**IN THE HIGH COURT OF SOUTH AFRICA**
**(EASTERN CAPE DIVISION, MAKHANDA)**

**Case No: CA149/2021**

In the matter between:

**MFUNDO MABUSELA** **First Appellant**

**THANDEKA JUDITH MABUSELA (Nee NGETHU)** **Second Appellant**

**AMATHUSE FAMILY TRUST** **Third Appellant**

And

**BULELANI BOOI** **First Respondent**

**ZANDA BOOI** **Second Respondent**

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**JUDGMENT**

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**BESHE J:**

[1] This is an appeal against the whole judgment and order of *Maswazi AJ* sitting as the court of first instance. In the court *a quo Maswazi AJ* found in favour of the applicants, now respondents, by issuing the following order:

"1. The *rule nisi* issued on the 27th of October 2020 is hereby confirmed.

2. First and Second Respondents in their capacities as trustees for the time being of the Amathusi Trust or any other trustees of the said Trust are hereby ordered to take all steps necessary to effect the transfer of Erf 42432, situate at 101 Beachcoomb Drive, Cove Rock East London to the names of the applicants forthwith.

3. The Trustees for the time being of the Amathusi Trust are hereby ordered to pay costs of this application, such costs to include the reserved costs of the 27th of October 2020."

Being dissatisfied with the court *a quo's* decision, first to third appellants (the appellants) are appealing against the said decision. Leave to do so was granted by the Supreme Court of Appeal.

[2] At the heart of the application that served before the court *a quo* was the question whether the respondents had concluded a valid offer to purchase from third appellant, immovable property described as Erf 42432 situated at 104 Beachcomber Drive, Cove Rock. The property belongs to a family trust, being third appellant with first and second appellants being trustees thereof. There were two other respondents in the main application. Only first to third respondents – the present appellants are appealing the decision of the court *a quo*. Before I deal with the merits of the appeal, the following aspects need to be dealt with:

1. Respondents' application for an order declaring that the appeal has lapsed;

2. Appellants' application for condonation of the late filing of the appeal record as well as the reinstatement of the lapsed appeal.

[3] The application to declare that the appeal has lapsed is premised on the following allegations:

Appellants filed their notice of appeal well beyond the prescribed twenty (20) days. Even though they were required to seek a date for the hearing of the appeal sixty (60) days after filing the notice of appeal they had not done so at the time the application to declare that the appeal has lapsed was made. Consequently, so the respondents contend, the appeal is deemed to have lapsed. The respondents also oppose appellants' application for condonation of the late filing of the appeal record as well as for the reinstatement of the appeal. This is essentially on the basis that the explanation proffered by the

appellants in this regard is woefully inadequate. Respondents also complain about appellants' failure to furnish security for the costs of the appeal as required by *Rule 49 (13)* of the *Uniform Rules* of this court.

[4] It is so that in terms of *Rule 49 (2)* a notice of appeal shall be delivered to all the parties within twenty (20) days after the date upon which leave was granted or within such longer period as may be permitted, upon good cause being shown. *Subrule 6 (a)* provides that an appellant shall make a written application to the registrar for a date of the hearing of the appeal. This should occur within sixty (60) days of the delivery of the notice of appeal. If no such application is made, the appeal shall be deemed to have lapsed. *Subrule 6 (b)* provides for the reinstatement of the appeal by the court to which the appeal is made. Whereas *Subrule 7 (a)* provides that:

"(7) (a) At the same time as the application for a date for the hearing of an appeal in terms of subrule (6)(a) of this rule the appellant shall file with the registrar three copies of the record on appeal and shall furnish two copies to the respondent."

*Subrule 7 (d)* provides that:

"(d) If the party who applied for a date for the hearing of the appeal neglects or fails to file or deliver the said copies of the record within 40 days after the acceptance by the registrar of the application for a date of hearing in terms of subrule 7(a) the other party may approach the court for an order that the application has lapsed."

