IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO.01/2017**

In the matter between:

SWAZI AUCTIONEERS (PTY) LTD **1st Appellant**

MARSHALL CAMPBELL (PTY) LTD **2ND Appellant**

MATLOCK ESTATES (PTY) LTD **3RD Appellant**

PIRCARDIE ESTATES (PTY) LTD **4TH Appellant**

DUMISA RANCHING COMPANY (PTY) LTD **5TH Appellant**

MAKHOSEMVELO DLAMINI N.O. **6TH Appellant**

And

THE SWAZILAND DEVELOPMENT AND SAVINGS BANK **Respondent**

Neutral Citation: Swazi Auctioneers (Pty)Ltd and Five others vs The Swaziland Development and Savings Bank [2017] SZSC 15(09 May, 2019)

Coram: **MCB Maphalala CJ, SJK Matsebula AJA**

Heard: **25 March, 2019**

Delivered: **31 May, 2019**

Summary: *Civil Practice and Procedure – Application for condonation – Late filing of heads of argument – Late filing of application – Requirements for condonation restated – Two of absolute requirements being a full explanation for delay and prospects of success – Condonation of the non-observance of the Rules of this Court is not a mere formality – Non-compliance due to Respondent's attorney's flagrant disregard of the Rules of this Court is no guarantee that condonation will be granted- compliance – Application for condonation dismissed.*

JUDGMENT

SJK Matsebula AJA

[1] I have had the benefit of reading the judgment prepared by my brother JM Dlamini JA. I agree with his narration of the events and analysis of the cases but disagree with the conclusion or some of the orders especially orders 1,3 and 4.

[2] This is an application for condonation for the late filing of heads of argument by Respondent, the Applicant herein. The appeal was originally enrolled for the 24th July 2018. On the morning of that day respondent filed its heads of argument and an application for condonation. Both documents are dated and stamped for that day, 24th July, 2018.

[3] From the onset I detect tardiness on the Notice of Motion dated and stamped 24th July, 2018, it partly reads –

> "BE PLEASED TO TAKE NOTICE THAT an application will be made before this Honourable Court for the hearing of the matter for an Order in the following terms:-
>
> 1. Condoning the Appellant's late filing of the Heads of Argument;
> 2. Further and/or alternative relief.

It is the Respondent who needs condonation for late filing of the heads of arguments and not the Appellants.

Further down it reads -

> "TAKE NOTICE FURTHER THAT if the Respondent intends to oppose this application, he is required to:-
>
> (a) Immediately notify the Appellant's Attorneys in writing of its intention to oppose this application and further appoint in such notice an address within the radius of 5 km from the Court sitting at which address it shall accept service of all documents in these proceedings.
>
> (b) And thereafter attend before the Supreme Court on Tuesday 6th March 2018 at 9:30 or so soon thereafter as the matter may be heard.
>
> The Notice of Motion is date stamped by the Registrar on the 24th July, 2018 and the date of Tuesday 6th March 2018 had long passed. That is not all. Mr Magagula signed the Notice of Motion on behalf of "Respondents Attorneys" and not as Applicants (or Appellants as the Notice seems to claim that he represents them) and is "*DATED AT MBABANE ON THIS 29 DAY OF JULY 2018*": a date after the 24th July 2018 when the Registrar is supposed to have received the Notice of Motion. Irreconcilable dates, that's all I can say.

[4] The Founding Affidavit in support of the condonation application by the Applicant is signed by Mr. Magagula on behalf of the Swaziland Development and Savings Bank, the Respondent in the main case, crafted in the following terms:-

> ***"(FOUNDING AFFIDAVIT)***
>
> *I the undersigned,*
>
> ***MANGALISO MAGAGULA***

Do hereby make oath and say that:-

1. *I am an Attorney of the High Court of Swaziland, practicing as such with the firm of attorneys, Messrs Magagula and Hlophe Attorneys, at 7th Floor, Corporate Place Building Swazi Plaza, Mbabane in the Hhohho Distsrict. We are the Attorneys of Record for the Respondent in the matter.*
2. *That facts deposed to herein are within my personal knowledge and belief, both true and correct.*
3. *This appeal was enrolled in 2017 and could not proceed because a majority of the Supreme Court judges have previously dealt with the Swazi Bank / Dumisa matters before and a quorum could not be formed. The matter was postponed sine die and the parties were to be advised once arrangements had been made to hear the matter.*
4. *Two (2) sessions of this Honourable Court have passed since the matter was enrolled. Due to a heavy work load when the roll for this session was issued I somewhat in advertently did not realize that the appeal was enrolled.*
5. *When the roll for this session was issued, I was involved in two (2) matters where I was representing a client with the Swaziland Communications Commission. I was spending most of my time outside the office. The matters themselves were quite involved and complex which distracted my attention. The matters involved Competition Law and Telecommunications Law and because of lack of resources required out of office research. One of the matters was concluded on the 6th and the other one on the 20th July 2018.*
6. *At the time, I was also working on heads for two other matters enrolled for the current session of the Supreme Court. Regrettably, these are not matters which I could delegate because of their complexity and the fact that I have been personally handling them.*

7. *During the week of 9 July 2018, there was a bereavement involving a senior member of the firm who passed away whilst was at work and I had to be involved in assisting her family. For a week and some days, I was unable to be involved in any work and I was totally distracted by the tragic passing away of the colleague.*
8. *I only learnt that the matter has been enrolled for this session on Thursday 19 July 2018. This is when I got the record and notice that the Appellants filed heads in February 2017. I also notice that the record of appeal is incomplete and does not include for example the supporting affidavit filed by Sibusiso Motsa, the trustee of the deceased insolvent estate.*
9. *I humbly apologize for not filling the heads on time. It is not willful but was caused by circumstances beyond my control.*
10. *The Respondent as a party has nothing to do with the failure to file heads . It is an error by its attorneys. The Respondent's rights should not be affected by its attorney's error. The Respondent has good prospects of success on appeal.*

***WHEREFORE** I pray that the late filling of the heads be condoned."*

[5] It is common cause that the Appellants filed their Heads of arguments as well as the List of Authorities on the 1st February, 2017 and again filed a document styled "INDEX TO BUNDLE OF AUTHORITIES" on the 24th July, 2018. The Appellants filed their Heads of arguments and List of Authorities within the limits imposed by the Rules of this Court.

[6] After some postponements partly due to lack of quorum by the Court, the application for condonation was finally heard on the 25th March, 2019. As stated above I only disagree with the conclusion or the order that seeks to grant the application for

condonation. I now examine the current position of this Court, for purposes of consistency, on applications for condonation.

THE CASE LAW

[7]. The headnotes in Saloojee and Another. NN.O. v. Minister of Community Development [1965 (2)] A.D. have been followed by this Court over the years and it reads:-

At pages 135 and 136 -

> *"Condonation of the non-observance of the Rules of the Appellate Division is by no means a mere formality. It is for the applicant to satisfy that Division 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.*
>
> *An appellant should, whenever he realises that he has not complied with the Rule of Court, apply for condonation without delay.*
>
> *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 the Appellate Division. Considerations* ad misercordiam *should not be allowed to become an invitation to laxity.*
>
> *The Court refused condonation in the absence of an acceptable explanation not only of the delay in noting an appeal and in lodging the record timeously, but also of the delay in seeking condonation, where there were no strong prospects of success on appeal".* (My underlining)

At page 140 -

"As to the delay in drawing and lodging the petition after the record had become available, the only excuses offered are that Mr. Lewis, the Pretoria attorney dealing with the matter, was unable to attend to it during February, 1964, as a result of extreme pressure of work after his return to office from annual leave at the end of January, and certain misunderstandings which arose because the applicants' Pretoria and Johannesburg firms of attorney did not keep one another properly informed. I need hardly say that in the circumstances of this case these are not excuses which could serve as a sufficient explanation for the delay". (My underlining)

At page 141 -

"There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency effect upon the observance of the Rules of this Court. Considerations ad misericordiam *should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of as failure to comply with a Rule of Court, the litigant should be absolve from the normal consequences of such a relationship, no matter what the circumstances of the failure are."* (My underlining)

[8] Holmes J.A in Melane v. Santam Insurance Co. Ltd [1962] (4) SA at 532 said :-

"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts that are usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts

are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects there would be no point in granting condonation".

In the present application the Respondent simply says: ***"the Respondent has good prospects of success on appeal".*** *There are no* details of what the prospects are so as to enable the Court to gauge them. I hold therefor that there is no statement but a bare and bold statement saying there are prospects of success.

