IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO: 18/2018**

In the matter between:

SWAZILAND PERISHABLE FOODS (PTY) LTD t/a FOOD LOVERS MARKET **1ST Applicant**

THANDI MAZIYA **2ND Applicant**

SIZWE SYDWELL SHABALALA **3RD Applicant**

DAVIOT(PROPRIETARY) LIMITED **4TH Applicant**

And

SWAZILAND DEVELOPMENT FINANCE CORPORATION **Respondent**

Neutral Citation: Swaziland Perishable Foods (Pty) Ltd t/a Food Lovers Market vs Swaziland Development Finance (18/2018) [2018] SZSC 20 (31st May, 2019)

Coram: **MJ Dlamini JA; SB Maphalala JA, and JM Currie AJA**

Heard: **01 April, 2019.**

Delivered: **31st May, 2019**

Summary: *Civil Practice – Reinstatement of appeal - Condonation – Record on appeal – Record not lodged in terms of Rule 30 – Record lodged by respondent – Record not certified – Heads of argument not filed – No satisfactory explanation – Prospects of success considered.*

JUDGMENT

MJ Dlamini JA

Introduction

[1] This is an application for leave to reinstate an appeal which was struck off the roll on the 14th August 2018, with costs in favour of the respondent. This application which was filed on 17 October 2018 is vehemently opposed by the respondent as out of time and without merit and an abuse of the court process.

[2] The primary dispute between the parties arises from a failed loan agreement which the parties signed at Mbabane on 26 March 2014. Under that loan agreement the first applicant represented by the second and third applicants obtained a loan amount in the sum of E10,259,254-00 from the respondent subject to a variety of terms and conditions as to interest and repayment and breach. It is the respondent's allegation that the first applicant breached the agreement by failing to make the agreed monthly payments since May 2015. In the result respondent demands from the first applicant an amount of over E15 million. First applicant opposed the demand giving rise to a summary judgment in favour of respondent. First applicant's appeal to this Court was struck from the roll and ordered not to be reinstated without leave. The present application proceedings are in quest of that leave to reinstate.

[3] The appeal arose from a summary judgment granted by Magagula J on 29 March 2018 in which the applicants were defendants. On 10 April 2018 the applicants as appellants filed an application for leave to appeal to this Court. The applicants were advised by the respondent's attorneys that such leave was not required since the summary judgement was final. Thereafter, the applicants filed an amendment for a direct appeal to this court. This was on 26 April 2018.

Background

[4] On 25 April 2018 (normally a public holiday in this country) the respondent lodged the record, purportedly with a view to expediting enrolment of the appeal. On 27 June 2018 the roll for the second session of this Court was published enrolling the appeal on 14 August 2018. On 3 July 2018 respondent filed its heads of argument. The applicants did not file their heads of argument by 16 July 2018, when they were supposed to, and had not filed any heads by 14 August 2018 when the appeal stood due for hearing. The applicants had also not filed any application for extension or condonation in respect of their missing heads of argument.

[5] Even though apparently the applicants had prepared and had stamped and served on the respondent an application for postponement but had not filed it in Court, on 14 August 2018, the day of the hearing of the appeal, the applicants came to Court virtually empty-handed. In her founding affidavit in this application, 2nd applicant avers that on the 14 August 2018 the applicants had wanted the appeal to be postponed because of the "non-preparedness of the appellants' current attorneys of record, Magagula & Hlophe Attorneys, to prosecute the appeal".

[6] 2nd applicant explains why the attorneys for the applicants were not prepared for the proceedings on 14 August. In her founding affidavit the 2nd applicant states: *"9 ...The enrolment of the appeal for hearing on 14 August 2018 did not give the*

