IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE Appeal Case No. 30/2015

In the matter between:

DE BARRY ANITA BELINDA **APPELLANT**

and

A.G. THOMAS (PTY) LTD **RESPONDENT**

Neutral Citation	:	DE BARRY ANITA BELINDA VS. A.G. THOMAS (PTY) LTD (30/2015) [2016] SZSC 07 (30 JUNE 2016)
Coram	:	CLOETE AJA, MAGAGULA AJA and MAPHANGA AJA
For the Appellant	:	MR Z. SHABANGU
For the Respondent	:	ADVOCATE D. VETTEN
Heard	:	09 MAY 2016
Delivered	:	30 JUNE 2016

Summary : **Application for condonation – Applicant to supply full, detailed and accurate account of causes of delay and date, duration and extent of any obstacle on which reliable placed to enable Court to assess responsibility – Prospect of success – Sufficient allegations to persuade Court.**

JUDGMENT

CLOETE -AJA

BRIEF BACKGROUND FACTS AND SEQUENCE

[1] 1. The Court *a quo* handed down a Judgment in this matter on 07 May 2015 in which it granted Judgment in favour of the Respondent in the following terms (using reference to the Parties in the Court *a quo)*;

1.1 **Defendant's counterclaim is hereby dismissed;**

1.2 **Plaintiff's cause of action succeeds and Defendant is hereby ordered to;**

1.2.1 **pay the Plaintiff the sum of E380,000.00;**

1.2.2 **interest at the rate of 9% per annum a tempore morae;**

1.2.3 **costs of suit including costs of Application for interdict *pendent lite,* Summary Judgment Application. Costs of this action (Summons) only to be paid in terms of Rule 68 (2) being costs of Senior Counsel at Attorney and own client scale.**

2. On 05 June 2015, the Appellant filed a Notice of Appeal setting out its grounds of appeal which will be dealt with later in this Judgment. (The Notice of Appeal was filed timeously).

3. The Record of Appeal was filed on 04 February 2016.

4. The Appellant's Heads of Argument were filed on Friday 06 May 2016 at 1659 hours. (The Heads of Argument of the Respondent were filed on the same day but before those of the Appellant).

5. On 29 April 2016 (and 4 working days before the hearing of the matter) the Appellant filed and served an Application for condonation of:

5.1 the Appellant's late filing of the Record of Appeal; and

5.2 the Appellant's late filing of Heads of Arguments.

(In fact the notice provides that the Respondent should give notice of opposition within 5 days which would have ended the day after the hearing of the matter).

6. This Appeal had been set down for hearing on 09 May 2016.

APPELLANT'S AFFIDAVIT IN SUPPORT OF THE APPLICATION AND THE ARGUMENT BY COUNSEL FOR THE APPELLANT

[2] 1. The Affidavit in support of the Application for Condonation was attested to by M. Ndlangamandla, an Attorney of the High Court of Swaziland practicing with the firm Magagula & Hlophe Attorneys. The Court and Mr Shabangu on behalf of the Appellant traversed the Affidavit in itemised detail as set out below.

2. At paragraph 7 of the Affidavit, the Deponent states that:

> **"…a Record of Appeal has to be filed within two (2) months from the date of noting of the Appeal. The purpose of this Application is to seek leave of this Honourable Court to condone the late filing of the record and to give an explanation regarding the Appellant's unintentional late filing of the Record of Appeal."**

3. At paragraph 8 thereof, and no date is given to assist the Court, the Deponent states that **"I thus proceeded to the High Court to the Judges Clerk of the Court *a quo*, Ms Gugu Mawela to enquire about the dates and Court rooms where the matter between the Parties herein under High Court Case No. 332/13 was heard on trial. This enquiry was for the purpose of retrieving the recordings and thereafter proceeding to transcribing them as per the requirement for compiling a Record of Appeal."** Mr Shabangu conceded that his firm had acted in the matter at the hearing thereof.