[9] The Founding Affidavit for condonation in The *Swazi Observer Newspaper (Pty) Ltd t/a Observer on Saturday and two Others v Dr. Johannes Futhi Dlamini (13/1018 [2018] SZSC 26 (19/09/2018)* has striking resemblance to the Founding Affidavit to the present case:-

(a) it is an application for condonation for late filing of heads of arguments as is the case in the present case;

(b) the Applicant's attorney is Mr. Mangaliso Magagula as is the case in the present case;

(c) the reason for the late filing of the heads of arguments is the death of a colleague in his law firm and secondly that he was busy with two matters before the Swaziland Communications Commission as is the case in the present case;

(d) he did not outline the prospects of success as is the case in the present case;

(e) he attributed the fault of not filing the heads of arguments to himself and that his clients were entitled to be heard by the Court, he apologized, stated the importance of the case and that his clients must be heard just as is the case in the present case.

It appears to me this is a cut and paste situation and the application in that case with the same reasons as herein was dismissed. For purposes of consistency, this case must be treated exactly in the same manner as in the *Swazi Observer Newspaper (Pty) Ltd Supra* holding that Condonation is not to be had merely for the asking but that full detailed and accurate account of acceptable causes of delay are required and convincing details on the prospects of success.

[10] The twin requirements for condonation applications was stressed in The Swazi Observer case, *Supra*, and its necessity, being full explanation for the delay and prospects of success just as in the Saloojee case cited above. It was held that an explanation for the delay must be an acceptable one, and, being overloaded with or having other cases is not an acceptable explanation:-

> *"In Melane v Santam Insurance CO Ltd, 1962 (4) SA 531 (A), the Court held that without a reasonable and acceptable explanation for the delay, the prospects of cusses are immaterial, and without prospects of success, no matter how good the explanation for the delay, and Application for Condonation should be refused."*

The case at paragraph 28 further cited the case of Novo Nordisk vs C.C.M.A and Others where helpful guidelines were given as:-

> *"[45]In my view whilst the standard required in showing prospects of success is lower than that applied when the main case is contested. The application for condonation needs to show more than just listing factors related to the prospects of success. The Applicant needs to persuade the Court that there is a chance of the arbitration award being found when the review is considered in the main case to be irregular or unreasonable."* (My underlining)

The present case does not come anywhere near this standard as it simply makes a bare allegation that there are prospects of success.

[11] In *Sandra Khumalo and 4 Others vs Lomdashi Limited (76/2018) [2019] SZSC 7 (20/03/2019)* the requirements for an application for condonation were restated as being full explanation for the delay and prospects of success in founding papers. At paragraph [10] it is stated:-

> " *In Maria* Ntombi Simelane and Nompumelelo Prudence Dlamini and Three Others *in the Supreme Court Civil case 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 is 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 prospectus of success on Appeal and (4) the Respondent's interest in the finality of the matter.*" (My underlining)

In the present case the reasons for delay are the death of a colleague in the Law Firm whose status we are not told, the Respondents attorney attending to other matters before a Commission in preference to this Court and no prospects of success explained what they are.

[12] The Sandra Khumalo case did not only restate the two requirements necessary in applications for condonation but also issued a final warning to Legal Practitioners against the flagrant disregard of the Rules of this Court at paragraph 20 as follows:-

> *"[20] Accordingly, despite all the above warnings, malpractice by legal Practitioners in the Kingdom continues unabated. At Page 38 of De*

Barry Anita vs A.G. Thomas (Pty) Ltd (30/2015) [2016] SZSC 07 (30 June 2016) following was said:

"[12] Despite numerous Judgements, circulars, warning from Judges practitioners in this Court nevertheless continue to fail to abide by the Rules of this Court with seemingly impunity and we hope that this Judgement 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 *Floyd Mlotshwa and Another vs Chairman Elections and Boundaries Commission and Others* (96/2018) [2019] SZSC3 (2019), this Court dismissed an application for condonation for the late filing of the heads of arguments, because of the failure to give a reasonable explanation for the delay in complying with the Rules of Court, and, secondly for failure to give details on the prospects of success. The Applicants attributed the delay to file heads of arguments to lack of finances to continue with the processes timeously. The Court held that such was not to be a reasonable and acceptable explanation. The dictum His Lordship Justice Steyn CJ in the *Saloojee and Another v. Minister of Community Development* Supra was restated and by extension forming part of Eswatini Jurisprudence and at paragraph [11] it is stated thus:-

"... it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the Attorney. 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. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect of the part of the attorney, after all, is the representative whom the litigant has chosen for himself, and there is a little reason why in regard to condonation of a failure to comply with a Rules of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are." (My underlining)

At paragraph [12] the Court stated:-

"*In addition the application for condonation does not deal with prospects of success on appeal. It is trite law that there are two main legal requirements for the granting to an application for condonation Firstly, the applicant must present a reasonable explanation for the delay in complying with the Rules of Court. Secondly, he must satisfy the Court that he has prospects of success on the merits. The appellants have failed to satisfy both requirements for condonation."* (My underlining)

The application for condonation for late filing of the heads of argument, and, the list of authorities was dismissed in this case.

[14] In a most recent case, *The Pub and Grill Limited and Another Pub and Grill vs The Gables* (Pty) Ltd (102/2018) [2018] SZSC 17 (20TH May 2019) in an application for condonation for the late filing of heads of arguments, at paragraph [30], the Court stated as follows :-

"[30] In O.K.H. Farms (Proprietary) Limited vs Cecil John Littler N.O. and Others

- *Supreme Court Case No. 56/2008 t Page 15 A.M. Ebrahim J.A. stated that:-*

> *"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 Villiers vs 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 are so slender that condonation could not be justified. See* Penrise vs Dicknson 1945 AD6; de Villiers vs de Villiers supra ad Herbstein Van Wisen *Supra at page* 902." (My underlining)

[15] At paragraph [26] of the Pub and Grill case *Supra*, the Court came to the following conclusion:-

> *"In the present case, the reasons given by the Applicant / Appellant for not filing the heads of arguments and list of authorities relate largely to Mr. Dlamini's busy schedule. The explanation is not reasonable and does not constitute sufficient cause for this Court to exercise its discretion to grant the condonation sought."* (my underlining).

The underlined statement should equally apply in the present case as the facts are the same, both relying on their busy schedules.

Judgment

[16] In this case I would like to make the following observations:-

> Firstly, the heads of arguments were not filed as is required by Rule 31 which stipulates that :-

> *"In every Civil Appeal and in every Criminal Appeal the appellant shall, not later than 28 days before the hearing of the Appeal, file with the Registrar six copies of main heads of arguments to be presented on appeal, together with a list of the main authorities to be quoted in support of each head."*

Secondly, Neither was an extension of time as per Rule 16 requested.

Thirdly, Rule 17 provides:-

> *"The Court of Appeal may on application and for sufficient cause shown, excuse any party from compliance with any of these Rules and may give such directions in matters of practice and procedure as it considers just a and expedient.."*

Fourthly, The application for condonation, apart from being defective as shown above, was filed on the very date upon which the main case was scheduled to be heard on the 24th July 2018 depriving the other party the opportunity to respond by filing its own papers. The notice of Application further required the appellants, if they oppose, to file the responses on dates already passed. There is no doubt that there was laxity in the preparation of the papers.

Fifthly, The Application for condonation did not attempt even to measure up to the twin requirements for condonation being , firstly, reasonable explanation for the delay in complying with the Rules of Court, and, secondly, prospects of success on the merits but :-

(a) *The Applicant (Respondent in the main case) attributed his delay in filing the heads of arguments to his busy schedule where he had to attend to two cases before the Swaziland Communication Commission which were very important and complicated.*

(b) *The Applicant further attributed his delay in filing due to the passing away of a colleague at his law firm which he says distracted him. Sad as the situation was but the Court is not taken into confidence to the level or hierarchy in the firm's structure of the deceased so that the Court could access the impact the death could have caused to the performance of the firm . Both explanation are and have been so held not to be adequate reasons. See the Swazi Observer case , Supra.*

Sixth, The Application for condonation lacks averments on the prospects of success in the main appeal. In the Melane v Santam Insurance *case, supra, where Holmes J A said at page 532 that if there are no prospects of success there would be no points in granting condonation.*

Seventh,Mr. Magagula contended that the fault for late filing of the head of arguments is his fault and not of his client and therefore his client should be heard. One inference I draw from this submissions is that the Rules of Court are not that important and could be flagrantly violated or disregarded. The Saloojee case, supra and others have held 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. To hold otherwise might have a disastrous effect upon the observance of the Rules of Court. It was further said the attorney, after all, is the representative whom the litigant has chosen for himself and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences no matter what the circumstances of the failure are.

[17] Accordingly, the following order is made:

(a) The application for condonation for the late filing of heads of arguments is hereby dismissed.

(b) The respondent is directed to pay costs at attorney and own clients scale including certified costs of counsel.

(c) The appeal is postponed to the next session of the Court for hearing on the merits.