appellants' attorneys of record at the time adequate time to comprehend the issues raised by the appeal and to file the appellants' heads of argument in preparation to argue the appeal accordingly". The appeal had been prepared and filed by applicants' erstwhile attorneys, Howe, Masuku and Nsibande Attorneys, in terms of "Rule 14 (b)". Since 'Rule 14 (b)' of the Rules of this Court does not exist, this must be a mistake for Rule '14(1) (b)'. [Item 25 of the ***Index*** to the ***Record of Appeal*** also wrongly refers to Rule '14 (6)' instead of '14 (1) (b)']. We shall deal with the ***Record of Appeal*** later. According to 2nd applicant, the former attorneys filed their notice of withdrawal as attorneys for the applicants on 11 July 2018. The notice of substitution, however, is dated and filed on 4 July 2018, substituting Magagula & Hlophe Attorneys for Howe, Masuku and Nsibande Attorneys. The above substitution was filed by the latter Attorneys. It may properly be concluded then that Messrs Magagula & Hlophe Attorneys were duly seized of the applicants' pending appeal as of the 4 July 2018. This is our inference. The date ought to be given by the applicants themselves.

Applicants' case

[7] The question that arises from the foregoing state of affairs is whether the period between 4 July 2018 and 14 August 2018 was not enough for the applicants' (new) attorneys to adequately acquaint themselves with the issues of the appeal so as to file the requisite heads of argument or apply for extension of time within which to file the heads or apply for condonation for the late application for postponement or late filing of the heads if the relevant heads had been prepared and were awaiting the order of Court to have them filed out of time. It would seem that no heads at all had been prepared by the appellants for the hearing of the 14 August.

[8] 2nd applicant further explains:

"10.15 I submit that the about five (5) weeks between the introduction of the appellants' new attorneys of record and the scheduled hearing date of the appeal on 14 August 2018 is insufficient for the said attorneys to fully comprehend the issues giving rise to the appeal, formulate heads of argument in preparation to argue the matter ...

10.16. The appellants made unsuccessful attempts to secure a firm of attorneys they would be comfortable with. Even though Mangaliso Magagula had expressed a hectic schedule on their part as a firm, he agreed to assist the appellants when the circumstances were explained to him.

11. I submit that the allegations in subparagraphs 10.1 – 10.16 above constitute a reasonable explanation for the appellants' non-preparedness for the hearing of 14 August 2018 when the matter was removed from the roll".

[9] From above averments, it is noted that 2nd applicant does not give the specific date when Mr. Magagula was secured as attorney for the applicants. Nor does 2nd applicant state the specific number of law firms she approached before Magagula & Hlophe Attorneys, after parting ways with Howe Masuku and Nsibande Attorneys. The details which appear to be missing in 2nd applicant's affidavits may appear uncalled for, but they are the material on which the Court has to assess the reasonableness or otherwise of the explanation for the delay or non-compliance. Generalities in this regard tend to lack the relevant air of credibility upon which the Court's indulgence is to be craved.

[10] According to 2nd applicant, the reason for parting ways with the former attorneys who had represented the applicants at the High Court and also filed the notice of appeal was that up until the summons in January – February 2018, there were aggressive negotiations by 2nd applicant with various entities to secure funds to meet the loan agreement repayments. That there were outstanding monthly instalments could not be denied. The major part of this search for the funds ultimately depended on the disposal of immovable assets. The property chosen for

disposal was a property which attracted the interest of, among others, Sincephetelo Motor Vehicle Accidents Fund (the MVA) as a potential buyer. The interest that had been shown by the MVA however dissipated into thin air and came to nothing where 2nd respondent had been hopeful. This was about end of November, 2017.

[11] 2nd applicant says that she later discovered that her erstwhile attorneys were and had for some time been also associated with MVA. The separation then became necessary. According to 2nd applicant Howe, Masuku and Nsibande Attorneys had been "MVA's principal legal representatives for several years....". It was this relationship between the former attorneys and MVA that caused 2nd applicant "grave discomfort" and precipitated the switch of applicants' attorneys towards the end of June 2018. At this time the summary judgment had been granted against the applicants. What seems to have further complicated things for 2nd applicant is that Zwelethu Jele also happened to be the Board Chairman of MVA and the attorney assigned by the respondent to handle these proceedings.