4. At paragraph 9 he states:

> **"I made numerous attempts to get the dates on which the matter was heard on trial and the Court rooms where trial was held but without much success."** Mr Shabangu conceded that no dates or full details of these attempts were placed on record to assist the Court. Further in this paragraph the Deponent states that **"On or about 23 July 2015, I opted to seek assistance from the office of Waring Attorneys…is a copy of the letter I wrote to Waring Attorneys requesting assistance of the dates and Court rooms where the matter was heard."**

5. At paragraph 10 the Deponent states **"We only received a response to Annexure "A" from the Respondent's Attorneys about two months later on 10 August 2015."** Mr Shabangu conceded that the response was not two months after the letter of 23 July and furthermore Mr Shabangu conceded that as at the date of the letter from the Respondents namely 10 August 2015, his firm knew that the date for the filing of the Record of Appeal had passed and that the filing thereof was accordingly out of time.

6. At paragraphs 11 and 12, again without giving any dates, the Deponent alleges that it then **"became apparent that this was an exercise which proved to be impossible as the sound recordings of this matter could not be located in the computer hard drives previously used to capture and store recordings at the High Court"** He goes on to say at 12 that it was suggested by Ms Mawela on 20 August 2015 that the alternative method of compiling the record of Appeal by the use of the Judges notes be used. He further states **"Having regard to the stipulated period for filing of the Record of Appeal we were amenable to the suggestion since we were already out of the time for filing. In adherence to Rule 30 (5) of the Court of Appeal Rules we wrote a letter to our Learned Colleagues, the Respondent's Attorneys enquiring if they were agreeable to the option of compiling the Record using the Judge's notes, and if not, we stated that we were amenable to any other alternative they would suggest. The Respondent's Attorneys were not opposed to the Judge's notes being used to compile the Record of Appeal. The Record was duly transcribed from the**

Judge's notes." Mr Shabangu again conceded that as at 20 August 2015 his firm knew that the period for the filing of the Record of Appeal had come and gone and that it was out of time.

7. At paragraph 13, the Deponent, again not giving any dates to assist the Court, alleges that a relevant document referred to as **"Exhibit A"** could not be found and that **"I duly enquired from our Mr Zweli Shabangu who advised that our copy of this document was first handed in as a copy during the examination in chief of "DW1".** Further on he states **"I could not proceed with the compiling of the Record of Appeal in the absence of the said document."**

8. At paragraph 14, and again without giving any explanation or dates to assist the Court, he states **"Since our Handwriting Expert is based in South Africa and her expertise is relied upon in most cases in the Republic of South Africa, we were failing to get hold of her to give us a copy from her own files. The only other option was requesting a copy of the same from**

our Learned Colleagues (Waring Attorneys) since it is a duty of both Parties to compile the Record of Appeal in terms of Rule 30 (5) of the Court of Appeal Rules. However, Respondent's Attorneys were reluctant to assist us with a copy of the said Exhibit."

9. At paragraph 15 he, without giving any dates or explanations which would assist the Court, attempts to lay the blame on Waring Attorneys about the non-availability of Exhibit A in what he describes as **"telephone calls and conversations continued until January 2016 where it became apparent that the Respondent's Attorneys were not willing to assist. Instead we got instructions from client that she had been served with a Writ of Execution by a Sheriff instructed by Waring Attorneys under the pretext that the Appeal had been abandoned. It is on this premise that we wrote to the Respondent's Attorneys and reminded them of the fact that, they are fully aware of the difficulty we were facing regarding the document, Exhibit "A" but, yet they now want to execute our client's property in the face of a pending**

Appeal. We undertook to complete compiling the record and serving them with same by close of business, on 05 February 2016 since our expert witness had come to our assistance and had sent us a copy of the report, Exhibit "A"." As in the previous instances, Mr Shabangu conceded that his firm was aware of the fact that the filing of the Record of Appeal was out of time on that date. He further concedes that there are no dates set out on which the South African Expert was contacted.

