Insurance Co. Ltd.* which is referred to in the same book at page 898 in which Holmes J A enumerated the general matters which would be taken into account in considering an application of this kind. But he said inter alia that if there are no prospects of success there is no point in granting the application for condonation. One of the matters which concerned us when we adjourned was whether the circumstance that there had been no objection by counsel for the respondent was a matter which we ought to take into account in deciding whether this application should be granted. That very question was considered in the case of *Saloojee and Another vs*

Minister of Community Development 1965 (2) SA 135AD at page 138 E - F where the court said this:-

" It is for the applicant to satisfy this court that there is sufficient cause for excusing him from compliance and the fact that the respondent has no objection, although not irrelevant, is by no means an overriding consideration."

In these circumstances it seems to me to follow that the fact that counsel for respondent has not objected is not a matter that should deflect us from what I regard as our proper course of conduct in this case. There is no allegation whatsoever in the affidavit that there are any prospects of success which is an essential requirement in an application of this kind. Moreover it is my view that there are no prospects of success in this case. I say that because this is a case where there is a hopeless irreconcilable conflict of fact as to whether the applicant was appointed when he claims to have been appointed, as opposed to the respondent's case which says the appellant was appointed at a different time. That irreconcilable dispute of fact must be resolved against the appellant. The onus of proving that was not discharged on the papers. There was no application to call oral evidence and in those circumstances, on that ground alone there are no prospects of success on appeal. Furthermore as I indicated earlier, no proper explanation has been given for the inordinate delay which has occurred in this case. In these circumstances I am firmly of the opinion that despite the fact that counsel for respondent did not oppose, this is a case where the application for condonation must be refused, and the appeal must be struck off the roll with costs.

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LEON, J P

I AGREE

STEYN, J. A

I AGREE

TEBBUTT, J.A.