[5] Appellants' attorney attributes the failure to comply with the aforementioned rules to *inter alia* the following factors:

*The delay in retrieving certain documents from the Supreme Court of Appeal which were going to be used in the compilation of the record. The documents having been sent to their Johannesburg office instead of Pretoria;*

*After the indexing of the appeal record there was a delay in checking same due to the fact that the attorney was busy in Mahikeng High Court, having received urgent instructions to attend to a matter in that court;*

*Upon checking the record, he discovered that there were missing pleadings. These in turn were sought from their correspondents in Grahamstown;*

*Then he was held up in disciplinary hearings in Cape Town;*

*One* ***Erica*** *who was tasked with finalising the record resigned with immediate effect;*

*Attending to administrative work in his office and preparation in respect of other matters;*

*The closure of their office during the festive season;*

*The delay in receiving instructions from the appellants.*

[6] It appears to be common cause that the two applications under consideration; condonation of the late filing of appeal record and the application for reinstatement were sparked by respondents' application for a declaration that the appeal has lapsed for the reasons already alluded to earlier in this judgment. It is also common cause that no power of attorney was filed by appellants' attorney as required by *Rule 7 (2)*. Only doing so once this failure was pointed out to them by the respondents. The respondents also complain of appellants' failure to enter into good and sufficient security for the costs of appeal. This too was drawn to the attention of the appellants by the respondents. Whichever way one looks at it, there can be no doubt that those representing the appellants handled the matter with tardiness. Their attorney choosing to attend to all other matters he regarded urgent or deserving of his attention and only attending to this appeal only when he happened to have time on his hands. I agree with the respondents that the explanation proffered by the appellants is inadequate. It falls far short of reasonableness. Be that as it may, it is trite that this factor cannot be decisive, it has to be weighed

together with all other relevant factors in this regard. In ***Van Wyk v Unitas Hospital***[1] the following was stated regarding an application for condonation:

"Condonation

[20] This court has held that the standard for considering an application for condonation is the interest of justice. Whether it is in the interest of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success."

[7] Similarly in ***United Plant Hire (Pty) Ltd v Hills and Others***[2] the principles upon which the court exercises its discretion in this regard were said to be the following:

"It is well settled that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice."

[8] A pronouncement on the condonation application can only be made after a determination of whether or not the appeal enjoys reasonable prospects of success. This is in light of the fact that prospects of success are one of the factors to be considered in this regard. To do so, the merits of the appeal must be considered. Should the prospects of success of the appeal be found to be strong, despite the respondents' explanation being unreasonable, condonation will be granted.[3]

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[1] 2008 (2) SA 472 CC at A-B.
[2] 1976 (1) SA 717 A at 720E
[3] See United Plant Hire (Pty) Ltd *supra* at 722 C.

[9] In the application before the court *a quo*, the respondents sought an order directing the third appellant to take all reasonable steps to the transfer Erf 42432, situated at 101 Beachcomber Drive, Cove Rock (the property), East London to the respondents. This was on the basis that the respondents and third appellant had concluded an offer to purchase the property as per the agreement marked Annexure "B". The central issue in the court *a quo* was as correctly identified by *Maswazi AJ* as being "*whether there was an agreement concluded on the 10th of August 2020 or at any time thereafter, as alleged by the applicants which conforms to the formalities of valid contract of sale*".[4]

[10] Respondents contended that on or about 10 August 2020 they concluded an offer to purchase the property in question with third appellant.