[12] Mr. Jele's alleged association with the MVA Board has not been denied. The respondent admits that it was aware of the negotiations between 2nd applicant and MVA. This was because 2nd applicant regularly informed respondent of what she was doing to repay the outstanding loan instalments. Respondent's deponent who was the General Manager of respondent at the time says that when nothing positive came out of the negotiations with MVA, respondent's Board became despondent and instructed the deponent to institute court proceedings without further delay after two years of waiting. A final demand was issued to 2nd applicant. Consequently, "27.5 In January 2018 and pursuant to further engagements, the applicants' erstwhile attorneys informed the respondent in writing that we (respondent) 'could resort to the security that was handed over to us', as a means of

recovering the debt. This to us was the proverbial 'white flag' to demonstrate that the applicant had exhausted her efforts at setting her debts" (sic).

[13] Before proceeding further I consider it necessary to warn that lawyers at every level should as far as possible avoid exposing themselves to situations which might comprise their professionalism. Applicants have not made this an issue. Even if they did that would not take the matter any further in their favour. There are more compelling reasons for the determination of this application. Attorneys should let their clients know situations and relationships which might give rise to controversy regarding the service they provide. 2nd applicant may have found herself between a rock and a hard place. But that did not exonerate the applicants from not observing the Rules of this Court.

[14] Taking all the facts and allegations and counter allegations into consideration, there was enough time between the 4th July and 16th July 2018 for the applicants' new attorneys to have done something towards complying with the Rules in their appeal. If the heads could not be filed, then application could have been composed and launched by the 16th or reasonably soon thereafter for the extension of time within which to file the heads. In this regard applicants would have had to state, inter alia, the date when Mr. Magagula was engaged and when it was realized that the heads could not be filed by due date. Whether that application would have succeeded or not is not the issue here, but it would not be the same as going to court empty-handed as the applicants did on the 14th August 2018. Whatever the applicants carried, if anything, on that date amounted to nothing, hence the appeal being struck off the roll. The appeal could have been dismissed for non-prosecution.

[15] Attorney Mangaliso Magagula has supported 2nd applicant as may be relevant to himself, and in particular confirmed his *"inability to prosecute applicants' appeal*

on 14 August 2018 and to subsequently draft the application to reinstate the main appeal...." Mr. Magagula also explains his unpreparedness by reason of his busy schedule in terms of cases he was handling at the High Court and at the Swaziland Communications Commission at the time he accepted to assist in this matter. Mr. Magagula says that the Communications matters were "quite involved and complex", requiring and extension of time on his part. Besides him attending to a client's arbitration hearing in South Africa, none of the matters he handled could be delegated "because of their complexity".

[16] Added to all the matters on his handy was a bereavement involving a senior staff member of his firm during the second week of July 2018, as a result of which "for a week and some days" he was "unable to be involved in any work" as he was "totally distracted by the tragic passing away of a colleague". Mr. Magagula then submitted a list of seven matters in this Court and the High Court he allegedly was dealing with at the time and which made it difficult for him to prepare for this appeal as expected. And he concluded: "..... *I had difficulty accepting the instructions and was only persuaded when I got to understand what motivated the applicants to seek my help. It was a desperate plea for help*". In an analogous case where an attorney had not complied with Court Rules, EM Grosskopf JA had this to say: *"A further matter raised in mitigation was a personal tragedy which occurred in Thompson's life. I need not go into details. What happened certainly calls for sympathy. I do not, however, consider that it can extenuate the extreme and continuing dereliction of duty by an officer of the Court. If his personal circumstances made it difficult for him to carry on with his work, he could have delegated it to someone else".*[1] It is obvious that Mr. Magagula's hands were just too full: he should not have accepted to assist 2nd applicant even in the face of a desperate plea. Alternatively, Mr.

[1] **Napier v Tsaperas** 1995 (2) SA 665 (AD) at 670 H - I

Magagula should have delegated some of his work to another colleague in the office. It cannot be that no one could be found to delegate to.

The record on appeal

[17] The deponent of the respondent's answering affidavit, Mr. Sikolemaswati Ntshalintshali, begins by pointing out that the respondent filed the record in the appeal even though that was the obligation of the applicants as appellants. Respondent allegedly filed the record because the applicant *"had demonstrated a lacklustre attitude towards an early hearing of the appeal..."* So, respondent was keen to have the matter heard without delay. I should point out, however, that the record filed by the respondent does not appear to have been certified by the Registrar of the High Court as required by the Rules. May be, in a hurry to have the appeal promptly enrolled, certification was forgotten. This defect was not brought to the attention of the Court during the hearing of this application. I do not wish to infer anything sinister on the part of the respondent in regard to this defective record.

