IN THE SUPREME COURT OF SWAZILAND

APPEAL CASE NO.56/08

In the matter between:

OKH FARM (PTY) LTD APPELLANT

VS

CECIL JOHN LITTLER N.O. 1st RESPONDENT
GIDEON TRUTER WILLEMSE 2nd RESPONDENT
MASTER OF THE HIGH COURT 3rd RESPONDENT
REGISTRAR OF DEEDS 4th RESPONDENT
ATTORNEY-GENERAL 5th RESPONDENT

CORAM
BANDA CJ EBRAHIM JA MAGID AJA

FOR THE APPELLANT ADVOCATE R.M. WISE SC
FOR THE FIRST AND
SECOND RESPONDENTS ADVOCATE M. VAN DER WALT

JUDGMENT

EBRAHIM JA:

This is an appeal against the judgment of Maphalala J in which the learned judge

(a) dismissed, with costs, an application by the appellant for the removal of the first respondent as executor of the estate of the late Petrus Joubert van der Walt and the issue

of letters of administration to Richard John Stanley Perry; and dismissed an application by the appellant to rescind a judgment, in terms of which the second respondent obtained judgment by consent against the estate in the sum of El 600 000; and

(b)

(b) allowed a counter-application by the first respondent (i) to declare that the leases between the appellant and the estate of the late PJ. van der Walt were invalid and (ii) for the ejectment of the appellant from the farm which is the subject matter of this case.

General Comments

The record is voluminous and at the same time confusing. When I first received the initial record, it was quite clear that it was incomplete because, *inter alia,* it did not include the respondents' opposing affidavits or the first respondents' counter-apphcation which was mentioned in the judgment and in the first respondent's heads of argument in the appeal. Be that as it may, we are told that the granting of the counter-apphcation which was successful is not being challenged in this appeal.

The facts:

The late P.J. van der Walt owned a farm officially known as portion H of Kubuta estate. He had inherited the farm from his wife, who died on 1st May 1990. The farm was also known less formally as the Roc Farm or the ROC Trust Farm. The farm shares a boundary with a farm officially known as

portion E of Kubuta estate, otherwise called Mellowwood, of which one Ashley Malcolm Cameron-Dow was the manager. That farm, and later the ROC Farm, were operated by Nisela (Pty) Ltd, which Mr. Cameron-Dow describes as "an associate company of the [appellant] and... the operating company of the [appellant]."

Mr. van der Walt died on 24f January 1998, but his will, referred to below, was executed on 13th September 1991 and the codicil to it on 22nd January 1998, apparendy two days before he died.

As mentioned, Mr. van der Walt executed a will before he died. In it he purported to create a trust, the ROC Trust, which he stipulated should continue until at least the year 2000. He nominated three persons as trustees, Jeremiah de la Rouviere Rens, Beukes Lodewickus Willemse and Johannes Lodeqickus Grobler. He stipulated that the whole of his estate, apart from specific bequests mentioned in the will and in the subsequent codicil, should be transferred to the trustees, who should administer it in terms of the detailed requirements of the will.

The will provided that the trustees had the right to lease, but not to sell, any fixed property forming part of his estate. However, in the codicil he provided that the farm should be leased to the second respondent, Mr. Gideon Willemse, for five years at a "nominal amount", whatever that meant. Mr. Willemse, not unnaturally, took this to mean that he would have the right to occupy the farm during that period. He accordingly occupied the farm and a written lease agreement was signed on 29th July 1999. The second

respondent and Mr. Rens signed the agreement, which specified that the lease would be for a period of three years from 1st march 1999. The leased area specifically included the homestead, but excluded an area known as "The Sanctuary". The lease expired on 28th February 2002.

On 22nd July 2002 (not 2003, as stated in the judgment), the appellant company, represented by Peter Barry Forbes (since deceased) signed a lease agreement in terms of which the appellant was to lease the entire farm for a period of three years, beginning 1st July 2002. Two handwritten agreements between Forbes and the second respondent were drawn up a week later. In terms of the first agreement, Nisela Farms (Pty) Ltd, represented by Mr. Forbes, agreed to pay the second respondent some R36 000 for "loose equipment". The second one appears to have been between Forbes and the second respondent, whereby Forbes paid R40 000 for an electric motor and various pipes.

In August 2003 Mr. Beukes Willemse, one of the trustees, sought an order than Mr. Rens be removed as an executor of the deceased estate. This order was granted on 6th February 2004, but the court also ordered that Mr. Willemse resign as an executor.