S.J.K. MATSEBULA
ACTING JUSTICE OF APPEAL

I agree

M.C.B. MAPHALALA
CHIEF JUSTICE

(Dissenting judgement by: **M.J. Dlamini J.A)**

For the Applicant / Respondent: Mr. M. Magagula

For the Appellants : Adv. Magriet (Instructed by Mr. L.R. Mamba)

MINORITY JUDGMENT

Summary: *Practice and Procedure – Rules 17 and 31(3) – Condonation – Late filing of heads of argument – Late filing of application - Factors to be considered – degree of non-compliance – explanation for failure to comply – importance of the case – prospects of success – respondent's interest in the finality of the judgment – convenience of the Court – avoidance of unnecessary delay in the administration of justice.*

MJ Dlamini JA

Introduction

[1] This is an application for condonation for late filing of heads of argument by respondent, the applicant herein. The appeal was originally enrolled for the 24th July 2018. On the morning of that day respondent filed its heads of argument and application for condonation. Both documents are dated that day, 24th July, 2018.

[2] The notice of motion of the application is somewhat peculiar. Its penultimate paragraph reads:

> "Take Notice Further That if the Respondent intends to oppose this Application, he is required to -
>
> (a) Immediately notify **Appellants'** Attorneys in writing of its intention to oppose this application and further appoint....
>
> (b) **And further attend before the Supreme Court of Swaziland on Tuesday 6th March 2018 at 9.30 hrs. or so soon thereafter as the matter may be heard".** (My emphasis).

[3] The notice is then signed for Magagula & Hlophe Attorneys as **"Respondents Attorneys"**. Yet on the face of the 'Notice of Motion', the respondent is the Bank. To what does part (b) refer? Is it relevant here? Clearly the document is confused and fatally defective on those considerations. The third paragraph of the Notice, however, correctly refers to the Bank as the 'Applicant'. In this Judgment we shall refer to the Bank as the respondent and to Swazi Auctioneers and the others as the appellants.

[4] The founding affidavit deposed to by Attorney Mangaliso Magagula also leaves a lot to be desired. Key to the founding affidavit in an application for condonation for failure to comply with any rule of court or any order of court or any step that is required by the rules of court or order of court is what every attorney/ counsel appearing before the Supreme Court should know inside out, namely, the twin requirements, viz. explanation for the non-compliance and prospects of success.

[5] In his paragraph 3 deponent avers that the *"appeal was enrolled in 2017 and could not proceed because a majority of the Supreme Court Judges (had) previously dealt with the Swazi Bank/Dumisa matters...."* The date for the enrollment in 2017 is not reflected. With such a statement in a case of condonation for late filing, the applicant is not being open or candid to the Court. Must it be assumed that since '2017' the appeal has been pending, for one and a half years till July 2018 and still heads were not duly filed and condonation therefor not made? If by July 2018 the respondent had not filed its heads of argument it follows that it could not have filed such heads at any time in 2017 when the matter was supposedly first enrolled. So, strictly speaking, it is since beginning of 2017 that the respondent had failed to comply with the rules regarding filing of its heads. The fact that the appeal was postponed *sine die* in 2017 was no basis for not complying with the rules or minimizing any existing non-compliance. But all this is really speculation until

specific dates are disclosed. We are therefore not certain if the matter was enrolled for hearing in 2017 or not. But the heads could only be overdue if they were due for filing as at a specific date in 2017. That date we do not have. We shall therefore proceed on the basis of the 24th July 2018 enrollment which is definite and provable.

Background

[6] In July 2018 the matter had been enrolled but again could not be heard because as respondent says: *"4... Due to a heavy work load when the roll for this session was issued, I somewhat inadvertently did not realize that the appeal was enrolled for this session"*. In the following paras 5 and 6 respondent explains its attorney's heavy work load. In para 7 respondent refers to a bereavement in its attorney's law firm which further negatively impacted on respondent's attorney's time. In para 8 respondent's attorney says he only learnt on 19 July 2018 that the matter had been enrolled for hearing on 24 July, 2018. However, the notice of appeal, the record, heads of argument and authorities were served by appellants on respondent between 17 January and 4 February 2017. How attorney Magagula could not have been aware of the matter for more than a year until 19 July 2018 boggles the mind. This can only reflect extreme tardiness on the part of respondent's attorney. For, in the normal course of office management, matters are diarized to allow time to avoid forgetfulness or distractions. A big office with several partners or assistants must have a way of knowing from point of entry to point of exit who is dealing with which particular matter or file. There has got to be a register for all matters in a properly run law office supervised by a managing partner or director. Because of the uncertainty of what happened following service of the appeal documents on the respondent, we shall not capitalize on any apparent defaults during 2017.

[7] In a letter of 26 September 2018 Mr. Mamba wrote to the Registrar of this Court pointing out, among other things, that "the above matter came before the Hon.

Court for hearing on the 24th July 2018" but was *"postponed following an application by the Respondent which was also ordered to pay the costs including those for counsel"*. Indeed, by Court order of 24th July 2018 the appeal was postponed *sine die* and costs for the postponement ordered in favour of appellants including "certified costs of counsel for the day". Mr. Mamba's letter of 26th September reflects that the parties were in the meantime urged to explore possible ways of settlement. This, however, was not successful as the parties appeared "too far apart" from settlement. In the same letter of 26 September Mr. Mamba requested a date for hearing. That date was by memorandum of the Chief Justice dated 27 September then fixed for 18th October 2018 and confirmed by notice of set-down dated 28 September 2018.

[8] On 18 October 2018 the respondent was granted leave "to lodge a formal application to seek the recusal of some Judges on the Coram…". Respondent had to do this by 22nd October 2018, with appellants filing their reply by 29th October 2018. Respondent failed to comply with the court order and only filed its formal application a day after, on 23 October 2018. The appellants, however, complied as they filed their opposition on 29 October. The appellants promptly noted that the respondent having defaulted in filing on time as ordered by the Court did not then apply for extension of time or condonation for late filing. The application for recusal was never heard as the Judges, the subject matter of the application, were not part of the coram at the next date of hearing of the matter on 29 November 2018.[1] Even then, in their recusal opposition the appellants noted a "pattern of tardiness, negligence and disregard for the convenience of the above Hon Court" on the part of the respondent. In the result, the late filing of the recusal fell away and was not heard.

[1] See Chief Justice's Memorandum dated 27 November 2018

[9] Again the matter did not take off on 29 November 2018. On 28 November 2018 respondent wrote to the Registrar stating that Mr. Magagula would not be available on 29th due to 'pre-set engagements' not possible to reschedule on short notice. Respondent's letter emphasized that the appeal was a *"matter of commercial importance to our client and required adequate time for preparation having regard to the fact that it involves millions of Emalangeni"*. In the result another date besides the 29th was requested in the course of the week following. However, the 29th November 2018 was the last day of the 2nd Session of the Supreme Court. What exactly happened to the appeal on 29 November is not clear on the papers. The appeal would seem to have been subsequently regularly enrolled for 12 February 2019, the 2nd day of the sitting of the Supreme Court in 2019.

[10] It is probably worth noting that in its letter of 28 November 2018, the applicant's attorney, Mr. Magagula, refers to the hearing of the 'appeal' and says nothing of the recusal application. In that regard Mr. Magagula casually wrote: *"We were advised late yesterday that Justice...and Acting Justice...recused themselves from the matter and that the appeal hearing will be tomorrow morning"*. I do not have the bridging information in this regard to be able to say how Mr. Magagula knew that some judges on the coram had recused themselves. Be that as it may, it does not appear that the recusal application and its challenges as above indicated were at any time formally closed. The matter was on 12 February 2019 postponed *sine die* for lack of a coram and was later set down for 25 March 2019 and the recusal application was lost in transit as a non-issue.

The condonation application

[11] On 25 March 2019 this Court went back to the late filing of respondent's heads of argument for the hearing that had been set down for 24th July 2018 and the

purported application for condonation therefor. Attorney for the respondent was somehow caught unawares as he appeared not well prepared for this part of the hearing. Mr. Magagula struggled and had a tough time putting up any strong support for his application. In his founding affidavit of 24th July 2018, the very day for which the matter had been enrolled for hearing, Mr. Magagula stated that after the first enrollment in 2017 the matter was postponed *sine die* and the parties were to be informed of the next hearing. Two sessions allegedly passed by and when the matter was enrolled for the 24th July Mr. Magagula 'due to a heavy work-load ... inadvertently did not realise the appeal was enrolled'. As we have stated above, Mr. Magagula says when the roll came out, he was busy with other work in his office which denied him time for this appeal as he could not delegate those other duties.