[18] It is true that the responsibility for preparing and lodging a record is for the appellant. There is nothing in the Rules which says that where a respondent with a view to expediting the enrolment of the appeal assumes the role of a good Samaritan and lodges a proper record that record should be rejected as irregular and a nullity. I do not understand this to be inferable anywhere under Rule 30. Who suffers what prejudice if the respondent prepares and lodges a proper record? After all the respondent is not a total stranger to the preparation of the record as that is done 'in consultation with' respondent. Rule 30 (1) provides that *"The appellant shall prepare the record in accordance with sub-rules (5) and (6) hereof...."*

[19] In my opinion the word 'shall' is directory as far as it refers to the appellant but mandatory in respect of the compliance with sub-rules (5) and (6). It is natural

to expect the appellant to prepare the record: he is, after all, the appellant, the party who is motivating the Court to hear the case. It is the appellant who stands injured by the decision of the court a quo. Appellant may not be compelled to prepare and lodge the record if he does not want to. It is not an offence for him not to prepare a record. But if he does prepare a record then the record must comply with sub-rule (1) as far as certification and lodging are concerned and (5) and (6). As the mover and prosecutor of the appeal appellant is responsible for the integrity of the record as lodged. This responsibility continues to rest upon the appellant even where the record in effect has been prepared and lodged by the respondent, as happened in the present appeal.

[20] The record filed in this case does not comply with the requirement of sub-rule (1) in that it is not certified by the Registrar of the High Court as a correct and authentic document. It is hard to understand this lapse as between senior attorneys, for respondent says in its answering affidavit, it filed the record "having first engaged the applicants' erstwhile attorneys". The appellants in this case ought to have satisfied themselves that the record lodged was correct, duly certified and lodged within the time prescribed. It is noted here that the putative record was lodged about a month earlier than required. Certification is an important aspect of a court record as it clothes the compilation of papers with official authority. It must be evident then that without certification the 'record' is dead; it is a nullity. The appeal cannot be sustained without a record. As pointed out above, the issue of the impugned record did not arise during the hearing. To avoid unduly compromising litigants where 'wrong' party submits a defective record, the practice of respondents lodging a record should desist and leave preparing and lodging the record where the Rules anticipate it, with the appellant.

Respondent's case

[21] Respondent observes that the roll for the second session was released on 27 June 2018, enrolling the appeal on 14 August 2018. Bearing in mind that the record had purportedly been lodged in April 2018 as stated above, the appellants were required to file their heads of argument within 28 days before 14 August 2018. We have been told of the trials and tribulations of 2nd appellant to dispose of one of her properties to secure funds to make payments under the loan agreements; and how the effort was unsuccessful. Respondent properly complains that the appellants ought to have informed it of the difficulties the appellants were facing in preparing for the appeal. In the same way that respondent complains not being told of any difficulties faced by appellants, the respondent also had a similar collegial duty to find out if appellants had any problems filing reasonably soon after the order striking off the appeal. In the result, other than the passage of time, the respondent has nothing to support the argument that applicants had abandoned the appeal. This is so in my opinion because there is no prescribed period within which the application to reinstate has to be launched in terms of the Rules. In the result what is reasonable depends on the circumstances and particulars of the case. The respondent has itself not suggested what might be a reasonable period in the circumstances.

[22] Even though 2nd applicant in her replying affidavit says that *"late June early July, 2018 is just about the time appellants were grappling with making the switch to their current attorneys of record,"* I consider 4th July to be the date when Mr. Magagula became 2nd applicant's attorney of record. In the result, Mr. Magagula should have realized that he could not file the heads in time and should have at once embarked on the application for extension of time within which to file the heads. Mr. Magagula did not do this. Instead, Mr. Magagula supports the assertion that he was very busy as he had reluctantly accepted to represent 2nd applicant. When Mr. Magagula accepted engagement as attorney for the applicants, his first task was to

ascertain whether the appeal had been enrolled. Failure to do this, whether Mr. Magagula was aware or not of the then recently released Supreme Court roll, was tardiness requiring exceptional explanation on his part.