[11] The appellants in turn denied that an agreement was reached between the parties on the 10 August 2020. Appellants further contend that the counter offer made by the Trust was withdrawn on 17 September 2020 before it was signed by the respondents. The appellants proceeded to give a factual matrix of the events that led to the launching of the application that served before *Maswazi AJ*. Briefly that, one **Esme Coetzee** (**Coetzee**) was mandated to sell the property for R600 000.00. On 10 August 2020 **Coetzee** sent a message that she has received a cash offer on the property. On 11 August she sent an offer to purchase (OTP) for R450 000.00. The OTP was signed by the respondents and dated 10 August 2020. The offer was rejected by the appellants. On 12 August 2020, as reported to them by **Coetzee**, the respondents enquired if they would consider an offer for R500 000.00. On 13 August 2020 appellants indicated that they can accept an offer for R525 000.00. On 17 August 2020 the respondents offered R505 000.00 as per email from **Coetzee** to which the initial OTP was attached. The amount that was initially offered by the respondents of R450 000.00 was scratched out and replaced with an amount of R505 000.00 and initialled on the right hand

[4] Paragraph 37 of the judgment page 160 of the indexed papers.

side of the amended price by one party. The appellants assume that the initial is that of **Coetzee**. They (appellants) assert that they did not initial next to the new amount to signify their acceptance of the offer, being for R505 000.00.

[12] On the 17 August 2020 the appellants communicated to **Coetzee** that the offer they were prepared to accept was an amount of R515 000.00 if the applicants cannot increase the offer to R525 000.00 which the appellants indicated was still the asking price. By so doing, counter offering for an amount of R515 000.00. Still on the 17 August 2020 **Coetzee** informed the appellants that the respondents were now prepared to offer R515 000.00. On 22 August 2020 the OTP having been signed by first and second appellants was forwarded to **Coetzee**. The alteration of the purchase price to R515 000.00 on the OTP was effected by the first appellant. The alteration was not initialled by the respondents to signify their acceptance of the offer. Nor did they counter sign the counter offer. Appellants contend that no agreement came into being, there having been no consensus about the purchase price between the parties. It is appellants' further contention that the initial OTP of the 10 August 2020 lapsed in respect of which the seller was required to signal its acceptance before midnight on 10 August 2020.

[13] Appellants attach annexures in support of their allegations in the form of *inter alia* email correspondence and copies of the OTPs concerned.

[14] In reply, respondents asserted that they offered to purchase the property for R515 000.00 on the 22 August 2020. The offer was accepted by the appellants on the same date by placing their initials next to the purchase price. They insist that the date of the agreement is 10 August 2020._They however do not explain how an agreement could have been concluded on the 10 August 2020 and yet their offer to purchase the property for the amount of R515 000.00 was, according to them, only accepted by the appellants on the 22 August 2020.

[15] In a comprehensive and well-reasoned judgment *Maswazi AJ* correctly acknowledges that there were various offers and counter offers made between the parties. Further that the amount of R450 000.00 that was contained in the OTP signed by the respondents on the 10 August 2020 was rejected by the appellants, hence the various other offers and counter offers.

[16] After considering the applicable legal principles and analysing the evidence, he made the following findings:

*That no agreement was concluded on the 10 August 2020. (Offer to purchase property for an amount of R450 000.00)*

*Appellants in turn tabled a counter offer of R525 000.00 as the purchase price they were prepared to accept.*

*This was not accepted by the respondents who offered a sum of R515 000.00 as the purchase price.*

*This amount of offer was accepted by the appellants.*

*Further that the appellants signed the offer for R515 000.00 on the 25 August 2020 to signify their acceptance on respondents' offer.*

*Furthermore, that there was no need for the applicants to put their initials next to the amount amended to read R515 000.00 because they were the ones who offered that amount as a purchase price in respect of the property. All they needed to do was to sign the OTP.*

He concluded that the contract complied with all the requisite formalities as set down in *Section 2 (1)* of the *Alienation of Land Act*.[5] This section provides that:

"**2 Formalities in respect of alienation of land**

[5] Act 68 of 1981.

(1) No alienation of land after the commencement of the section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

[17] The court *a quo's* judgment is assailed on the basis, *inter alia* that the court erred in the application of the rule enunciated in ***Plascon-Evans Paint v Van Riebeeck Paints (Pty) Ltd***[6] by failing to determine the matter on the facts as set out by the appellants together with those admitted by the respondents.