10. At paragraph 16, he states that there was no wilful default and again attempts to blame Waring Attorneys. He then states **"Owing to the fact that the parties were only notified recently about the current Appeal Session and also the many public holidays after Notice had been given by the Registrar of this Court regarding this session of the Appeal Court, it has not been possible to adhere to the time lines for filing but Appellant's Attorneys are working around the clock to have the Heads of Argument filed before the date of hearing of the Appeal."** Mr Shabangu conceded that

there was no explanation of any nature in the Founding Affidavit explaining the time lag between the filing of the Record of Appeal on 04 February 2016 and the date of actual filing of the Condonation Application on 29 April 2016 despite the fact that the Rules of this Court and the host of decisions of this and other Courts requiring such Condonation Applications to be brought **"without delay"** as will be referred to in the **Unitrans, Burger** and **Barrow** cases which will be fully dealt with and described below. He further conceded that there was a delay which was the fault of the Attorneys.

11. The Deponent then stated at paragraph 17 that **"The Appellant has shown good cause for the occasioned delay and has furnished this Honourable Court with a reasonable explanation supported by documentary evidence in the form of letters annexed hereto, which delay I submit was beyond the Appellant's control. It suffices for Appellant to pray that this Honourable Court condones the delay in filing the Record of Appeal and the Heads of Argument."**

12. At paragraph 18, the Deponent states that:

"18. I submit that the Appeal was noted *bona fide* and with well-founded bases in law and as such there are good prospects of success on Appeal as will more fully appear from the Notice of Appeal in that;

18.1 The Court *a quo* erred by dismissing the Appellant's Counterclaim and not finding that Respondent had failed to discharge the onus resting on it to prove clearly that the loan certificate Exhibit "B", being a clear acknowledgement of indebtedness by Respondent to the Appellant was a fraud or forgery, inasmuch as the party alleging a fraud bears the onus to prove the fraud clearly and without relying on mere speculation.

18.2 The Court *a quo* erred by not finding that the Appellant had established her Counterclaim on a balance of probabilities inasmuch as the Respondent's director had conceded and the authenticity of his signature on Exhibit "B", being the

acknowledgement of indebtedness that formed the basis of the Appellant's Counterclaim.

18.3 The Court *a quo* erred by not finding that the terms of the investment agreement between the parties were as per the written document Exhibit "B", which was a loan certificate signed by Respondent's director and shareholder and which was accepted by the Appellant as a valid acknowledgement of indebtedness by Respondent to the Appellant.

18.4 The Court *a quo* erred by making factual findings that are not supported by the evidence led at trial.

18.5 The Court *a quo* erred by rejecting relevant and material evidence established by Appellant's Counsel from Respondent's witness "PW1" through cross-examination on the basis that same was not adduced by Appellant in chief. In so doing the Court *a quo* failed to take into consideration that Appellant was

entitled to solicit answers from Respondent's witnesses through cross-examination on any relevant and/or material issues touching upon the subject matter, including issues arising from evidence submitted by the Respondent's witnesses in chief.

18.6 The Court *a quo* erred by not applying the *Caveat subscriptor* rule in respect of Exhibit "B" and/or holding that Respondent was bound by it inasmuch as DW1's expert testimony confirmed that it was PW1's authentic signature that appeared on Exhibit "B" and "PW1" himself conceded the authenticity of his signature on Exhibit "B" hence the Court *a quo* ought to have found that the Respondent was bound by it.

18.7 The Court *a quo* erred and/or misdirected itself by dismissing the Appellant's Counterclaim and in doing so exhibited bias in favour of the Respondent.

18.8 The Court *a quo* erred and/or misdirected itself by finding that the

Defendant's Counterclaim is so farfetched that no Court of Law could believe it, thus ignoring the fact that the Counterclaim was supported by documentary evidence in the form of Exhibit "B" whose authenticity was confirmed by expert testimony and the signature thereon confirm by "PW1" as authentic. Further that the document was on the Respondent's letterhead and was an acknowledgement of indebtedness by Respondent to the Appellant.