[23] It was on the morning of the hearing, that is, 14th August, in court, that applicants' attorneys approached the attorneys of the respondent with an intimation that the hearing of the appeal be postponed. This proposal was made to the respondent just before the matter was called. Respondent turned down the request in consideration of the lateness of the request and that the matter was of commercial importance to the respondent. When the appeal was called, applicants' attorney requested that the appeal hearing stand down briefly as he wished to address the issue of postponement. The request was granted but the application for postponement was declined as the Court would not accept an application filed from the Bar. In the result the appeal was struck from the roll with costs and not to be reinstated without leave. What is clear then is that application for postponement and or condonation was not heard on 14 August 2018.

[24] The story of what happened on 14 August 2018 is better told by the respondent in its answering affidavit:

> *"10. There was also no attempt by the applicants' present attorneys to engage with the respondents' attorneys in relation to any issue pertaining to the matter and in particular, any difficulties that they had relating to filing of heads of argument ..... There were no heads of argument filed on behalf of the applicant as required by the rules of court nor was there any application for condonation.*
>
> *"11. On 14th August (.....), the applicants' attorneys approached the respondent's attorneys in court (before the commencement of the appeal) and indicated that they sought a postponement of the appeal. This request was turned down on the bases of the exigency of the matter, its commercial*

importance to the respondent and the lateness of the request. They thereafter indicated that they wanted to bring an application for condonation and postponement of the matter. I refer the Honourable Court to the affidavit of Zwelethu Jele.

"12 When the matter was called Mr. Magagula representing the appellant requested that the matter stand down as he wanted to make an application for condonation and postponement. The Court duly stood the matter down and subsequently an application was brought to court. Though served on the respondent's attorneys the aforesaid application was not filed with the court. I annex hereto ... a copy of the application that was served on the respondent's attorneys.

"13. The court indicated that it would not accept an application handed over the bar and without proper notice to the respondent. The applicants' attorneys then made an oral application for a postponement which was opposed. The application for postponement was refused and the court ultimately struck the appeal off the roll with costs. In its ruling the court made the following pertinent remarks". (13.1 and 13.2 set out the 'remarks').

[25] In their replying affidavit, however, the applicants deny that they ever applied for condonation in court on the 14 August 2018. Indeed, in their unfiled application as annexed to respondent's answering affidavit, the applicants request pertinently only for "postponing the hearing of the proceedings" of the 14th to a date to be determined by the Court. It is clear however that in the case of **Christopher Vilakati** [2], which had been struck off the roll, the application for reinstatement was accompanied by condonation (for failure to file the record of proceedings of the court a quo...). The **Christopher Vilakati** approach would seem the correct approach. If this Court at an earlier hearing had considered the issue of condonation but struck the appeal off the roll, instead of dismissing it, it would mean that if the appellant should decide to reinstate he must in his condonation shown exceptional reasons if

[2] **The Prime Minister of Swaziland and 2 others v Christopher Vilakati,** Civ Cas No. 30/12 (31 May 2013)

the failed condonation is to be offset and the appeal returned on the roll. It was in this respect that the attorney for the applicants in the **Christopher Vilakati** case answered: *"... the applicants seek the Honourable Court's indulgence to grant the applicants leave to reinstate the appeal matter back into this Honourable Court's roll for May 2013, and to condone the applicants' late filing of the record for the appeal which led to the appeal being struck off the roll in November 2012.* Emphasis added". It had been at the November 2012 hearing that the application for condonation had been fully considered and dismissed and the appeal struck off.