It is of interest to note that neither of these individuals was described in the will as executors; they were nominated as trustees of the ROC. I do not know what difference, if any, this makes. This will did not specifically appoint any executors at all.

On 9 June 2004 Mrs. Fikile Mthembu was appointed executor dative and letters of administration were issued to her.

At the same time as Mr. Beukes Willemse sought the order removing Mr. Rens as executor, he sought an order declaring that the purported creation of the ROC Trust was invalid. This order was also granted on 6th February 2004 and confirmed on appeal in March 2005.

Because it appeared to the people concerned that the lease agreement of 22nd July 2002 was probably invalid, Mrs. Mthembu, on behalf of the deceased estate, drew up another lease with the appellant company. This lease was dated 20th July 2004 and purported to lease the farm for two years, beginning 1st August 2004, with an option to renew for a further two years. The appellant had been in occupation of the farm since July 2002.

Mrs. Mthembu was removed from office as executrix by order of the High Court on 24th June 2005 and the first respondent, a practising attorney, was appointed in her stead on 7th July 2005. According to Cameron-Dow's affidavit, it was the second respondent who initiated the proceedings whereby Mrs. Mthembu was removed from office.

The grounds for doing so appear to be that she was not empowered to enter into the lease she did in July 2004.

On 17th September 2005, the first respondent, on behalf of the estate, signed a consent to judgment in favour of the second respondent. The claim was for improvements made to the farm while the second respondent was in occupation. This claim had been made a year previously when Mrs. Mthembu was executrix. According to the second respondent's heads, she had conceded the merits of the

claim but was awaiting an opinion on the *quantum* (this is yet another example of the poor state of the record. In the second respondent's heads of argument at para 3.16, it refers to the first respondent's answering affidavit which was initially not in the record).

In November 2005 three family members, who claimed to be the intestate heirs of the late P.J. van der Walt, entered into agreements with the appellant whereby they, for various considerations, purported to cede to the appellant all their rights, tides and interests in the deceased estate.

In January 2006 the appellant launched the application. The respondents replied to the founding affidavits and dealt with the merits therein; but when the matter was argued in the Court *a quo* several points *in limine* were raised by the respondents. Several of these were upheld by the learned Judge *a quo* who accordingly dismissed the application with costs.

The learned Judge *a quo* handed down his judgment in the matter on the 31st October 2008. An appeal was noted against his judgment on the 20th November, 2008.

The issues in this Court

The appellant has brought an application for condonation reading as follows:

1. *Condoning the late delivery of the Appellant's Heads of Argument;*
2. *Condoning the initial delivery of an incomplete record and the subsequent late delivery of the complete record;*

3. *The cost* (sic) *of this application for condonation, only in the event that it is opposed;*

4. *Further and/ or alternative relief* "

In considering such an application it is necessary to consider how venial the conduct sought to be condoned is and also the strength of the appellants' argument on the merits, because it is self-evident that a bad procedural case may be excused by a good appeal on the merits. We accordingly heard full argument from counsel on both sides on the procedural issues and then heard argument on the appeal itself.

Rule 30(1) provides as follows:

"*30(1) The appellant shall prepare the record on appeal in accordance with sub-rule (5) and (6) hereof and shall within 2 months of the date of noting the appeal lodge a copy thereof with the Registrar of the High Court for certification as correct*".

In terms of the Rule the appellant ought to have lodged the record with the Registrar within two months of 20th November 2008 which is to say, by midnight on 19th January 2009. The record, in incomplete form as already mentioned, was actually lodged only on 30th January 2009. On 28th January 2009 the second respondent's attorney wrote to the appellant's local attorney, in the following terms:

"*We refer to the above and note that you have failed to file the appeal record timeously as required by Rule 30 the Rules of Supreme Court* (sic). *Accordingly, your client's appeal is deemed to have lapsed in terms of sub-rule 4 thereof.*

In response thereto, the appellant's local attorney suggested on grounds, conceded by the appellant's counsel, Mr. Wise, to be untenable, that no condonation was necessary.

A further unsatisfactory feature is that the appellant's attorneys were notified by the Registrar, that they were required to file their heads of argument by 19th March 2009 and were alerted to the defective record in the first respondent's heads of argument which was filed on the 1st April 2009. Despite this, the application of condonation of the late filing of the record was only filed on 30th April 2009. I received the corrected record some time after my arrival in Swaziland on the 4th May, 2009. This is hardly satisfactory as by then all the members of the Court were seized with the Court of Appeal session being in progress and there was very little time available to consider the voluminous documentation filed in the way of heads of argument and other related papers. No satisfactory explanation has been given as to why condonation had not been sought earlier. In my view this is yet another example of the dilatory approach exhibited by appellant's attorneys. Their conduct virtually amounts to a discourtesy to the members of this court.