18.9 The Court *a quo* erred and/or misdirected itself by misapplying the legal principle *nemo debet locupletan cum alterius detriment* in circumstances wherein it was not applicable against the Appellant.

18.10 The Court *a quo* erred and/or misdirected itself by placing too much reliance on the need for Appellant to prove the source of funds for the investment made to the Respondent when such was not an essential element for establishing the Appellant's Counterclaim in light of

Exhibit "B" which was a clear acknowledgement by Respondent of its indebtedness to the Appellant.

18.11 The Court *a quo* erred and/or misdirected itself by granting a punitive costs Order in circumstances wherein a punitive costs Order was not justifiable.

18.12 The Court *a quo* erred by not granting an Order allowing Appellant's Counterclaim with costs."

13. It was pointed out to Mr Shabangu that the contents of 18.1 to 18.12 (in paragraph 12 above) was merely a word for word regurgitation of the grounds of Appeal as set out in the Notice of Appeal. Mr Shabangu insisted that what was set out for example at 18.6 and 18.8 set out sufficient detail to have the Court interrogate the issues and show that the Appellant has good prospects of success.

14. He further stated that his client should not suffer as a result of the actions or omissions of the Attorneys.

15. He further addressed the Court on the issue of the costs and did not make any Application for costs of the Application.

OPPOSING AFFIDAVIT AND ARGUMENT BY COUNSEL FOR THE RESPONDENT

[3] 1. That it was trite that sufficient cause needed to be shown by the Appellant.

2. That there was no voice from the Appellant herself in that she has not attested to any Affidavit. (The Court states here that this is not the practice in this jurisdiction). The Court was referred to the **Salogee** case which will be dealt with in full below.

3. Condonation is not merely for the asking and one cannot just arrive at Court and be granted Condonation in the light of the numerous pronouncements on the issue by this Court and others. The Court was referred

to the decisions of **Simelane, Tsabedze** and **Hlatshwayo** which will again be dealt with in full below.

4. The Applicant is required to give a full and detailed explanation relating to all material facts which gave rise to non-compliance and referred the Court to *inter alia* the **Duke** case which will be referred to below which deals with *inter alia*, the degree of lateness, the actual reasons given, the importance of the matter, the prejudice and the prospects of success.

5. Counsel traversed the timelines relating to the matter (which we need not repeat again here as it is fully dealt with above as regards the Affidavit of the Appellant). He reiterated the total absence of necessary information and dates, such as when contact was made with the South African Expert, why no Application for an extension of time in terms of Rule 16 of the Rules of this Court was not brought in the November 2015 session of this Court and the concession by Mr Shabangu that the Appellant would have known as far

back as August 2015 that the filing of the Record of Appeal was out of time and that there is absolutely no explanation at all why no such Application was brought immediately when the Appellant knew it was out of time and furthermore that there is no explanation why the Appellant failed to bring any such Application immediately after 04 February 2016 but chose to bring the matter on 29 April 2016.

6. The requirement of all the cases which will be referred to is that a party is required to bring an Application forthwith, without delay or as soon as it realises that it is not in compliance with the Rules of this Court and that there is no explanation for such failure by the Appellant.

7. The degree of lateness between the date on which the Record of Appeal was due and the actual filing is a period of approximately six months and worst still, the period after the filing and the bringing of the Condonation Application on the eve of the matter being heard was a further three months.

8. The matter of dispute was not of great importance and was normal litigation between parties.

9. The only prejudice suffered was that of the Respondent who was unable to execute on the Judgment in his favour in the amount claimed, which was not disputed in any way by the Appellant in the Court *a quo*.

10. In its Opposing Affidavit:

10.1 At paragraph 8, 9, 10, 11, 12 and 13 thereof it, through the Deponent, the Respondent categorically denies that the Respondent's Attorneys were unwilling to assist with the exhibit and gives a full explanation relating thereto.