[26] On the issue of prospects of success, the attorney for the respondent in the **Christopher Vilakati** case submitted as follows: *"The question of prospects of success then also arises. The affidavit [for the applicants] does not deal with that at all. In any event, given the well-reasoned findings by the learned Judge, it is difficult to see how the applicants could establish prospects of success...."* (My emphasis). What is to be gathered from the above submission is that where the founding affidavit has not dealt with a particular factor required for consideration and proper determination of the appeal, the enquiry does not stop at the end of the affidavit by merely noting the default. In the interest of the administration of justice the Court must cast about and survey the record and other materials before it to see whether the missing factor or factors, such as prospects of success, can be found.

[27] In paras 8 and 9 this Court in the **Christopher Vilakati's** case observed: *"8.... It has been submitted by the respondent that the bald and un particularised assertions in paragraph 9 of appellants' affidavit do not show sufficient cause for excusing the appellants' non-compliance with the rules of court.... 8(bis). The appellants' case is based substantially upon the founding and confirmatory affidavits. It is therefore necessary to examine those documents to see to what extent they disclose good and substantial reasons for the grant of the applicants' prayers.*

Both affidavits are singularly lacking in specificity ... The basic rule is that affidavits, particularly dealing with contentious issues, should not contain unparticularised and empty statements or estimates, such as of time or distance, where accurate information is readily available ....." In casu, quite some statements in the affidavits of the applicants contain just such unparticularised and bald allegations even where the specific information is clearly within reach of the affidavit. The Court in condonation proceedings is often interested to know just how the time was spent by the applicant between point A and point B when compliance with a Rule was supposed to have happened. It is on such information that the Court is in a position to assess if the applicant was tardy or not. If the required information is not provided where it appears that it could have been provided by a diligent and candid applicant, the Court will likely conclude unfavourably towards the applicant.

[28] Respondent also asserts that appellants were out of time with their application for reinstatement and that the appellants must be deemed to have abandoned the appeal. An appeal struck off the roll is not the same as an appeal which has been dismissed. An appeal struck off is like a soul in limbo: it could be saved and returned on the roll. In this regard Mokgoro J. had this to say: *"[8] Finally, it must be said that the fact that the matter has been struck from the roll does not mean that the doors are completely shut to the appellants. They may make an application for the reinstatement of the appeal. In that event they will be required to show good cause and furnish a full explanation, not only as to why they could not proceed with the matter on 24 August 2000, but also in relation to any lapse of time between this date and the date of the application for reinstatement.* ***The prospects of success in the appeal will be an important factor to be taken into account when any reinstatement application is considered.***"[3] In casu, according to respondent appellants should have

[3] **National Police Service Union and Others v Minister of Safety and Security and Others** 2000 (4) SA 1110 (CC)

applied "*at the earliest opportunity. In essence once the attorney becomes cognizant of his non-compliance, he should without delay file the application*". Whist the principle is correct, there is still the question of how to measure 'earliest opportunity' or 'non-compliance' in an open-ended application such as the present. In other words, applying to reinstate an appeal without timelines is a bit challenging. At some point, however, the Court must draw a line and put its foot down. In the present case it is not necessary to draw that line and decide whether 8/9 weeks delay is or is not unreasonable. But applicants are warned to be on their guard that they do not cross the invisible line and fail to get condonation from the Court because they have been tardy. (My emphasis).

Conclusion

[29] Having defaulted to prosecute the appeal in accordance with the Rules, a defaulting party has no right to reinstate on the roll an appeal that has been struck off. Reinstatement is then by indulgence of the Court and must be justified. Have the applicants shown sufficient cause for the Court's indulgence to grant the reinstatement? The reinstatement cannot be granted unless the applicants also show existence/presence of reasonable prospects of success on appeal. Since the order striking the appeal off the roll did not prescribe within what time application for reinstatement may be made, I do not see the need for a strong case of condonation for late launching of the application. There is no Rule of Court providing for reinstatement or leave to reinstate. The nearest to such an application is Rule 9 which provides for leave to appeal within a specific period of six weeks from date of the judgment which is sought to appeal against. **Herbstein and van Winsen,** 3rd ed. (pp 714-5) state that leave to appeal is usually granted where (a) there is a reasonable prospect of success; (b) the amount in dispute is not trifling, and (c) the matter is of substantial importance to one or both of the parties concerned. In my opinion, in

the absence of any other consideration to the contrary, the foregoing three principles may usefully be employed where leave for reinstatement is under consideration.

