G.P.-S.59968—1970-71—2 500

J 219

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE Provincial Division)
(Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

UNITED PLANT HIRE (PTY) LTD. *Appellant,*

versus

B. L. HILLS & TWO OTHERS *Respondent*

Appellant's Attorney Rosendorf, Venter & *Respondent's Attorney*
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate H R Schreiner S.C. *Respondent's Advocate* J B Brownlee S.C.
Advokaat vir Appellant D E I Nicholas *Advokaat vir Respondent* J D Schwarz

Set down for hearing on
Op die rol geplaas vir verhoor op

Coram: Holmes, Jansen, Corbett JJ.A.
Goldstone et Kotzé A.JJ.A.

(D.C.I.D.) 9.45 am — 11.00 am
11.15 am — 12.45 pm
2.15 pm — 3.00 pm

C.A.V.

The Court refuses the application for condonation with costs the latter to include the respondents' costs

P.T.O.

Bills taxed—Kosterekenings getakseer

Date Datum	Amount Bedrag	Initials Paraaf

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :

UNITED PLANT HIRE (PTY). LTD. ... Applicant

and

BRIAN HILLS ... First Respondent

TREVOR RUPERT HOWARD ... Second Respondent

ANTHONY JOHN SWABY ... Third Respondent

Coram: HOLMES, JANSEN, CORBETT, JJ.A.,

et GALGUT, KOTZÉ, A.JJ.A.

Heard: 17 November 1975

Delivered: 27 November 1975

J U D G M E N T .

HOLMES, J.A., :

This is an application for condonation, brought under Rule 13 of the Rules of this Court, which reads in part -

/"The ...

"The Court may, for sufficient cause shown, excuse the parties from compliance with any of the aforegoing rules ....."

The applicant, a company, was the unsuccessful respondent in an opposed motion in the Durban and Coast Local Division. Judgment was given against it on 6 December 1974. Appeal was noted direct to this Court by consent.

The Rules which have not been complied with are -

Rule 5 (4) (b), which required the present applicant to lodge six copies of the record with the registrar of this Court within three months of the date of the judgment, i.e., on or before 6 March 1975.

Rule 6 (2), which required the applicant, before lodging the said copies of the record, to "enter into good and sufficient security for the respondent's costs of appeal".

/The ...

The copies of the record were lodged only on 29 May 1975 - a delay of nearly three months.

As to security, the applicant's Bloemfontein attorneys, on the day after they had lodged the copies of the record with the registrar of this Court, sought to deposit a cheque for R2500, made out in favour of the registrar, representing the amount of the security fixed by the registrar of the Court a quo. The applicant's attorneys say that the registrar of this Court declined to accept the cheque on the grounds that his office had no banking account, and suggested that the instructing attorney deposit the cheque in his trust account. This the attorney did on 2 June 1975. However, the attorneys for the respondent only came to hear of this early in November, and they requested that the R2500 be transferred to their trust account. This was done on 11 November 1975.

It is well settled that, in considering applications for condonation, the Court has a discretion,

/to be ...

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 therefor, 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. The list is not exhaustive.

These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. See Liquidators, Myburgh, Krone, and Co. Ltd. v. Standard Bank of S.A. Ltd., and Another, 1924 AD., 226 ("The merits of the appeal may in some cases be very important" - per Innes C.J. at page 231); Melane v. Santam Ins. Co. Ltd., 1962 (4) S.A. 531 (A.D) at page 532;

/Federated ...

Federated Employers Fire and General Insurance Co. Ltd., and Another v. McKenzie, 1969 (3) S.A. 360 (A.D.) ; and Glazer v. Glazer, N.O., 1963 (4) S.A. 694 (A.D.) per Steyn C.J. at page 707 E -

> "In my view, for the reasons stated above, her prospect of success on the merits, if there is one at all, is so slender that condonation would not be justified."

I proceed to consider the relevant factors. After the appeal had been noted, there were negotiations by correspondence between the attorneys on both sides with a view to fixing the amount of the security to be lodged. The director of the applicant was overseas. Before the figure had been finalised, the time ran out for the lodging of the record. The respondent's attorney thereupon took up the attitude on 11 March 1975 that the appeal must be deemed to have been withdrawn, in terms of Rule 5 (4) bis (b) which reads -

/"If an ...

> "If an appellant has failed to lodge the record within the period prescribed and has not within that period applied to the respondent or his attorney for consent to an extension thereof and given notice to the registrar that he has so applied, he shall be deemed to have withdrawn his appeal."

The applicant's attorney asked for the respon= dents' attorneys consent for an extension of time under Rule 5 (4) (c) which reads -

> "within such further period as may be agreed to in writing by the respondent".