The appellant's instructing attorney is Mr. J.S. Bekker who practises in Gauteng. In his affidavit in support of the appellant's application for condonation he states that after the Notice of Appeal was filed
(although he does not say how long after) he instructed the local attorney, Mr. Mots a "to attend to the preparation of the record". According to Mr. Motsa he instructed a professional assistant "to proceed with the preparation of the record". He

did not himself check the record but stated that it was his [11] *bona fide* belief that the record was complete and in order".

That it was not "complete or in order" is clear and would have been obvious to any one who knew anything about the case on a cursory examination of what was filed at court. The correct record consisted of five bulky lever-arch files of paper, whereas what was originally filed consisted of two unbound volumes. Before us Mr. Wise conceded as much. It follows that nobody with the slightest knowledge of the case even took the interest to examine what had been done by the professional assistant who had been deputed to prepare the record. In my opinion, this lack of supervision amounted to serious if not gross negligence.

Moreover there is nothing on the papers to tell us who the professional assistant (presumably a qualified attorney) was or how the mistake came to be made because there is no affidavit from that person in the condonation application. In the absence of such an affidavit there is nothing to explain how, when the complete record consists of over 1800 pages, the inadequate and incomplete record came to be filed. If, as I assume, the professional assistant had had nothing to do with the original application, that fact simply compounds the negligence of the attorney who failed to supervise his work. If, on the other hand, the professional assistant had been involved in the original application we certainly should have had his or her explanation for the inadequate record file.

The appellant's case seems to be that it was not until 1st April 2009 when the appellant's attorneys received the

respondents' heads of argument that it realized for the first time that the record originally filed was incomplete.

In what appears to be a suggestion that the respondent's attorney contributed to the delay in preparing the record Mr. Bekker says:

"*37. On 17 April 2009, I responded with a telefax to Mr. Shilubane,*
which I copied to both Kobinson Bertram and the First Respondent's Attorney.

38. *I annex hereto a copy of that telefax, marked annexure "JSB 7".*

39. *In this telefax, I set out the page numbers of the portions of the record that should be excluded, totaling 1265pages and I advised both the attorneys for the first and second respondents, that should we not hear form them by 14h00 on that day, the full record would be filed.*

40. *No response has to date hereof been received from Mr. Shilubane's office and the only response receivedfrom Sigwane*
& Partners is a telefax dated 22 April 2009, a copy whereof is annexed hereto as annexure "JSB 8 ".

41. On 17 April 2009 the full record was filed."

Mr. Bekker is there dealing with what happened after an exchange of telefaxes stretching back to 2nd April 2009. I point out firstly that Mr. Shilubane was the second respondent's attorney and there is no suggestion that Mr. Bekker or Mr. Motsa had discussed the record with the first respondents' attorney. Secondly and more important if the appellant's attorneys had complied with Rule 30(6"),

questions relating to omitting portions of the record ought to have been discussed with the respondents' attorneys while the appellant's attorneys were initially preparing the record i.e. in January 2009. And if that had been done there would not have been the confusion about the record for Mr. Motsa or Mr. Bekker must in the course of those discussions have inevitably have discovered the inadequacy of what came to be filed. It is, after all, impossible to decide what should be omitted from the record without examining in detail what requires to be included therein.

The main reason advanced for the lateness of the heads of argument seems to be the temporary absence of counsel who appeared in the
Court *a quo.* That is, I suppose, a partial excuse, though ultimately other counsel was briefed to draft the heads. Perhaps counsel who could deal with the matter more expeditiously should have been briefed. But, compared to the appellant's performance in relation to the record, the question of the heads of argument pales almost into insignificance.

It is true that the Registrar's notice on when heads of argument were to be filed indicated that this should be done by the 19th March 2009. The notice was in fact issued on that date. This was indeed improper notice but the appellant's heads of argument were subsequently only filed on the 21st April 2009, more than a month after the notice which notified legal practitioners that the first session would commence on 4th May 2009.