[12] From paragraph 5 through paragraph 7 of his affidavit Mr. Magagula tells the Court about what he was doing in and out of his office resulting in his being unaware of this appeal on the roll. In para 8 he writes: *"I only learnt that the matter has been enrolled for this session on Thursday 19 July 2018. This is when I got the record and notice that the appellants filed heads in February 2017... 9. I humbly apologise for not filing the heads on time. It is not willful but was caused by circumstances beyond my control. 10 The respondent as a party has nothing to do with the failure to file heads. It is an error by its attorneys. The respondent has good prospects of success on appeal"*. That is substantially all the founding affidavit contained in its plea for condonation.

[13] It is no wonder that Mr. Magagula had difficulty supporting the condonation. He had not filed any heads or authorities for his argument on the application. There really was nothing much to stand on. His founding affidavit provided no firm stand. As the alleged 'work load' of his office could not assist respondent's failure to comply with the rules, Mr. Magagula sought to raise argument based on a distinction

between failure to file a record and not filing heads. He said that Rule 30 was clear on what happens when record was not filed in time but the case of failure to file in time heads under Rule 31 was not clear. That therefore the Court has discretion to condone the lapse on the heads as the matter was otherwise ready for hearing.

[14] What Mr. Magagula seemed to ignore or take for granted was that his so-called heads may have been filed by default and should not have been before Court in the absence of an order for extension or condonation. Mr. Magagula could offer no meaningful exit from this rut and assuage the feelings and wasted labour of the appellants and inconvenience to the Court. On the point by Mr. Magagula that when the matter was postponed in July 2018 costs were ordered in favour of the appellants, it was pointed out that the order did not grant condonation for the late filing of respondent's heads: seemingly the issue did not then arise for determination. The appellants opposed the application but were seemingly unsure what result the Court should come to save for punitive costs after dismissing the application if it should be so inclined.

Requirements for indulgence

[15] Holmes JA has stated[2]:

> *"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piece-meal approach incompatible with a true discretion, save of course that if there*

[2] Melane v Santam Insurance Co Ltd 1962(4) SA 531 (A) at 532 C-F

are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective ***conspectus*** *of all the facts. Thus, a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavit".*

[16] In **Cape Town Municipality v Paine**[3] Innes CJ had occasion to consider the concept of 'sufficient cause' in connection with out of time application under the Rules of Court. The learned Judge stated as follows: *"It is not desirable to attempt to lay down any hard and fast rules as to what circumstances will constitute sufficient cause. The Court should retain as free a hand in the matter as the terms of the rule will allow. But I agree that it is for the applicant to make out his case."* The learned Judge went on to point out that in dealing with these matters the Court *"must take a wider view and look at the case in all its aspects"* and, with reference to the matter before him, Innes CJ observed: ***"The delay though not justified was not inexcusable and the papers show upon the face of them the importance of the case not only to the respondent, but to the rate payers and the public.*** *It is not desirable to enter into any discussion of the merits".* In that case leave was granted for applicant to file notice of appeal within one week; applicant also to pay the costs of the application including costs for the opposition. (My emphasis).

[3] 1922 AD 568 at 569

[17] In **Gordon and Another v Robinson**[4] Young J stated: *"Further, it would be quite unnecessary to repeat the allegations contained in any pleading before the Court. These could be incorporated by reference in the affidavit of merits"*. After considering the question of merits, Young J concluded as follows:

> *"I am of opinion, therefore, that the defendants clearly fail on the merits. This makes it unnecessary to consider the second branch of the inquiry....**It remains to consider whether I should dismiss the application and grant default judgement or take some other course in the circumstances.** In the recent case of* **Standard Bank of South Africa Ltd v Johnnies Umtali Fisheries** *(February 21, 1957) before Quenet J a somewhat similar problem arose. An application for removal of bar and leave to plead was supported by (as the learned Judge found) a wholly inadequate affidavit of merits. Quenet J said:*
>
> > *'**In my view, the applicant should be given leave to file a fresh affidavit.** I am of this opinion because the affidavit filed in these proceedings has not enabled me to form a view as to whether the applicant had a good defence or not. **For all I know he may have such a defence. If that be so,** and other things being equal, **the door to defend the main action should not be shut upon the applicant.** The order I make is that the preliminary points are upheld; the applicant is given leave to file a fresh affidavit of merits within seven days from today'"*. (My emphasis).

[18] With regard to the foregoing order made by Quenet J, Young J went on to observe and warn as follows:

---

[4] 1957 (2) SA 549 (SR) at 552A

> *"I do not think that this statement by Quenet J was ever intended to be construed as laying down a general rule that where a defendant has failed to file an adequate affidavit on the merits the proceedings should be adjourned in order to afford him an opportunity of filing a supplementary affidavit rectifying the matter. To allow a defendant who already is in default a special adjournment, in order to remedy what is in effect a second default on his part, is an expedient which, in my view, should be resorted to only in special circumstances. The general rule should be the course followed in* ***Markides v Levendale*** *(1954 (4) SA 181 (SR), that is, where a defendant's affidavit fails to comply with the Rule the application should be dismissed.* ***Subject to the overriding power of the court to prevent an injustice,*** *litigants must comply substantively with the Rules, and if they neglect to do so the rights conferred upon the opposing party thereby must not be rendered illusory, (...)".* (My emphasis).

In the case before him Young J considered it undesirable to visit the defendants, in the circumstances of that case, with the consequences of a *bona fide* but wrong advice given by their legal advisers: *"In the circumstances but not without considerable hesitation, I am prepared to give the defendants the opportunity to file a further affidavit if they so wish. I shall therefore postpone the applications for removal of bar and for default judgement to a definite day in the near future. This course should not result in substantial prejudice to the plaintiff"*, (p 554B-C). Costs were to be paid by the defendants.

[19] In **Liquidators, Myburgh** [5] Innes CJ stated:

> *"What amounts to sufficient cause in each case; what constitutes a ground for the exercise of indulgence must depend upon the circumstances.* ***The cause***

[5] 1924 AD 226, 231

of the delay and the excuse for it, though necessarily factors to be considered, are not decisive. The merits of the appeal may in some cases be very important; but they have not been relied upon by either side, and I do not propose therefore to consider them" (My emphasis).

[20] Van Rensburg J in **Fanapi** [6] stated the following: *"Condonation of non-observance of the Rules of Court is by no means a formality. It is for the applicant to satisfy the Court that there is sufficient cause for excusing him from compliance. What calls for some acceptable explanation is not only the delay in noting the appeal and the delay in the prosecution thereof, but also the delay in seeking condonation"*. The learned Judge also pointed out that the applicant was guilty of "gross disregard of the Rules and practice" regulating the observance of Court Rules and condonation for non-compliance. In the result, the Judge observed. *"The explanations furnished by the applicant's attorney leave much to be desired.* ***This, however, need not be fatal to the success of the application if the prospects on appeal are strong. Good prospects of success may transcend deficiencies in an application for condonation and warrant a granting of the application, notwithstanding the presence of such deficiencies.*** *S v Yusuf 1968(2) SA 52 (A) at 56 H-57A"*. (My emphasis).

[21] In **Silverthorne v Simon** 1907 TS 123, Solomon J wrote at p. 124-5:

"The main question which arises in an application of this nature is, what is sufficient cause to justify the Court in removing the bar and giving the defendant leave to plead? The practice certainly has been to give a very wide interpretation to these words 'sufficient cause', and to give the very largest discretion to the Court to judge in the special circumstances of each case... I

[6] Fanapi v East Cape Administration Board 1983 (2) SA 688 (E) at 690C-D

think it is right that the Court should have such discretion in a matter of ***this nature, because I think everything should be done to secure a fair trial between the parties to the action, so that the disputes and questions between them may be settled on their merits.*** *Whenever, therefore, there is any really satisfactory explanation of a delay on the part of the defendant, if the Court comes to the conclusion that his application is bona fide, that he is really anxious to contest the case, and believes that he has a good defence to the action, and if in those circumstances, the order can be made without any damage or injury to the plaintiff other than can be remedied by an order as to payment of costs, I think when those conditions are present in any application the Court should as far as possible assist the defendant and allow him to file a plea in the action".* (My emphasis)

[22] In **Service Motor Supplies Ltd v Fouche and Another**[7] Roper AJ observed:

"The question in the present matter is whether sufficient cause has been shown for granting indulgence. A great deal of industry and some ingenuity have been expended in attempts to define 'sufficient cause', or to make a category of the various factors or circumstances which will or will not be held to be sufficient cause, but in my view those attempts are not very helpful". (Referring to applicant's attorney, the learned Judge continued): *"In my view he has not shown sufficient cause for indulgence and strictly the proper order would be simply to dismiss the application and order the applicant to pay the costs. It has been held, however, in many cases that a client should not be penalized by the negligence of his attorney and, on this point, I might refer to the case of* **Rose and Another v Alpha Secretaries Ltd** *1947 (4) SA 511 (AD) where Tindall JA at 518 said: 'It has never been laid down in this Court*

[7] 1960 (3) SA 672 (WLD)

that, where the delay has been due to the attorney's negligence, such negligence by itself is sufficient to debar his client from relief".