10.2 At paragraph 15 the Respondent deals specifically with the issue of abandonment and states the following; **"However, when Appellant's Appeal lapsed due to the time frame that has lapsed and there was no Condonation filed by the Appellant, it became apparent that the Appeal had**

> **been abandoned as there was no indication that Appellant intended to prosecute the Appeal. I humbly submit that this Court has held on numerous occasions that Rule 30 (4) of this Court's Rules is to be enforced strictly on recalcitrant Appellants. It was only reasonable for the Respondent to conclude that the Appeal had been abandoned. It was only after a Writ of Execution was levied that Appellant suddenly awakened and served the Record."**

11. That accordingly the Application for Condonation must fail on the first requirement of giving the Court a full and reasonable explanation of the reasons for the delay in not bringing timeous Applications in terms of Rule 16 and/or 17 as is required in those Rules and case law.

12. As regards the prospects of success, Counsel stated that paragraph 18 of the Founding Affidavit was merely a regurgitation of the Notice of Appeal and made no attempt of any nature to present the Court with explanations why any of those grounds constituted

grounds which would illustrate to and persuade the Court that the Appellant had good prospect of success by reference to actual factual and legal issues and not even Exhibit "A" was attached to their papers.

13. Accordingly Counsel prayed that the Application for Condonation be dismissed with costs.

REPLY BY APPELLANT'S COUNSEL

[4] 1. Mr Shabangu correctly pointed out that it was not necessary for the Appellant to attest to an Affidavit.

2. He pointed out that in the **Unitrans** matter, the period which the Court found to be unreasonable was eighteen months and not three years as he had indicated in his initial address.

3. There was no prejudice to the Respondent.

4. That the Affidavit contained sufficient detail on the prospects of success on appeal.

5. That it was a very important matter as it related to a purported counterclaim of the Appellant.

6. That the non-compliance was the fault of Counsel and that the client should not be punished.

FINDINGS OF THIS COURT

[5] 1. The relevant provisions of Rule 30 of the Rules of this Court provide that: (with our underlining)

> "**30. (1) The Appellant shall prepare the Record of 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.**
>
> **30. (4) Subject to Rule 16 (1), if an Appellant fails to note an Appeal or to submit or resubmit the Record of Certification within the time provided by this Rule, the Appeal shall be deemed to have been abandoned.**
>
> **30. (5) The Appellant in preparing the record shall, in consultation with the opposite party, endeavour to exclude therefrom documents not relevant to the subject matter of**

the Appeal and to reduce the bulk of the record so far as practicable. Documents which are purely formal shall be omitted and no document shall be set forth more than once. The record shall include a list of documents omitted. Where a document is included notwithstanding an objection to its inclusion by any party, the objection shall be noted in the index of the record."

2. Rule 31 (1) of the Rules of this Court provide as follows:

"**31 (1) In every Civil Appeal and in every Criminal Appeal the Appellant shall, not later than twenty eight days before the hearing of the Appeal, file with the Registrar six copies of the main Heads of Argument to be presented on Appeal, together with a list of the main authorities to be quoted in support of each head."**

3. Rule 16 of the Rules of this Court provides as follows:

> "**Rule 16 (1) The Judge President or any Judge of Appeal designated by him <u>may on application extend any time prescribed by these rules</u>: provided that the Judge President or such Judge of appeal may if he thinks fit refer the Application to the Court of Appeal for decision.**
>
> **Rule 16 (2) <u>An Application for extension shall be supported by an Affidavit setting forth good and substantial reasons for the Application</u> and where the Application is for leave to Appeal the Affidavit shall contain grounds of Appeal which *prima facie* show good cause for leave to be granted."**

4. Rule 17 of the Rules of this Court provides as follows:

> "**Rule 17 The Court of Appeal may <u>on application and for sufficient cause shown, excuse any party from compliance with any of these Rules</u> and any give such directions in matters of practice and procedure as it considers just and expedient."** (my underlining in all of the above)

5. All of these Rules are clear and unambiguous and set out the obligations of a party who is obliged to submit a

Record of Appeal in the fashion set out in Rule 30 and Heads of Argument in the fashion set out in Rule 31 and failing that, as provided for in the case law which will be referred to below, to bring Applications as set out in Rules 16 and/or 17 above. Contrary to what the Appellant alleged about shared responsibility, the onus is squarely on the Appellant to prepare and file the record "in consultation with the Respondent".