This was refused on the ground that a consent could only be given before the time had elapsed. The amount of security was then fixed at R2500 by the registrar of the Court a quo on 19 March 1975.

/In my ...

In my view the respondent's attorney might well have given the consent sought, seeing that the parties were in the course of negotiating about security when the guillotine fell. Rule 5 (4) (c) and 5 (4) bis (b) must not be read so rigidly as to exclude the restorative balm of consent to an extension in a case such as this one. This Court has already indicated that it is only if such an agreement is not forthcoming that an application to condone need be made; see A.A. Mutual Insurance Association Ltd. v. Van Jaarsveld and Another, 1974 (4) S.A. 729 (A.D.) at page 731 D. Hofmeyr, J.A., went on to say -

> "The plain purpose of the present provision is to avoid the need for such applications and to save the costs of them, and parties should obviously be encouraged to make full use of this useful measure."

Thereafter, however, there was some dilatori= ness on the part of the applicant and its attorney, to which I shall now refer.

/As to ...

As to the applicant's dilatoriness, its director was still overseas and it was only towards the end of April that its attorney was belatedly put in funds in the matter of the R2500 required as security for costs. In this the applicant was remiss. Litigation is a serious matter and, once having put a hand to the plough, the applicant should have made arrangements to see the matter through.

And so the application for condonation had to be made; and there has been an exchange of recrimina= tory niceties in the matter of each attorney suggesting an order that the other pay the costs of any such appli= cation de bonis propriis. Was it not Caesar who believed in carrying the war into the enemy's camp?

As to the dilatoriness of the applicant's attorney, he candidly accepts responsibility for the delay of three weeks in making the application for con= donation. He says that normally it would not have taken him more than a week to prepare it. However, -

"due to extreme pressure of work, including the preparation for two Supreme Court Trials and the attendances at Court and the necessity to deal with four urgent applications to the Supreme Court, these papers have not been prepared until now".

The result was that the application for condo= nation was filed and served only on 26 May 1975. As to that, as a matter of humanity one has a measure of sympathy with any overworked practitioner; but as a matter of justice, there is scant reason why this should be allowed prejudicially to set the other side's teeth on edge; see Kgobane and Another v. Minister of Justice and Another, 1969 (3) S.A. 365 (A.D.) at page 369 B.

I turn now to the applicant's failure to "enter into good and sufficient security for the respondents' costs of appeal" in terms of Rule 6 (2) of this Court. An appellant is not required to lodge this security with the registrar of this Court. Its form is left to the

/field .....

field of negotiation between the attorneys. For example, a bank or building society guarantee might be agreed upon and furnished. In the present case, it was agreed in November 1975 that the applicant's attorney should send a cheque to the respondents' attorneys who were to deposit it in trust; and this was done. But it should have been done in May, when the record was required to be lodged. Why the delay? The applicant's attorney says that he did tender a cheque to the registrar of the Court in May and, when it was pointed out that this was inappropriate, he paid it into his trust account. But he did not tell the respondent's attorney about this: it only came to light early in November. Nevertheless it was argued that this unilateral act constituted the entering into of good and sufficient security. I have no doubt but that it did not. The integrity of the attorney is not questioned for a moment; but with what assurance can a respondent embark on the costly business of re=

/sisting ...

sisting an appeal, when he has no knowledge whether the appellant has entered into security for the costs? In my view the applicant breached Rule 6(2) by several months.

And so to the prospects of success on the merits of the appeal, for these, if strong, could carry the day despite an inauspicious dilatoriness and explanation. In this regard I must refer to the factual background.

In the Durban and Coast Local Division the applicant had sued the three respondents, who were then practising in partnership as accountants, for substantial damages alleged to have been caused by their professional negligence. The upshot of the case was that on 22 October 1973 the trial Judge, Shearer, J., granted absolution, with costs on the attorney and client scale.

In due course the resultant bills of costs was presented to the Taxing Master of the Durban and Coast Local Division. The attorney for the present

applicant, however, made representations to the Taxing Master against the taxation of the bill (not, be it noted, for the disallowance of any or all of the many items therein). The applicant's attorney relied upon the facts that in the relevant litigation the present respondents had at all material times been covered by an Accountants' Indemnity Policy, which had been issued to them by the Commercial Union Assurance Company of South Africa; and that the insurance com= pany, as it was entitled to do, took over and conducted the defence in the name of the insured. Accordingly, so it was urged upon the Taxing Master by the applicant's attorney, the costs reflected in the bills were not incurred by the present respondents but by the insurance company; and the present applicant was therefor not liable to pay such costs. That was the basic point.