However, it has been held that the Court may grant relief where the *mora* in prosecuting the appeal is due to the attorney's negligence *"unless that negligence has reached such a degree of culpability as in the opinion of the Court should debar his client from relief, having regard to the other circumstances of the case".* In **Service Motor Supplies** Roper AJ concluded by making an order *"which will avoid further delay and also avoid further costs".* (p 676)

[23] In **Trans-African Insurance**[8], after observing that each case must be decided in light of its own circumstances, Schreiner JA stated:

"No doubt parties and their legal advisors should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But, on the other hand, technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits".

[24] Having regard to the frequency of these applications before this Court and the 'hue and cry' that has been raised by my brothers and sisters in this Court one is compelled to conclude that it is the majority of the practitioners who appear before this Court who persistently fail to comply with the Rules of this Court in general practice. As things stand, there is an urgent need to turn this majority to a minority at the earliest time. Generally speaking, a litigant has himself to blame for the attorney they choose to represent them. But this, no doubt, is a rather simplistic view of a complex situation. Litigants may well be justified to think that long standing

[8] Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (AD), at p 278F

practitioners know better the rules of the game. Sometimes, may be most of the time, this is not the case.

[25] Litigants are in danger of finding themselves in a most invidious situation in which bad and inefficient practitioners seem to be in league with the courts against litigants who are compelled by the exigencies of their cases to hire practitioners and still have to do the work themselves by closely following the practitioner all the way all the time to ensure the practitioner does comply with the Rules. And how is the lay litigant to know that the practitioner he has instructed does in fact comply? This is not at all fair to the majority of litigants many of whom may be lay persons. In the war against non-compliance with rules, the courts must increasingly turn their focus to the practitioners themselves, as knowledge of the Rules is what they are trained for and are admitted to practice on the basis of their proficiency in this regard. *In casu* the applicant is not entirely a lay person because, I believe, it has in-house legal advisers. But still, why should a litigant have to suffer for its paid practitioner? That is not the meaning of the decision in the **Saloojee** case (See para [28] below).

[26] Ordinarily, one would assume that a respondent would be eager to execute as soon as the Rules permit. But this is not necessarily always the case. *In casu,* we seem to have a respondent who for some inexplicable reason is rather reluctant to execute and bring the matter to finality. From the outset after the judgement *a quo* the appellants have promptly done what they needed to do; on the contrary, from the outset the respondent has been a reluctant player. Could it be that the respondent is not so sure of its victory? It is hard to say when the prospects of success were not fully considered during the condonation hearing and the culprit is the attorney.

[27] In para 10 of his founding affidavit Mr. Magagula avers that his client the *"respondent as a party has nothing to do with the failure to file heads,"* which "is an error by its attorneys", and that *"the respondent has good prospects of success on*

appeal". Mr. Magagula's submission is almost similar to that of counsel in **P E Bosman**[9] where : *"Counsel also contended that the applicants themselves were not responsible for the delay in the present case but that such delay was attributable at least to some extent to the negligence and dilatoriness of the applicants' attorneys, and he argued that this Court should in the circumstances be hesitant to debar the applicants from the relief they seek"*. The quick answer to the argument of Mr. Magagula and fellow travelers is to be found amply set out in the often-cited passage from **Saloojee**[10] case at p 141 C-E in that *"there is a limit beyond which a litigant cannot escape the results of his attorneys' lack of diligence or the inefficiency of the explanation tendered"*. This is indeed unfortunate for every litigant who cannot easily be absolved of the tardiness of its legal representative. But the Court still has a discretion to exercise no matter how bad the case may be said to be. *In casu,* one is almost persuaded to adopt without amendment Muller JA's words in the **PE Bosman** case, where the learned Justice of Appeal stated:

> *"In the present case the breaches of the Rules were of such a nature and the explanation offered in many respects so unacceptable or wanting that, even if virtually all the blame can be attributed to the applicants' attorneys' condonation ought not....to be granted"* (p799H).

[28] The second part of the respondent's para 10 stated above is to the effect that the respondent has good prospects of success on appeal. Again, this averment is far from the required standard. What prospects of success is respondent referring to? Nowhere are these prospects set out or adumbrated in the affidavit. Nor does the affidavit incorporate by attachment of any specific document or part thereof where these prospects can be found and considered. It is usually said that the prospects

---

[9] PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A), 799E
[10] Saloojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A).

must be set out in the founding affidavit itself.[11] To what extent this is an invariable rule of practice is not clear to me. Holmes JA in **Federated Employers**[12] case wrote (p 364 A-E): *"On this crucial issue, as we had before us the full record and the heads of argument on the appeal in the event of condonation being granted, it seemed to us appropriate to hear the full argument as if on appeal, a course for which counsel were prepared. The reason was that, if we were persuaded that the appeal would succeed on the merits, condonation would be granted.* ***Aliter,*** *if we were not so persuaded. This procedure is not without precedent. It must not be thought, however, that in future cases such procedure will be adopted as a matter of course".*

[29] On the basis of the foregoing statement by Holmes JA, it seems clear to me that it would be very unfair to deny the respondent the opportunity of testing its defence to the appeal without first pronouncing that there are no prospects of success or that the appeal is not hopeless. This, the Court cannot properly pronounce without having heard the parties. The better evil in the circumstances is to give the respondent the benefit of the doubt and rely on a cursory view of the record and heads of argument presented by the parties. To hold otherwise would not be realistic; instead it would be unremittingly punishing the respondent for not complying with the Rules of this Court, even where the respondent could not help it. Thus, not being in a position to say as a matter of considered opinion that there are no prospects of success for the respondent or that the appeal is likely to succeed an appropriate costs order would be meet and just against granting the condonation.

[30] So much has been said in this and related jurisdictions on the matter of condonation for non-compliance with Rules of Court, it is not possible to summarise.

---

[11] De Barry Anita Belinda v AG Thomas (Pty) Ltd, App Case No 30/2015
[12] Federated Employers Fire and General Insurance Co Ltd v McKenzie 1969 (3) SA 360 (AD)

Suffices to restate briefly and selectively what eminent Judges have said, bearing in mind always the specific circumstances of each case: *"Condonation of the non-observance of the Rules of this Court is not a mere formality"*[13]nor it is " *to be had merely for the asking"*, **(Uitenhege Transitional Local Court v SAR Service** 2004 (1) SA 292 (SCA); in the absence of reasonable and acceptable explanation for delay or lapse on the Rules, good prospects of success are immaterial and the reverse is true; *"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 result in procedural orders being made such as striking matters off the roll, or in appropriate orders for costs, including orders for costs de bonis propriis"*: **(Hlatshwayo v Swaziland Development and Savings Bank**, Case No. 21/2006); "*... 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"*. In **Nhlavana Maseko**[14] it was also noted: *"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 punitive costs order..."*; "*. . . The other argument that the Rules and decisions of this Court should simply be ignored so that litigants are not prejudiced is not a sustainable argument"*[15]

[31] The issue of the non-compliance with the Rules of this Court is a sad and persistent disease. What comes out clearly, however, from the various authorities, judicial statements and warnings to comply with the Rules is that an outright dismissal of the case should be avoided in the greater interests of justice, depending

[13] Darries v Sherriff, Magistrates' Court Wynberg & Another 1998(3) SA 34 (SCA)
[14] Nhlavana Maseko & Others v George Mbatha & Another Civil Appeal No. 7/2005, para [15]
[15] Sandra Khumalo & Others v Lomdashi Ltd App Cas. No 76/2018, para [9]

always on the specific facts of the particular case. Where the defaulting party is the appellant, striking the appeal off the roll may be easy to handle. Where, however, the defaulting party is the respondent, the situation is a bit tricky, more particularly so where the culprit is the attorney. Unlike the appellant, the respondent has been successful *a quo*. Striking the matter off the roll may not assist the appellant who wishes to reverse or have set aside the judgment *a quo*. Reversing or setting aside the judgment on appeal requires that the judgment be shown to be wrong unless that judgment be abandoned by the respondent. Striking the matter off the roll *in casu* would unduly punish the appellant who has complied with the Rules and desires to have a definitive decision on the matter.