6. The relevant case law relating to the activities referred to in 5 above can be referred to as follows:

6.1 In **Dr Sifiso Barrow v. Dr Priscilla Dlamini and the University of Swaziland (09/2014) [2015] SZSC09 (09/12/2015)** the Court at 16 stated **"It has repeatedly been held by this Court, almost *ad nauseam*, that as soon as a litigant or his Counsel becomes aware that compliance with the Rules will not be possible, it requires to be dealt with forthwith, without any delay."**

6.2 In **Unitrans Swaziland Limited v Inyatsi Construction Limited, Civil Appeal Case 9 of 1996,** the Court held at paragraph 19

that:- **"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.** The same Court also referred, with approval, **to Commissioner for Inland Revenue v Burger 1956 (A)** in which **Centlivres CJ** said **at 449-G** that: **"…whenever an Appellant realises that he has not complied with the Rule of Court he should, without delay, apply for condonation."**

6.3 In **Maria Ntombi Simelane and Nompumelelo Prudence Dlamini and Three Others in the Supreme Court Civil Appeal 42/2015**, the Court referred to the dictum in the Supreme Court case of **Johannes Hlatshwayo vs Swaziland Development and Savings Bank Case No. 21/06 at paragraph 7** to the following: **"It required to be stressed that the whole purpose behind Rule 17 of the Rules of this Court on condonation is to enable the Court to gauge such factors as (1) the degree of delay involved in the matter, (2) the adequacy of the reasons given for the**

delay, (3) the prospects of success on Appeal and (4) the Respondent's interest in the finality of the matter."

6.4 In the said matter of **Hlatshwayo** referred to above, the Court at 4 stated as follows: **"The Appellant's Heads of Argument were filed on 25 October 2006 which was a period of only six days before the hearing of the matter. This was a flagrant disregard of Rule 31 (1) of the Court of Appeal Rules which provides as follows…** (the wording of the Rule followed)".

6.5 In the same matter, the Court referred to **Simon Musa Matsebula v Swaziland Building Society, Civil Appeal No. 11 of 1998** in which Steyn JA stated the following: **"It is with regret that I record that practitioners in the Kingdom only too frequently flagrantly disregard the Rules. Their failure to comply with the Rules conscientiously has become almost the Rule rather than the exception. They appear to fail to appreciate that the Rules have been deliberately formulated to facilitate the delivery of speedy and efficient justice. The disregard of the Rules of Court and of good practice have**

so often and so clearly been disapproved of by this Court that non-compliance of a serious kind will henceforth procedural orders being made – such as striking matters off the roll – or in appropriate orders for costs, including orders for costs de bonis propriis. As was pointed out in <u>Salojee vs The Minister of Community Development 1965 92) SA 135 at 141</u>, *"there is a limit beyond which a litigant cannot escape the results of his Attorney's lack of diligence"*. Accordingly matters may well be struck from the roll where there is a flagrant disregard of the Rules even though this may be due exclusively to the negligence of the legal practitioner concerned. It follows therefore that if clients engage the services of practitioners who fail to observe the required standards associated with the sound practice of the law, they may find themselves non-suited. At the same time the practitioners concerned may be subjected to orders prohibiting them from recovering costs from the clients and having to disburse these themselves."

