

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 40602/08

- | | |
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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED. |

16/01/2023

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DATE

SIGNATURE

In the matter between:

MTSHALI, D I N.O.

1st Applicant

THE NATIONAL DIRECTORATE OF ANIMAL

HEALTH OF THE DEPARTMENT OF

AGRICULTURE AND ENVIRONMENTAL AFFAIRS

OF THE REPUBLIC OF SOUTH AFRICA

2nd Applicant

THE MINISTER OF AGRICULTURAL AND

ENVIRONMENTAL AFFAIRS OF THE REPUBLIC

OF SOUTH AFRICA

3rd Applicant

and

BUFFALO CONSERVATION 97 (PTY) LIMITED

Respondent

J U D G M E N T

MNGQIBISA-THUSI, J:

[1] The applicants seek the following relief:

1.1 condonation for:

1.1.1 the. late filing of the notice of appeal; and

1.1.2 the late filing of the record of appeal.

1.2 the reinstatement of the appeal, which lapsed for non-compliance with Rule 49 (2) of the Uniform Rules of Court.

[2] On 10 December 2019, this court granted an order (under case number 40602/2008) in terms of which the applicants were held liable to pay to the respondent the sum of R14, 145, 117.38 and costs, including the qualifying fees of two expert witnesses employed by the respondent.

[3] After the High Court refused to grant the applicants leave to appeal, on 20 September 2020 the Supreme Court of Appeal granted the applicants leave to appeal.

[4] On 13 October 2020 the applicants delivered on the respondent, via email, a notice of appeal. On 19 October 2020 the respondent served a notice to cross-appeal with the Registrar.

[5] On 01 and 11 February 2021 the respondent addressed letters to the State Attorney inquiring about its non-receipt of the record. On 11 March 2021 the Deputy State Attorney², Mr K I Chowe, informed the respondent's attorneys that due to some challenges in the State Attorneys' office, the matter of the record had not been attended to and undertook to personally attend to the matter.

[6] On 23 March 2021 the State Attorney's office informed the respondent's attorneys that it appeared that the appeal had not been properly executed because no date had been requested and the record had not been delivered.

[7] The respondent having threatened to apply for a warrant of execution and after having been informed that the applicants intend applying for the reinstatement of the appeal, on 21 April 2021 the respondent's attorneys informed the State Attorney that a warrant of execution had been issued and was with the sheriff's office.

[8] On 23 April 2021 the State Attorneys' office appointed Ascent Appeals and Transcriptions to prepare the record.

[9] On 28 April 2021 the warrant was executed and certain of the first applicant's movables were attached.

[10] It is common cause that the notice of appeal was not filed with the Registrar. It was not until 4 June 2021 when it was uploaded on Caselines. At the same time the applicants launched this application for an extension of the time period for the filing of the notice of appeal, alternatively, condonation for the late filing of the notice of appeal and the reinstatement of the appeal.

[11] On 18 May 2021 the applicants served the respondent with this application.

[12] Even though the applicants are of the view that the application for condonation is interlocutory to the appeal and ought not to be dealt with as an opposed motion, and that it ought to be determined by the court hearing the appeal, the applicants do not persist with this objection.

[13] The explanation given on behalf of the applicants for the failure to file the notice of appeal and to timeously prepare the record is as follows. It was submitted that the court should note that even though the notice of appeal was not filed with the Registrar, the notice was timeously served on the respondent, hence the respondent was able to file a cross-appeal.

[14] It was submitted on behalf of the applicants that the failure to file the notice to appeal was as a result of some challenges experienced in the office of the State Attorney. As appears from the founding affidavit deposed to by Mr

Chowe, the person responsible for the file had resigned at the end of October 2020. It was not until April 2021 that Mr Chowe discovered that the notice of appeal was not filed with the Registrar and that even the transcription of the record has not been requisitioned.

[15] Inasmuch as the applicants have conceded that the delay in filing the notice of appeal and provisioning for the record was long, it was submitted on behalf of the applicants that the respondent has not suffered any prejudice. It is further the applicants' contention that the lapses in the State Attorneys' office should not be imputed to them as every effort was made by the first applicant's Senior Legal Administrative Officer, Mr O S Nemukovhani, to enquire from the state attorneys' office about progress regarding the prosecution of the appeal.