[32] This application is not in terms of Rule 30(4) where non-compliance results in the appeal being deemed abandoned. This application is in terms of Rule 17 even as it addresses a default in terms of Rule 31(3) which is not explicit on what happens on failure to comply. What is clear is that an unrepresented litigant *"shall be excused from compliance with ... this rule"*, and that the time limits under this Rule 31 may be abridged with leave of a single judge. What would be required for abridgment is not stated but one assumes it would require a showing of good or sufficient cause. Unlike the appellant, the respondent who has been successful *a quo* enters the appellate forum carrying in his hand the cup of victory: he has that advantage over the appellant. In my opinion, to dispossess the respondent of that cup because of default in procedure would, in the absence of a clear rule to that effect, not be just.

[33] For the worst-case scenario, the headnote in **PE Bosman** (supra) is helpful. It reads:

> *"Where, in an application for condonation of the late noting of an appeal to the Appellate Division and the late filing of the record, there has been a flagrant breach of its Rules (. . .) in more than one respect, and in addition*

there is no acceptable explanation for some of the periods of delay and, indeed, in respect of other periods of delay, no explanation at all, the application should not be granted whatever the prospects of success on appeal may be. . . . And, where the breaches of the Rules were of such a flagrant nature, and the explanation offered in many respects so unacceptable or wanting, then, even if virtually all the blame can be attributed to the applicant's attorneys, condonation ought not to be granted."

Happily, we are not in exactly that sort of situation. There seems to be consensus in that for the 'non-compliance of a serious kind', an appropriate costs order which may include costs *de bonis propriis* may still avail. That is what I think should happen in this case, bearing in mind the words in **De Barry** case (supra): *"[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 Judgement will demonstrate that this* Court *will no longer tolerate non-compliance of the Rules of this Court nor the flagrant abuse of such Rules..."*

[34] In the result, in the **De Barry** case, the application which had been noted by the applicants was dismissed with costs on the ordinary scale to include certified costs of counsel to be paid by the applicants' attorney *de bonis propriis*. And the appeal was deemed abandoned and dismissed purportedly in terms of Rule 30(4) thereby confirming the judgment of the court *a quo*. But what is to be done where the defaulter is the respondent under Rule 31(3)? Does this Court have the power to declare an unheard appeal successful purely on the basis that the respondent has failed to file at all or timeously required processes such as the heads of argument, authorities and or list of authorities and condonation has not been granted or simply not applied for? No authority was presented in this regard. It is easy to say the

litigants must be subject to similar treatment in analogous situations, but can a judgment **creditor** and judgment **debtor** ever stand on exactly the same footing before the Court on appeal?

[35] After citing from para [12] of the **De Barry** case, this Court in the **Sandra Khumalo & Others v Lomdashi**, supra, made further pertinent observations such as that the parties not even *"remotely complied with the Rules....and as such both applications (for condonation) stand to be dismissed"* and *"due to the flagrant disregard for the Rules"* in the face of *"numerous warnings issued by this Court"*, the appeal was dismissed. But the Court concluded as follows: *"[24] Neither of the litigants should suffer from the actions or omissions of their legal representatives and as such the attorneys concerned should bear all of their own costs themselves."* The appeal was dismissed: but did this dismissal result in **equal treatment** of the parties? The judgment of the court *a quo* was sustained by reason of applicants 'failure to file heads of argument.' That respondent had also not filed heads of argument accounted for nothing, except, may be, cost-wise; in other words, respondent lost nothing while appellant probably lost all. Was justice served? That appellant could sue its attorney for damages is but a remote possibility hardly heard of in this jurisdiction. What is certain is that notwithstanding the stern warnings and harsh decisions on litigants and their attorneys, the rot of non-observance of the Rules of this Court continues almost unabated. Some legal practitioners may have to be debarred for some time where the non-observance of the rules is accompanied by a clear show of ignorance of the rules on the part of the practitioner.

[36] We have seen that in terms of the Rules of this Court the granting of condonation largely depends on there being 'sufficient cause shown' by the applicant. The courts have been persistently reluctant to limit their discretion by

defining and accordingly curtailing the concept of 'sufficient cause'. In this regard, Herbstein and van Winsen[16] write:

> *"The rules contain provisions for the extension or abridgement by the court, in certain circumstances, of anytime prescribed by the rules or by an order of court, not in connection with the doing of any act or the taking of any step, in connection with any proceedings of any nature whatsoever. The applicant for relief will often be a party who has failed to deliver a pleading timeously in terms of the rules of court, and has been barred from doing so".*

[37] The learned authors continue:[17]

> *"The courts are loath to limit their discretion by attempting to define what is meant by 'good cause' or 'sufficient cause'. In the leading case of* ***Smith NO v Brummer NO & Another*** *[18] the court, ... stated that the courts are inclined to grant applications for removal of bar where (a) a reasonable explanation for the applicant's delay is forthcoming; (b) the application is bona fide and not made with intent to delay the other party's claim; (c) it appears that there has not been a reckless or intentional disregard of the rules of court; (d) the applicant's case is not obviously without foundation; and (e) the other party is not prejudiced to the extent which cannot be rectified by a suitable order as to costs. This judgment in effect restates the useful general guide as to the nature of the onus resting upon the applicant for relief laid down by Solomon J in* ***Silverthorne v Simon***[19]*,..."*

---

[16] P 377, 3rd ed.
[17] Ibid pp 381-2
[18] 1954 (3) SA 352 at 358
[19] 1907 TS 123 at 124-5

[38] The learned authors continue on the courts' discretionary power to grant relief in cases of defaults and condonations:[20]

> *'"'In* ***Suidwes-Afrikaanse Municipale Personeel Vereniging v Minister of Labour*** *[1978 (1) SA 1027 (SWA) at 1038 B-C] Hart AJP held that the principle has now been firmly established that, in all instances of time limit action, whether statutory or in terms of the rules of court, the Supreme Court had an inherent right to grant condonation when principles of justice and fair play demand it to avoid hardship and when the reasons for non-compliance with time limits have been explained to the satisfaction of the court.*
>
> *'"There have been a number of decisions by the Appellate Division on applications for indulgence under its rules. The Supreme Court of Appeal and other courts have consistently refused to frame an exhaustive definition of what will constitute sufficient cause to justify the grant of indulgence:*
>
> > *"any attempt to do so would merely hamper the exercise of a discretion which the Rules have purposely made very extensive, and which it is highly desirable not to abridge. All that can be said is that the applicant must show.... 'something which entitles him to ask for the indulgence of the court'".*

[39] It is generally accepted that condonation of the non-observance of the rules is by no means a mere formality and that it is for the applicant to satisfy the court that there is sufficient cause to excuse him from compliance, and the fact that the respondent has no objection, although not irrelevant, is by no means an overriding consideration; and that the courts' power to grant relief should not be exercised arbitrarily and upon the mere asking, but with proper judicial discretion and upon

---

[20] Herbstein and van Winsen, **The Civil Practice of the High Courts of South Africa,** 5th ed pp 1227-1228.

sufficient and satisfactory grounds being shown by the applicant. In **Rose v Alpha Secretaries Ltd** [1947(4) SA 511 (A) at 517] Tindall JA preferred to replace the expression *"something which entitles him to ask for the indulgence of the court"* with the expression *"something which the Court considers sufficient to justify it in granting indulgence"*. The latter expression would seem to underscore the Courts' power and discretion to grant or refuse indulgence as against the applicant's claim to some entitlement to be granted indulgence.

[40] The courts' reluctance to define and circumscribe 'sufficient cause' leaves the door open and correctly so too as cases differ, with the result that what might constitute sufficient cause in one instance might not so constitute it in another instance; and the bottom line for the grant of the indulgence would seem to be the courts' discretion in the consideration of 'principles of justice and fair play' to avoid causing hardship for all parties concerned and the inconvenience to the Court is not substantial. It is also true, however, that the explanation of the dalliance by the applicant must be such as to dispel any impression of a reluctance to achieve an expeditious hearing of the appeal on merits. By alleging the importance of the case, the respondent signified its desire to have the merits adjudicated notwithstanding its failure to react with appropriate diligence to the preparation for hearing.

[41] A further reference to Holmes JA's decision in **Federated Employers Insurance** could be helpful in sharpening our focus on the issues for consideration in deciding on the indulgence necessary to move this appeal forward. After canvassing, more or less in detail, what happened since the delivery of the impugned judgement the learned Justice of Appeal stated as follows:

> *"As to the degree of non-compliance with Rule 5(4), the petitioners were out of time in lodging the record by about five weeks when their petition for an extension of time was sworn. As to the explanation for the delay, this was largely caused by a factor beyond the control of the petitioners, namely the*

illness of the trial Judge. Furthermore, with regard to counsel's request for a copy of the judgment before advising, the respondent's counsel rightly concedes, with colleaguely understanding, that this was not unreasonable. As to the importance of the case, the amount of the award in issue is substantial, namely R14, 300. As to the respondent's interest in the finality of the judgement, this has been referred to above; and the amount has been paid albeit conditionally. As to any inconvenience caused to the Court, this seems to be minimal. True, the Court has to adjudicate on the petition for condonation, ***but it is ever its duty to do justice between man and man****, and petition is sanctioned by Rule 13. As to the need for avoiding unnecessary delays in the administration of justice, the person primarily affected here is the respondent, and the appellants' delay was not wholly avoidable.*

"In all these circumstances there is a good deal to be said for granting the relief sought - unless, as the respondent contends, there are no prospects of success; see ***Melane's*** *case, supra at p. 532 D. On this crucial issue, as we had before us the full record and the heads of argument on the appeal in the event of condonation being granted it seemed to us appropriate to hear the full argument as if on appeal, a course for which counsel were prepared. . ."* (My emphasis).