[30] The task of the court in summary judgment proceedings is to find-out from the papers before it, if the defendant has a *bona fide* defence. Accordingly the business of this Court in this application for reinstatement is to establish whether, should the appeal be reinstated, the applicants (as appellants) have any prospects of success on appeal, that is, if the applicants have any reasonable chance of convincing the Court on appeal that the court *a quo* ought to have found that the applicants (as defendants) had a *bona fide* defence in the form of a trial issue in terms of Rule 32(4)(a) of the High Court. In weighing the applicants' chances of success, it should not be forgotten that the summary judgment procedure is designed to favour the plaintiff with a certain defined class of claim. (See **Herbstein an van Winsen,** 3rd ed p 302).

(a) Bona fide defence

[31] In the applicants', [as defendants,] affidavit resisting summary judgment there is no firm submission in defence of the action. The applicants only deny that they do not have a *bona fide* defence to the action but fail to point out that defence. Instead, the applicants allege that *"there are issues that ought to be tried in due course"* as indicative of their *bona fide* defence. In my opinion these issues do not constitute a defence as required. The issues referred to by the applicants are (i) objection to use by the plaintiff of letters exchanged on a 'without prejudice' basis; (ii) the need to have an explanation on how the interest has been calculated; (iii) why the statement (of account) should reflect respondent's (as plaintiff) attorney's fees; (iv) discrepancies in the amount claimed; and (v) the alleged renunciation by the applicants (as sureties) of the legal defences available at law. Most of these issues

are just a scratch on the surface of the claim; they do not hit hard enough to provide a defence.

[32] It appears that in its replying affidavit and the judgment *a quo* the issues raised by applicants to the summary judgement were adequately answered or explained. May be, save for the last issue touching on exceptions, none of the issues go to the heart of the claim as a defence. The last issue alleging that the renunciation of the defences was not explained to the applicants (that is 2nd and 3rd applicants), even as they had signed the agreements, received and retained the loan amount and even paid a number of instalments under the agreement over a period of four years. The *bona fides* of such an allegation by the applicants stands questioned and calls for a strong explanation by the applicants. That explanation was not tendered. Even cumulatively these issues are not strong enough to provide a possible *bona fide defence.*

(b) Prospects of success

[33] Before this Court in their founding affidavit the applicants prayed that this Court look at the record of appeal in the main proceedings in order to assess the applicants' prospects of success. They pleaded that the record be deemed to be incorporated as part of their founding affidavit. The applicants then broadly discuss the issues they had raised in opposition to the summary judgement as already referred to above. The deponent concludes thus:

> *"30. I submit that what is set out in paragraphs 23-29 above demonstrate the appellants' prospects of success which should invoke the power of this Honourable Court to reinstate the appellants' appeal in the interests of justice. Otherwise the appellants would be denied their fundamental right to be heard and condemned to pay the massive sum of over E15,000,000-00 which will inevitably lead to their financial ruin".*

It is true that the amount of E15 Million is not a trifling amount for a middling businesswoman to lose by default. Even if some weight were attached to it, it would not be sufficiently heavy in the absence of reasonable prospects of success to justify an order of reinstatement.

[34] Needless to observe, the founding affidavit does not take the matter further than does the affidavit resisting summary judgment. The alleged prospects of success are not strong enough to compensate for the poor explanation for not filing at all or timeously their heads of argument. Since it cannot be said that appellants have a strong case on appeal, there would be no benefit in granting the reinstatement as prayed for by the applicants. In this regard reference may be made to the case of **de Villiers** (supra) where Davis AJA, at p 637, said:

> *"I wish, however, particularly to guard myself from being thought to lay down that in every case the Court will go into the merits in order to estimate the applicant's chances of eventual success, or to encourage the parties to file long affidavits on the merits or, perchance, the whole record, or to canvass disputable points of law. Nothing could be further from my mind. I refrain indeed even from using the term 'reasonable prospect of success' in this connection as requiring apparently something stronger than is required in a case like the present. It is only where, from the judgment itself, it is quite clear that the applicant has 'no prospect of success on appeal' that ordinarily condonation will be refused upon that ground alone".*