There were also ancillary points, arising from the fact that the company instructed its Johannes= burg attorneys as well as a firm in Durban. It was

/contended ...

contended that both firms acted only for the insurance company or at any rate that there was a limited attorney and client relationship with the respondents; alternatively, that the Johannesburg firm was not the attorney of record and was not included in the power of attorney and was not necessarily engaged in the perfor= mance of any services connected with the defence of the action: hence its bill of costs could not be taxed under Rule 70 (3).

Faced with these contentions, the harassed Taxing Master refused to tax the bills, holding that the issue was a matter for the court to decide.

So the present respondents applied to the Durban and Coast Local Division for a mandamus ordering the Taxing Master to tax the bills. The present applicant was cited. Howard, J., granted the order. It is against that order that the present applicant seeks to appeal, via this application for condonation for non-compliance with the Rules. In my view the application

/for a ...

for a mandamus had to succeed. Shearer, J., had granted absolution with costs (on the attorney and client scale) in the litigation between the very parties. Standing that order, when the bills of costs were submitted to the Taxing Master, it was his plain duty to tax them, even if, in the exercise of his discretion, he were to tax off many an item. However, Howard, J., in a helpful judgment (since the Taxing Master would welcome the guidance provided) decided the matter by rejecting the contentions which the attorney for the present applicant had advanced, as aforementioned. I therefore set out the relevant provisions in the Indemnity. The insurance company agreed (subject inter alia to the conditions) to indem= nify the insured -

(a) against loss arising from any claim in respect of breach of professional duty as chartered accountants in public practice, by reason of any neglect, omission or error;

/(b) ...

(b) against all costs charges and expenses incurred with the written consent of the company in relation to the matters aforesaid.

It is clear that, in any litigation to enforce any claim referred to, the insured would be the defen= dants. And the policy indemnifies them against any judgment and costs. Then there is a condition (numbered No. 2) as follows -

> "The insured shall not admit liability for nor settle any claim nor incur any costs or expenses in connection therewith without the written consent of the Company who shall be entitled to take over and conduct in the name of the Insured the defence or settlement of any claim." (My italics).

In my view words which I have italicised have the effect of giving the company a power of attorney to conduct the defence. The insured remain

/the ...

the defendants. The company conducts the litigation in their name. The company does not become the defendant. When Shearer, J., granted costs (on the attorney and client scale) he granted them to the defendants, i.e., the present respondents. He did not grant them in favour of the insurance company, and the latter cannot present any bill for taxation in its name. Furthermore, the fact that the defendants (the present respondents) were indemnified by insurance as to costs, is irrelevant as between plaintiff and defen= dants. The fact that the defendants were indemnified in regard to costs does not mean that the defendants cannot claim them from the plaintiff who was ordered to pay them. The basis of the contention on behalf of the plaintiff (the applicant for condonation) before the Taxing Master and in the Court a quo is therefore unsound.

It is not necessary in this application for condonation to discuss the judgment of Howard, J., in detail. We are not hearing an appeal against it.

/What ...

What I have said above was the basis of it. That (coupled with what I said earlier about the inevitable success of the application for a mandamus) indicates that the applicant's prospects of success are minimal. Bearing in mind the element of dilatoriness discussed earlier, the result is that condonation cannot be granted.

As to the ancillary points raised, (supra), these are referred to in the judgment of Howard, J. The learned Judge was careful, however, not to curtail the discretion of the Taxing Master. The relevant part of the order was as follows -

> "(a) The first respondent, (i.e., the Taxing Master) is directed to tax on the attorney and client scale the bills of costs (copies of which are annexures 'D' and 'E' to the affidavit of the first applicant) and, subject to the due exercise of any function or discretion conferred upon him in terms of Rule 70, to allow the costs reflected in the said bills on the said scale."

/In the ...

In the result, the application for condonation cannot be granted, and is refused with costs. As to the latter, each side was represented in this Court by two counsel, the merits of the appeal being regarded as important, novel, and of much interest to the legal profession as well as to the insurance field. We consider that the costs of two counsel should be allowed. In addition, as the merits of the appeal were canvassed by consent because of their bearing on the prayer for condonation, the respondents should have their costs in relation to the appeal; see Federated Employers Fire and General Insurance Co. Ltd., and Another v. McKenzie, 1969 (3) S.A. 360 (A.D.) at page 364 D.

/To sum ...

To sum up -

The application for condonation is refused with costs, the latter to include the respondents' costs in relation to the appeal. Costs occasioned by the employment of two counsel are sanctioned throughout.

G.N. HOLMES.

JUDGE OF APPEAL.

JANSEN, J.A.)
CORBETT, J.A.)
GALGUT, A.J.A.) ALL CONCUR
KOTZÉ, A.J.A.)