[42] Without deciding on the prospects in the **Federated Employers Fire** case, the learned Justice proceeded to a full consideration of the merits of the appeal and having analysed the evidence concluded that there would be no point in granting the petition for condonation as there were no prospects of success on appeal (p 364 C-D). The petition for condonation was accordingly refused with costs, the latter to include the plaintiff's (i.e. respondent's) costs in relation to the appeal, which had been fully considered in the process of determining the existence of the prospects of success. In **Aberdeen Asset Management Asia Ltd and Another v Fraser & Neave Ltd and Others**[21] the Court of Appeal of Singapore **held** as follows:

"3. *There were four factors which the court took into consideration in determining whether it should exercise its discretion to extend time to enable applicant to file a notice of appeal out of time, namely, the length of the delay,*

[21] Law Reports of the Commonwealth [2002] 4 LRC 180, pp. 181-2

the reason for the delay, the merits of the appeal and the degree of prejudice. The appellants had delayed for 18 days because their solicitors had misconstrued the rules. Where an appeal was entered late because of a misreading of the rules by solicitors, such a mistake might be a sufficient ground for the grant of an extension but, in exercise its discretion, the court had to examine all the circumstances. In the instant case the law was not patently clear and the mistake was certainly not gross. On the question of merits, the appellants had room for argument as to the correct meaning of the words and their appeal was not hopeless. On the question of prejudice, there would be no real prejudice to F & N Ltd and others if the appeal were allowed to continue. The prejudice could not possibly refer to the fact that the appeal would thereby be continued if the extension were granted. Otherwise, it would mean that in every case where the court considered the question of an extension of time to file a notice of appeal there was prejudice – the prejudice had to refer to other factors. Having considered all the circumstances of the case, the extension of time would be granted".

[43] In **Attorney General v Manica Freight Services (Botswana) (Pty) Ltd**[22], a judgment of Tebbutt JP sitting alone, the head-note summarizes the position thus:

"It is well-established that in order to succeed in an application for condonation for the late filing of a notice of appeal that the applicant must, by way of affidavit, set forth good and substantial reasons for the application, that is reasons why the appeal was not timeously noted and also provide grounds of appeal which prima facie should show good cause why the leave sought should be granted. Condonation of a breach of the rules of court was granted not as of right but as an indulgence. It was accordingly unnecessary for an applicant for such condonation to show not merely that he had strong prospects of success on appeal but to give good reasons why he should receive such indulgence, that is that he acted expeditiously when he discovered his delay and advance an acceptable explanation for the delay. Other factors which the court was obliged to take into account included not only the degree of non-compliance, the explanation for it, the prospects of success and the importance of the case but also the respondent's interest in the finality of his judgment, the question of prejudice to him, the convenience of the court and the avoidance of unnecessary delay in the administration of justice".

[22] [2005] 1 BLR 35 (CA)

Adjudication

[44] The judgment appealed against *in casu* was delivered on 16 December, 2016. The appeal was noted and served on the respondent on the 12 January 2017. The record was lodged and served on the respondent on 17 January, 2017. Appellants filed their heads of argument and authorities on 1 February 2017 and served them on the respondent on 4th February 2017. Whether the appeal was ever enrolled in 2017 it is not clear from the record and pleadings. It is intimated here and there on the papers that the appeal was enrolled but somehow not heard in 2017 due to issues connected with the coram, but no specific date is mentioned. We take it that the appeal was only regularly enrolled for hearing on 24 July, 2018. On 24 July, 2018, neither the appeal nor the application for condonation was dealt with. The appeal enrolled for that day was postponed *sine die* at the instance of the respondent who was mulcted with costs including 'certified costs of counsel for the day'. It is worth noting that the Court Roll enlisting the appeal for 24 July 2018 carried this Notice on the front page: "2. ATTORNEYS ARE FURTHER ADVISED TO COMPLY STRICTLY WITH THE RULES OF COURT IN RESPECT OF THE RECORDS OF PROCEEDINGS, THE FILING OF HEADS OF ARGUMENT AND THE LIST OF AUTHORITIES".

[45] Notwithstanding that respondent had been duly served with the appeal documents in January – February, 2017 and that the Court Roll had been dispatched by the Registrar on 27 June 2018, the respondent only filed its heads of argument together with an application for condonation for the late filing of the heads on the morning of 24 July 2018. In the result the respondent was out by the entire 18 days. Mr. Magagula says that he was not aware of the enrollment until the 19th July, 2018. Hence the late filing and application for condonation. In terms of Rule 31, the respondent should have filed its heads 18 days before the 24th July, failing which the application for condonation should have been filed as soon as respondent realized it

would not comply with the 18 days requirement. Until the date for hearing, that is, until the appeal is enrolled, the time for the appellant and respondent to file their heads of argument does not begin to run. This will remain so even where the appellant files its heads before the date for hearing is set, as happened in this case. The appellants having long filed their heads, the time for filing started running for respondent when the appeal was enrolled for hearing on 24 July 2018.

[46] Mr. Magagula's explanation for not filing in time is not entirely satisfactory, but I cannot reject it as entirely unreasonable. Mr. Magagula says he had a heavy work load which was exacerbated by a bereavement at his office about mid-July. My concern, however, is that Mr. Magagula says he was not aware that the appeal was set down for hearing that very month. That being the case, the work load could not have caused the default in filing. In any case, it seems to me that at about the time of the alleged work load and bereavement, respondent's heads of argument were already late and out of time. Of the bereavement Mr. Magagula says:

> *"7. During the week of 9 July,2018, there was bereavement involving a senior member of the firm who passed away whilst at work and I had to be involved in assisting her family. For a week and some days, I was unable to be involved in any work and I was totally distracted by the tragic passing away of a colleague".*

[47] Finally, Mr. Magagula pleads that the respondent should be absolved of the default as it is an error by its attorneys. Mr. Magagula apologises for not filing the heads on time and says that it was not willful but was caused by circumstances beyond his control, and that the respondent as a party had nothing to do with the filing of the heads. The Court is not expected to single out any factor as necessarily decisive one way or the other. The Court is enjoined to consider all the circumstances of the applicant's case in the light of any possible prejudice to the other party and

the inconvenience to the Court. The explanation which mainly centres around respondent's attorney being busy and unaware of the timelines under the Rules is not entirely satisfactory. The importance of the case and the yet unexplored prospects of success should not be summarily discounted.

[48] Rule 17 requires that applicant must show sufficient cause. Has the respondent shown 'sufficient cause' to motivate this Court to excuse the respondent from compliance with Rule 31(3)? Ordinarily, it is not enough for the applicant to merely allege. As it has been said, the applicant must 'show something which the Court considers sufficient to justify it in granting indulgence' if condonation should be granted. The Court is also warned to exercise its power judicially and not arbitrarily in dealing with condonation application. Holmes JA in **Melane v Santam** (supra) says that in deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion to be exercised judicially upon a consideration of all the facts and in essence it is a matter of fairness to both sides. Herbstein and van Winsen, advise as follows: *"Where the default is due to the negligence of the applicant's attorney, that does not* ***per se*** *disentitle the applicant to relief. The court will consider all the circumstances of the case and will not lay down that a certain degree of negligence will preclude the granting of relief and another will not"*, (3rd ed, p 726; or 5th ed, p 1231).

[49] In **Saloojee,** at p 141, however, the Appellate Division clarified the position as follows: *"It has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. 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. . . Considerations* ad misericordiam *should not be allowed to become an invitation to laxity. . . "* Is the plea with reference to bereavement at Mr. Magagula's firm a plea *ad misericordiam*? It's hard to say: it

could be; it could be not. The tragic death in the firm could understandably distract a colleague. Even though the prospects do not come out clearly in respondent's affidavit, this Court is not in a position to say that there are no prospects of success or that the appeal will succeed. All that Mr. Magagula says is 'respondent has good prospects of success on appeal'. In general, this is not sufficient. The grounds must be identified so they can be examined. This statement is a bare allegation and by itself does not suffice as evidence of the existence of the said prospects. We must then take a synoptic view of whether *prima facie* respondent has a defendable case on appeal, bearing in mind the fact that the respondent had been successful below. If the appeal were to be struck off the roll, the respondent would hold on to its victory *a quo*. On the other hand, it is hard to understand how the appellant can succeed by default of the respondent where it cannot be said that the respondent has voluntarily capitulated, indicating clear lack of desire to oppose the appeal. I cannot make that determination here. The parties will have to be heard on the merits.