[35] I find it unnecessary to consider the magnitude of the claim rounded at E15,000,000-00, the importance of the case to the parties and the public, as well as the balance of convenience or hardship. In the absence of a valid record, this appeal should never have been enrolled and the appeal would possibly have died a natural death by being deemed abandoned and or dismissed at first sitting. It need be reemphasized that had the respondent not purported to lodge the defective record the

matter might not have come this far. For it is apparent that any prospect of success from the affidavits and the judgment a quo would be very hard to come by.

[36] If there should be any doubt as to the soundness or otherwise of the explanation given by the applicants for the failure to comply with the Rules of Court in filing the heads of argument of the applicants, this Court is entitled to survey the record for the merits of the appeal. To begin with, the headnote in **de Villiers** case is helpful: *"If from the judgment of the lower court it is clear that an applicant who applies for condonation of the late filing of appeal has no prospects of success of appeal, the Appellate Division will refuse the application on that ground alone".* The merits are intrinsically bound with the prospects of success of the main matter. What this means in effect is that even if the explanation for the non-compliance is satisfactory, if there are no prospects of success condonation and or reinstatement ought not be granted. In **de Villiers** Davis AJA wrote: *"The irregularities have been satisfactorily explained and condonation would be granted were this Court not entitled to consider also the merits of the proposed appeal"* (p636). The learned Acting Justice of Appeal then referred to the case of **Cairn's Executors v Gaarn**[4] where Innes JA is said to have laid down that an applicant "might be able to show such merits as would justify the Court in granting relief even though the delay was abnormal", and also observing that in some cases "there may be such lack of merits as would justify the Court in refusing the indulgence sought even though the delay were short and were satisfactorily explained". (pp 636-637).

[37] In the present case, the question is whether there is merit or good prospects of success in the proposed appeal. In my opinion, in the present application there is sufficient information before this Court to decide whether the appeal has or has not

[4] 1912 AD 186

merit or reasonable prospects of success. In my respectful opinion the merits or prospects of success are not at all bright. Accordingly, " .... *if the appeal is hopeless, the great expense of prosecuting it would be mere waste of time and money*". (See **Penrice v Dickenson** 1945 AD 6 and **Liquidators, Myburgh, Krone & Co Ltd v Standard Bank of SA Ltd** 1924 AD 226). In **Liquidators, Myburgh, Krone**, at p 231, Innes CJ stated that "... *what constitutes a ground for the exercise of indulgence must depend upon the circumstances. The cause 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, ...*". In **R v Mokoena** [1954 (1) SA 256 (A)] Centlivres CJ stated the position thus:

> *"The question which the learned Judge should have considered was whether the accused would have a reasonable prospect of success on appeal and the answer to this question depends not only on the evidence of the accomplice but on all the evidence led on the case.* ***If the whole record in the present case is examined*** *it will be found that there was ample corroboration of the evidence given by the accomplice"*. (p 257 E-F) (My emphasis).

Ebrahim JA in **OKH Farm** [5] stated as follows: *"In considering such an application it is necessary to consider how venial the conduct sought to be condoned is and also the strength of the appellants' argument on the merits, because it is self-evident that a bad procedural case may be excused by a good appeal on the merits."* The learned Justice of appeal continued at page 15: *"A court will not exercise its power of condonation if it comes to the conclusion that on the merits there is no prospect of success, or if there is one at all, the prospects of success are so slender that condonation would not be justified"*.

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[5] **OKH Farm (Pty) Ltd v Cecil John Littler NO and Others**, Appeal Case No. 56/2008

[38] Accordingly, this Court makes the following order:

(1) The application for leave to reinstate the appeal is dismissed;

(2) Costs are awarded to the Respondent on the attorney and own client scale to be paid 50% by the Applicants' Attorney, Mr. M. Magagula and 50% by the Applicants.

MJ Dlamini JA

SB Maphalala JA

JM Currie AJA

For the Applicants Mr. M Magagula

For the Respondent Mr. Z. Jele