6.6 In **Nhlavana Maseko and Others v George Mbatha and Another, Civil Appeal No.**

7/2005, the Court stated at 15 **"In a circular dated 21 April 2005 practitioners were again warned that failure to comply with the Rules in respect of the filing of Heads of Argument would be regarded with extreme disapproval by this Court and might be met with an order that the appeals be struck off the roll or with a punitive cost order. This warning is hereby repeated."**

6.7 In the matter of **Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA),** the summary of the matter is as follows: **"Appeal – Prosecution of – Proper prosecution of – Failure to comply with Rules of Supreme Court of Appeal – Condonation Applications – Condonation not to be had merely for the asking – Full, detailed and accurate account of causes of delay and effect thereof to be furnished so as to enable Court to understand clearly reasons and to assess responsibility – To be obvious that if non-compliance is time-related, then date, duration and extent of any obstacle on which reliance placed to be spelled out."**

6.8 **Herbstein** and **van Winsen, The Fifth Edition** at page 723, is instructive on when a Court may grant condonation on good cause shown. It is stated therein:

"Condonation

The Court may on good cause shown condone any non-compliance with the Rules. The circumstances or 'cause' must be such that a valid and justifiable reason exists why compliance did not occur and why non-compliance can be condoned."

6.9 **In Standard General Insurance Co Ltd v Eversafe (Pty) Ltd it was stated that:**

"It is well-established that an Application for any relief in terms of Rule 27 has the burden of actually proving, as opposed to merely alleging, the good cause that is stated in Rule 27 (1) as a jurisdictional prerequisite to the exercise of the Court's discretion. Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 325G. The Applicant for any such relief must, at least, furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about and

to assess his conduct and motives (Silber v Ozen Wholesalers (supra at 353A)).

6.10 In the **Unitrans** matter referred to supra, the following observation is also made:

"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."

6.11 As was said in **Kombayi v Berkhout 1988 (1) ZLR 53 (S)** at 56 by **Korsah JA:**

"Although this Court is reluctant to visit the errors of a legal practitioner on his client, to whom no blame attaches, so as to deprive him of a re-hearing, error on the part of a legal practitioner is not by itself a sufficient reason for condonation of a delay in all cases. As Steyn CJ observed in Saloojee & Anor NNO v Minister of Community Development 1952 (2) SA 135 (A) at 141C:

A duty is cast upon a legal practitioner, who is instructed to prosecute an Appeal, to acquaint himself with the procedure prescribed by the Rules of the Court to which a matter is being taken on Appeal."

7. In the present matter it is clear that:

7.1 No Application was brought in terms of Rule 16 at any time, let alone without delay, when by in their own admission the Appellant knew in August 2015 and up to 04 February 2016, the Appellant knew that it was out of time but simply disregarded the provisions of the Rules.

7.2 As set out in the **Uitenhage** matter, no full, detailed and accurate account of causes of delay and effect thereof were put before the Court.

7.3 The Appellant through its Counsel conceded at all the relevant time frames dealt with by him and the Court, that the Appellant knew that it was out of time and not in compliance with the provisions of Rules 30 and 31 and despite that, no Application to this Court was brought in terms of Rule 16.

7.4 Accordingly the Appellant must dismally fail the first test relating to the giving of detailed and acceptable reasons for delay and non-compliance with the Rules.

8. As regards the issue of prejudice, Mr Shabangu stated that the Appellant should not be punished because of the actions or omissions of its Attorneys. In this regard, the words of Steyn CJ in **Saloojee and Another, NNO v Minister of Community Development, 1956 (2) SA 135 (A)** at 141 C – E, which was also referred to in **Unitrans** (*supra*), are apposite. With reference to **R v Chetty, 1943 AD 321** at 323 and **Regal v African Superslate (Pty) Ltd, 1962 (3) 18 (AD)** at 23, where non-compliance with the Rules was also attributed to the laxity of legal representatives, he held that, **"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… The**

Attorney, after all, is the representative whom a litigant has chosen for himself, and there is little reason why, in regard to condonation of the failure to comply with the Rule of Court, a litigant should be absolved from the normal consequences of such relationship, no matter what the circumstances of the failure are."