[50] In **De Vos v. Cooper and Ferreira** 1999 [4] All SA 432 (SCA), at p 434: *"The Court held that the factors to be considered in an application for condonation were laid out in the judgment of* **Federated Employers Fire & General Insurance Co. Ltd and Another v. McKenzie** *1969 (3) SA 360 (A) viz: (i) degree of non-compliance with the Rule; (ii) the explanation for the non-compliance; (iii) the importance of the case; (iv) the prospects of success; (v) the respondent's interest in the finality of his judgment; (vi) the convenience of the court and (vii) the avoidance of unnecessary delay in the administration of justice."* See also **Kgobane and Another v Minister of Justice and Another** 1969 (3) SA 365 (A); **Meintjies v. HD Combrinck (Edms) Bpk** 1961 (1) SA 262 (AD); **Melane v. Santam Insurance Co Ltd** 1962 (4) SA 531 (AD). On the importance of the case, respondent submits that the matter is of commercial importance to his client as it involves an amount estimated at between E13 Million and E27 Million, a claim which is said to be

supported by the appointed trustee of the deceased insolvent estate. The respondent therefore is an important stakeholder and stands to lose a great deal should the appeal not proceed to finality on the merits. The inconvenience to this Court and to the appellants is not so heavy.

[51] In **Kgobane & Another** [23] Rumpff JA, after recalling the facts and what had gone before, stated:

> *"An appeal against this judgment was noted on 20th April,1968. What happened thereafter is explained in an affidavit by the attorney of the applicants, dated 30th August 1969, annexed to the petition, an affidavit by the attorney for the first respondent and a replying affidavit by applicants' attorney. The facts disclose not only an ignorance of the Rules of this Court but an incredible degree of negligence by the attorney and his assistant in the prosecution of the appeal of the applicants.* [The learned Judge then dealt with the averments in the affidavits and continued]
>
> *"The attorney for the applicants attributed his neglect to observe the Rules of this Court and to ensure that his instructions were carried out to his working under pressure and being away from his office. When an attorney tells this Court, in effect, that he is too busy to study the Rules of this Court and to supervise the prosecution of an appeal, his explanation is quite unacceptable. In my view, this is one of the worst cases of disregard of the Rules of this Court that have come before it. Not only was there an appalling remissness by the attorney's assistant in prosecuting the appeal but a persistent failure on the part of the attorney to acquaint himself with the Rules of this Court, after he became aware that he did not know them. The result of this gross negligence of the attorney and his assistant was an inordinate delay.*
>
> ***"In exercising its discretion to condone any failure to comply with its Rules, this Court, as has been often stated before, will consider all the relevant facts, such as ... the degree of lateness, the gravity of the slackness or negligence on the part of the persons responsible for the omission, the importance of the case and the prospects of success on appeal.***

[23] Kgobane and Another v Minister of Justice and Another 1969 (3) SA 365 (A), 368H – 369F

> *"As far back as 1912, Solomon JA, in Cairns' Executors v. Gaarn 1912 AD 181 at p 190, expressed the following view: 'It would be intolerable if there were no reasonable limit of time within which appeals might be brought and it is to the interest of the public that the time should be limited. When a party has obtained a judgment in his favour and the time allowed by law for appealing has lapsed, he is in a very strong position and he should not be disturbed except under very special circumstances'. ... The duty to balance the interest of the respondent against the delay and excuse of the applicant is stressed by this Court in Melane v. Santam Insurance Co Ltd 1962 (4) SA 531 (AD) ..."*

In the result, the application was dismissed because "there were no prospects of success on appeal". Indeed, in my opinion, the Court should be able to say there are no prospects of success and not merely that prospects of success were not canvassed. But in our case, can it be said we have 'one of the worst cases of disregard of the Rules of this Court' or a case showing 'an appalling remissness' by a defence attorney or a 'persistent failure' on the part of the attorney to follow the Rules of this Court or is respondent's attorney guilty of gross negligence or a case of 'flagrant disregard' of the Rules? With respect, I do not think so.

Conclusion

[52] The Court's displeasure to the continued failure to observe the Rules of this Court cannot be overemphasized. The non-observance of Rules has a lopsided impact on the proper administration of justice. On any application for condonation, whether relief is granted or not, there is bound to be a feeling of unequal treatment of the parties. To a large extent this is due to the inexact character of the expression 'sufficient cause' and the inarticulate premise of the exercise of the court's discretion. That the failure to comply with the rules of court is by no means unique to us is no reason to be half-hearted or overly aggressive about it. There is no easy solution to this problem. Loading the price of the non-observance on the litigant is

ultimately unfair when in fact the fault is that of the attorney. Rumpf JA in **Kgobane and Another,** at pp. 369H – 370A observed:

> *"Judging by the number of applications for condonation which come before this Court, there is, at the present time, unfortunately, a tendency amongst some practitioners not to observe properly the Rules of this Court. This tendency must be reduced in order to ensure that the administration of justice is maintained on a proper level and it is, I think, necessary to remind practitioners of what is really an elementary obligation ... The negligence of the applicant's attorney and his persistent failure to observe the Rules are such that this Court will look at the applicant's prospects of success with a critical eye ..."*

Herbstein and van Winsen, 5th ed p.1231, have noted: *". . . the court is reluctant to penalize a litigant on account of the conduct of his legal advisers, and condonation may be granted if, through the error of a legal adviser, finality would otherwise be reached from which a miscarriage of justice is likely to follow."* See Louw v Louw 1965 (3) SA 750 (E) at 751H.

[53] In general, the authorities highlight the following factors as among those usually considered in condonation applications, viz. the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. In my opinion, on the basis of the above considerations, the interests of justice and fair play require that the parties be afforded an opportunity to argue the merits of the case. The explanation for the lateness may not be persuasive but that alone is not decisive. It is only one factor to be taken into account in the overall assessment of the application for condonation. The respondent was only 18 days late – even though the supporting authorities were not filed. In my opinion, the case is of sufficient importance. Even though the estate is said to be insolvent it is not without any assets

and the default is substantially that of the attorney. It is my considered opinion that both parties have an interest in the final settlement of this matter. The merits of the appeal should be heard without further delay.

[54] In my view, if condonation is not granted miscarriage of justice is likely to follow. The matter has been postponed *sine die* before. The matter must, however, proceed to finality. But the respondent would be non-suited and out of the proceedings on a purely procedural point which depends as much on the Rules as on the Court's discretion. Non-suiting the respondent means the millions of Emalangeni at stake in the appeal – of which the respondent already has a judgement in its favour – would be instantly lost by default. This is so because on the return date for hearing the merits the appellant would be unopposed. Not having filed its heads, there would be no purpose for the respondent to be present in court. On the contrary, an appropriate costs order should suffice to compensate the appellants for their wasted labour and inconvenience and allow condonation even if on the lower level of the scale. There is a tendency in some judicial circles to overemphasise the point made by some judicial authorities that absent a satisfactory explanation for non-compliance good prospects weigh nothing, the applicant must lose; and vice versa. Surely, what kind of justice is it that condemns a litigant with good prospects of success purely on a procedural offence, even where the default could be compensated by a costs order. It should be remembered that the Rules of Court are not written on stone as were the Ten Commandments on Mount Sinai. They are not inflexible. The Rules of Court are meant to facilitate speedy administration of justice. The efficacy of these Rules has its own limits just as judicial endeavor has its own boundaries.

[55] Asked on what basis or consideration the Court should grant the relief sought, Mr. Magagula was unable to offer anything and, accordingly left it to the discretion

of the Court should the indulgence be granted. Counsel for appellants asked for punitive costs should the Court be inclined to grant the application. That Mr. Magagula had been seriously tardy and remiss in the performance of his duties as attorney for the respondent cannot be gainsaid. Mr. Magagula properly accepted blame and pleaded for the absolution of his client, the respondent.

[56] In the event, I make the following order –

(1) The application for condonation is granted;

(2) Mr. Magagula and the Respondent to pay costs of Appellants at attorney and own client scale, including certified costs of counsel on a fifty-fifty basis;

(3) That Respondent file supporting authorities to its heads of argument within ten days from date hereof.

(4) That Appellants file any supplementary heads within seven days after the ten days mentioned in (3) above.

MJ Dlamini JA

For the Applicant / Respondent Mr. M Magagula

For the Appellants Adv. Magriet (Instructed by Mr. L Mamba)