From what I have indicated above it is my view that the appellant has clearly not complied with the rules of court. It was therefore incumbent on it to apply, without delay, for condonation see **Saloojee and Anor Nno v Minister of Community Development 11965(2) SA 135 (A); Kgobane and Anor v Minister of Justice and Anor 1969(3) SA 365 (AD) and Waikiki Shipping Co. Ltd v Thomas Balour and Sons (Natal) Ltd 1981(1) SA 1040(A).**

In **Herbstein and van Winsen,** "The Civil Practice of the Superior Courts in South Africa, fourth edition, the learned authors at page 903 state:

'*The onus is on the applicant, and it is he who must persuade the court, that he has a good claim to the grant of condonation. Since the court, in the nature of the case, hesitates to deny a party the opportunity of enforcing a right because he fails to take procedural steps timeously, it is disposed to consider such applications indulgently; but the application is anything but a pure formality. The relief sought can only be granted upon sufficient and satisfactory grounds …*"

As a rule, an applicant who seeks condonation will need to satisfy the court that the appeal has some chance of success on the merits see **De VilUers v. de Villiers 1947(1) SA 635 (AD).** A court will not exercise its power of condonation if it comes to the conclusion that on the merits there is no prospect of success, or if there is one at all, the prospects of success are so slender that condonation would not be justified. See **Penrice v Dickinson 1945 AD 6; De Villiers v De Villiers (supra) and Herbstein and van Winsen.** (supra) at page 902.

I turn now to deal briefly with the merits of this matter.
In the Court *a quo* the appellant brought two applications: one for the removal of the first respondent as executor of the estate and the other to rescind the judgment granted in favour of the second respondent against the estate with the consent of the first respondent. In its application for the removal of the first respondent as executor it claimed to be both a creditor of, and the cessionary of the rights of the interstate heirs against, the estate. In the rescission application, it relied merely on the latter rights.

In the Court *a quo* the learned Judge held that neither aspect of *locus standi* had been established and accordingly dismissed both applications.

The appellant claimed to be a creditor by virtue of the estate's liability to pay the costs of an urgent application which the first respondent had brought against the appellant under Case No.2454/05. The first respondent withdrew the application and tendered costs; and the appellant asked for attorney and client costs and eventually the matter was subsequendy argued in Court; but the court had not yet given judgment on the matter of costs when the appellant's present application was launched. I agree with the appellant's contention that it was not necessary for its costs to be taxed before it could regarded as a creditor. But it was necessary to have either an order for costs against the first respondent or a binding agreement with the first respondent to pay such costs. In the appellant's heads of argument it is submitted that "it was common cause that the appellant was a creditor of the estate in respect of legal costs, although the scale thereof and the amount thereof had not been

determined". That was in fact not common cause. What had happened was that the first respondent had made an offer and the appellant had made a counter-offer, which by definition amounted to a refusal of the offer. In short, there was no agreement. Indeed, it would have been open to the first respondent to argue, when the matter came to be argued, that he was not liable for costs at all.

In my view, therefore, the appellant had little prospect of overturning the judgment of the Court ***a*** *quo* on this issue.

The appellant's cession document was unstamped. In terms of Section 13 of the Stamp Duties Act No.37 of 1976 that fact rendered it inadmissible in Court proceedings. In terms of the proviso to that Section the learned Judge *a quo* had a discretion to receive the document if it were subsequently duly stamped and penalty paid. In this matter, the learned Judge ***a*** *quo* elected not to receive the cession. Mr. Wise assured us that he had requested the learned Judge in the Court ***a*** *quo* to act in terms of the proviso to Section 13 of the Act, but, for reasons which are not clear to us, for no reasons were mentioned in his judgment, the learned Judge declined to do so.
Quite plainly, we cannot substitute our discretion for that of the learned Judge *a quo* even if we were to consider that he had exercised his discretion wrongly.

It follows that in relation to the claim of *locus standi* based on the cession, the appellant is left with the weaker part of its case based on the affidavit of Mr. J.H. van der Walt.

In my judgment, therefore, the appellant's prospects of success on the merits are not nearly adequate to counter-balance the grave inadequacies of its performance on the procedural point.

The respondents have sought costs on the higher scale. I do not believe we have been appraised of the full facts by both parties in this matter. There are glaring failures which I have highlighted on the part of the appellant which has resulted in its failure in this appeal but I remain uncomfortable on whether the court has been fully put in the picture by all concerned with this matter. I believe a simple order for costs would suffice in this matter.

In the result I propose the following order:-

1. The appellant's application for condonation is dismissed with costs.
2. The appeal is struck off the roll.
3. The appellant is to pay the respondents' costs of appeal, including the certified costs of counsel.

A.M. EBRAHIM
JUSTICE OF APPEAL

I agree:
R.A. BANDA
CHIEF JUSTICE

I agree:
A.M. MAGID
ACTING JUSTICE OF APPEAL

Judgement delivered in open court on the 19th day of May 2009.