[16] With regards to the importance of the issues raised in the appeal it was submitted on behalf of the applicants that since this matter involves public funds, it is in the public interest that condonation be granted. It is further submitted, as conceded by counsel for the respondent, that the appeal has some prospects of success and that the applicants have strong prospects of succeeding in their appeal on both claims granted in favour of the respondent.

[17] It is further submitted on behalf of the applicants that the applicants have also taken the necessary steps to have the record transcribed.

[18] On behalf of the respondent it was submitted that the applicants could not, for their tardiness, rely on the conduct of the attorneys as there was a

limit to which courts excuse litigants in circumstances where the default was as a result of their legal representatives. It is the respondent's contention that, taking into account the time it took the applicants to prosecute the appeal, the delay is excessive and the applicants have not given a proper and detailed explanation for non-compliance with the Rules of this court.

[19] Furthermore, it is the respondent's contention that the application for condonation was brought in bad faith in that, even though the applicants have admitted that the sum of R 6,229,015.25 is due to the respondent, no effort has been made to pay the said amount. It was submitted on behalf of the respondent should the court be inclined to grant condonation, the applicants should be ordered to pay the amount due.

[20] With regard to the requirements for condonation to be granted, in *Van Wyk v Unitas Hospital and Another*¹ the court stated the following:

“[20] This Court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests 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.”

[21] From the facts of this case it would appear that the failure in filing the notice of appeal with the Registrar, even though it was delivered timeously to

¹ 2008 (2) SA 472 (CC).

the respondent, cannot be attributed to the applicants, but to the applicants' legal representatives, the State Attorneys' office. It cannot be disputed that litigation involving organs of State is primarily handled by the State Attorneys' office. As appears from the applicants founding affidavit, which is supported by a confirmatory affidavits of Mr Nemukovhani, Mr Mosito, an official within the State Attorneys' office, the applicants have always had the intention of pursuing the appeal against the judgement and order of 10 December 2019 and Mr Nemukovhani did make several enquiries at the State Attorneys' office about the progress in the prosecution of the appeal.

[22] In *NUM v Council for Mineral Technology*² this court held that:

“Courts have traditionally demonstrated their reluctance to penalise a litigant on account of the conduct of his legal representative but have emphasised that there is a limit beyond which an applicant cannot escape the results of his representative's lack of diligence or the insufficiency of the explanation tendered.”

[23] I am of the view, taking into account the explanation given by the applicants for the late filing of the notice of appeal and the non-availability of the record that the delay in the prosecution of the appeal is well explained and is reasonable. The delay was solely caused by the conduct of the officials in the State Attorneys' in failing to pursue the prosecution of the appeal. This court has sympathy in the way in which the applicants' legal representatives

² [1999] 3 BLLR 209 (LAC) at 211I-212A.

have dealt with this matter. The applicants have given particulars as to what they did during the time delays experienced in this matter in pursuing the appeal after Mr Chowe discovered that the notice of appeal was not filed with the Registrar and the process for the transcription of the record had not been undertaken. I am satisfied that the applicants have given an explanation with sufficient particularity as to what happened during the significant periods during which no action was taken to prosecute the appeal.

[24] More so, I am of the view that there is no prejudice on the part of the respondent as it had been served with a notice of appeal before the lapse of the prescribed period for the noting the appeal, hence the respondent was in a position to cross appeal.

[25] The fact that the applicants have not paid the damages they have acknowledged are due to the respondent is not indicative of bad faith on their part. As appears in the replying affidavit, the State Attorney was in the process of advising the applicants in this regard.

[26] Taking into account all the facts before me I am satisfied that the applicants have shown sufficient cause for condonation to be granted for the late filing of the notice of appeal and the record should be granted.

[27] With regard to costs, it is trite that the successful party is entitled to costs. However, due to the fact that the applicants were seeking an indulgence and I was not unreasonable for the respondent to oppose the application, I am of the view that it would be fair for each party to pay its own costs.

[28] Accordingly, the following order is made:

1. Condonation for:
 - 1.1 the late filing of the notice of appeal; and
 - 1.2 the late filing of the record of appeal,
is granted.
2. The lapsed appeal is reinstated.
3. No order as to costs is made.

MNGQIBISA-THUSI J

Date of hearing : 08 March 2022

Date of judgment : 16 January 2023

Appearances:

For Applicants: Adv N Nyembe (instructed by the State Attorney, Pretoria)

For Respondent: Adv R Stockwell (instructed by Friedland Hart Solomon & Nicolson)