9. The Appellant in any event will, given the adverse findings of this Court, be able to pursue an alternate remedy.

10. Having failed to jump the first hurdle successfully, it is perhaps not necessary to deal with the issue of the prospects of success of the Appellant. However, notwithstanding that, in that regard:

10.1 The purported grounds on which the Appellant relies in the Founding Affidavit (on which it is bound to stand or fall in terms of trite law) are a mere word for word regurgitation of the grounds of appeal as set out in the Notice of

Appeal without a single amplification of any nature of any ground;

10.2 There is no reference to any circumstance or law or any decision of any other Court relating to any of the purported grounds which would make this or any other Court believe that there are reasonable let alone good prospects of success;

10.3 Not even the hotly contested Annexure "A" was annexed to the Affidavit;

10.4 Under those circumstances this Court has not been persuaded that the Appellant has made out any case for this Court to find that she has a reasonable prospect of success. However, the Appellant having failed dismally in the first leg of her obligations, the second leg does not need to be canvassed in any greater detail;

10.5 In the **Uitenhage** matter referred to above it was stated that:

"It is trite that where non-compliance of the Rules has been flagrant and gross, a Court should be reluctant to grant condonation whatever the prospects of success might be. Darries v Sheriff, Magistrate's Court,

Wynberg 1998 (3) SA 34 (SCA) at 41D." (my underlining)

10.6 As was pointed out in **Kodzwa v Secretary for Health & Anor 1999 (1) ZLR 313 (S)** by **Sandura J** (with whom McNally JA and I concurred):

"Whilst the presence of reasonable prospects of success on Appeal is an important consideration which is relevant to the granting of condonation, it is not necessarily decisive. Thus in the case of a flagrant breach of the Rules, particularly where there is no acceptable explanation for it, the indulgence of condonation may be refused, whatever the merits of the Appeal may be. This was made clear by Muller JA in P E Bosman Transport Works Committee & Ors v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A) at 799 D-E, where the learned Judge of Appeal said:

'In a case such as the present, where there has been a flagrant breach of the Rules of this Court in more than one respect, and where in addition there is no acceptable explanation for some periods of delay and, indeed, in respect of other periods of delay,

> **no explanation at all, the Application should, in my opinion, <u>not be granted whatever the prospects of success may be</u>."** (my underlining)

11. The issue of the non-compliance with the provisions of Rule 31 relating to the late filing of the Heads of Argument was not canvassed at the hearing but it follows that for the same reasons of non-compliance with the Rules, those Heads were filed out of time and this Court expresses its displeasure at the lack of courtesy, in the least, in the filing of such Heads two days (including a weekend) before the matter was to be heard and the words of the Court in the **Hlatshwayo** matter are applicable here.

12. Despite numerous Judgments, circulars, warnings from Judges, practitioners in this Court nevertheless continue to fail to abide by the Rules of this Court with seeming impunity and we hope that this Judgment will demonstrate that this Court will no longer tolerate non-compliance of the Rules of this Court nor the flagrant abuse of such Rules. Having said that, this Court will

always consider genuine, well documented Applications in terms of the Rules provided that full acceptable details are set out in Founding Affidavits, the Court taken into the confidence of the Applicant and such Applications brought in terms of the Rules of this Court immediately upon a problem arising.

13. In many of the cases referred to above the issue of punitive costs has been debated and ordered. See the **Matsebula** matter *supra*. Also see the **Saloojee** matter *supra*. In this instance, the Court seriously considered the matter but in view of the fact that the Respondent did not seek such a punitive costs order, the Court will abide with the Order sought by the Respondent. Save that the Appellant should not be required to suffer the consequences of the disregard of the Rules by her representatives who under the circumstances shall bear the costs out of their own pockets.

14. **JUDGMENT**

14.1 In the result the Application for Condonation is dismissed with costs on the ordinary party and party scale which shall include the certified costs of Counsel under Rule 68 (2) to be paid by the Appellant's attorneys *de boniis propriis*;

14.2 It follows that the Appeal be deemed to have been abandoned in terms of Rule 30 (4) and the Judgment of the Court *a quo* is confirmed.

R. J. CLOETE
ACTING JUSTICE OF APPEAL

I agree

J. S. MAGAGULA
ACTING JUSTICE OF APPEAL

I agree

C. MAPHANGA
ACTING JUSTICE OF APPEAL