[18] The court *a quo* had regard to a letter that was addressed to *Conlon Legal Services*, a company retained by the appellants to attend to the transfer of the property. The letter was from *Cumberlege Attorneys* who were fifth respondents in the main application. Reliance was placed on the letter on the basis that its contents were important for the version which appellants proffered. In the second paragraph the letter records thus:

"Our instructions are that on or about 10 August 2022 the Trust entered into a Written Agreement of Sale with Mr and Mrs Booi for the purchase of the above property. In terms of the agreement, the purchase price in the amount of R515 000.00 was payable in cash."

[19] However, this cannot be accurate. Evidence reveals that no agreement was concluded on the 10 August 2022 in terms of which the purchase price in the amount of <u>R515 000.00</u> was payable. [my underlining] This much was acknowledged by the judge *a quo*.

[20] The email that was sent to **Coetzee** by first appellant on 17 August 2022 demonstrates that the amount of R515 000.00 was suggested by the appellants where it records that "Our price of R525 000.00 stands. The least we can accept is R515 000.00 … … …". According to the appellants, they then deleted the previous figures being R450 000.00 and R505 000.000 and wrote R515 000.00 and initialled in respect of all three changes.

[6] 1984 (3) SA 623 A.

[21] In my view, in the circumstances the matter should have been determined on the facts as set out by the appellants as well as those that were admitted by the respondents or were common cause. Namely that the appellants offered the property for sale at an amount of R515 000.00. That the respondents did not signify their acceptance of the offer. That therefore no agreement came into being. Appellants assert that they initialled or put their initials next to the alteration to the figures (purchase price) and complain that the respondents did not. As a result, they did not consent or agree to the alteration. In my understanding, adding one's initial/s on a page or next to an alteration denotes that that party consents to what is contained therein. Respondents, as I understand the evidence had already signed the OTP on the 11 August 2020. That offer then was for R450 000.00 and not in respect of the amount of R515 000.00. Clearly therefore their signatures could not have denoted a consent or agreement to the purchase price of R515 000.00.

[22] It is clear from what I have stated hereinabove that I am of the view that the appeal is a good one. It held reasonable prospects of success. And that the appeal should succeed. It is in the interest of justice that the application for an order declaring that the appeal has lapsed be dismissed. Even though the appellants fell short on the other requirements in respect of the condonation, I am inclined to grant the condonation sought in light of the appeal being successful.

[23] As regards costs, there is no reason why costs should not follow the result. However, in respect of the applications for condonation of late filing of appeal record as well as for the reinstatement of the appeal, the costs should be borne by the appellants. They were seeking an indulgence in this regard. The opposition by the respondents was justified especially in view of the manner in which the appellants conducted the appeal. The opposition was therefore not frivolous.

**[24] Accordingly, the following order will issue:**

**1. The application for an order declaring that the appeal has lapsed is dismissed.**

**2. The late filing of the appeal record is condoned.**

**3. The appeal is re-instated.**

**4. The appeal is upheld with costs, which costs are to include those occasioned by the employment of two counsel.**

**5. The order of the court *a quo* is set aside and substituted with the following order:**

**The *rule nisi* that was issued on the 27 October 2020 is discharged.**

**6. Appellants to pay costs in respect of the application for condonation and re-instatement of the appeal.**

**7. No order for costs is made in respect of the application for an order that the appeal has lapsed.**

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**N G BESHE**
**JUDGE OF THE HIGH COURT**

**BROOKS J**

**I agree.**

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**R W N BROOKS**
**JUDGE OF THE HIGH COURT**

**GWALA AJ**

**I agree.**

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**M GWALA**
**JUDGE OF THE HIGH COURT (ACTING)**

**APPEARANCES**

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| Date Heard | : | 28 November 2022 |
| Date Reserved | : | 28 November 2022 |
| Date Delivered | : | 2 May 2023 |