B:6 171/88

Case No. 406/84

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

PETER JOHN RENNIE Appellant

and

KAMBY FARMS (PROPRIETARY) LIMITED Respondent

CORAM: HOEXTER, GROSSKOPF et STEYN, JJA

HEARD: 4 November 1988

DELIVERED: 1 December 1988

J U D G M E N T

HOEXTER, JA .....

HOEXTER, JA

The late Peter John Rennie was the owner of the farm "Penavon" in the district of Richmond, Natal. Although "Penavon" itself consists mainly of land and grazing, it is bounded by forests owned by large forestry estates. To the north of "Penavon" is a property known as "Kamby Farms", of which the owner is a private company ("the defendant"). On 10 August 1981 a large part of "Penavon" was devastated by fast-moving forest fire, and the plaintiff suffered considerable losses. In August 1982 the plaintiff instituted an action for damages against the defendant in the Natal Provincial Division. The defendant resisted the action, and the trial came before NIENABER, J. The plaintiff's loss was agreed at R22 000. The broad issue in the case was thus described by the trial Judge in his judgment:-

"The Plaintiff blames an employee of the Defendant

for.....

> for ordering a 'back-burn' to be drawn along their common boundary to his north which, he says, accounted for the damage to his property. The Defendant admits responsibility for starting a counter-fire but denies that the back-burn was the true cause of the damage to the Plaintiff's property. The back-burn was put in to meet the very real threat of a huge fire advancing from the north. The damage to the Plaintiff's farm, so the Defendant maintains, was caused by sparks and incandescent material wafted aloft by the updraught of the approaching fire, and carried forward by the strong wind that was blowing at the time, thereby setting the Plaintiff's farm alight. The Defendant furthermore claims that the 'back-burn' was put in as a matter of urgent necessity and it denies that there was any negligence on the part of any of its employees in doing so."

Having heard the evidence at the trial (in the course of which he undertook an inspection in loco) and argument, the trial Judge on 7 August 1984 gave judgment for the defendant with costs, including the costs of two counsel. With leave of the Court below (which was granted on 16 October 1984) the plain= tiff noted an appeal to this Court against the whole of the

judgment .....

judgment of NIENABER, J.

In terms of Rule 5(4)(b) of the Rules of this Court the necessary copies of the record of the proceedings in the trial Court should have been lodged with the Registrar of this Court within three months of 16 October 1984. An incomplete record of the proceedings was lodged on 21 November 1986; and on the same date a petition by the plaintiff for condonation of the late lodging of the record was also filed. The plaintiff died on 18 March 1987. The application for condonation was heard on 4 November 1988 when this Court granted an order substituting the executor in the plaintiff's estate as the petitioner in the application and the appellant in the appeal.

I proceed to consider the application for condonation. On 11 December 1984 the plaintiff's Pietermaritzburg attorneys ("MBLW") applied to the defendant's Pietermaritzburg attorneys

("GLDL").....

("GLDL") for an extension of the prescribed period of time within which the record had to be lodged with the Registrar of this Court. On 13 December 1984 GLDL informed MBLW by letter that:-

> ".....we are prepared to allow you a reasonable extension of time within which to obtain the record from Lubbe Recordings....."

The evidence at the trial was recorded by means of a tape-recording machine. A firm known as Sneller Recordings ("SR") was responsible for the transcription thereof. After the trial but before SR had begun the transcription a number of the tapes concerned were stolen from the office of the Registrar of the Provincial Division in Pietermaritzburg. MBLW received an incomplete transcription of the record from SR in April 1985. Accordingly it became necessary to fill in the gaps in the transcribed record by a process of reconstruction from such materials as were available. In the record before us

the evidence at the trial appears at pages 2 to 236. Counsel informed us that what appears at pages 82 to 92, and again at pages 168 to 179 represents the reconstructed portion of the record.

On 13 September 1985 GLDL wrote a letter to MBLW in which, inter alia, the following was said:-

> "Your client has now had some six months within which to reconstruct the missing portions of the record. Kindly by return advise -
> (a) what steps you have taken to reconstruct the missing portions of the record;
> (b) how far you have progressed therewith?
> We have available copious notes of the evidence at the trial as taken by our junior counsel, together with the notes taken by Attorney Sean Mullins. These are available to you if you require same.....
> .....
> We are furthermore not prepared to allow this matter to drag on indefinitely....and we must therefore request you to attend to this matter urgently and without delay. You have already had six months and unless the record is reconstructed by you not later than the 15th October 1985 for submission to the Trial Judge, application will be made for leave to execute on the judgment in favour of our client.

You.....

> You may collect the notes referred to hereabove from our offices....."

In a letter dated 20 September 1985 MBLW acknowledged receipt of the above letter and intimated that:-

> "We will immediately arrange to collect the notes from your office and will commence reconstructing the record."

According to an affidavit by the plaintiff's Pietermaritzburg attorney filed in support of the petition for condonation the notes kept by defendant's junior counsel (Mr Broster) were collected from GLDL "at the beginning of October, 1985". On 17 October MBLW wrote a letter to the trial Judge in which they requested him to make his own notes of his evidence at the trial available to the plaintiff. In support of this request the letter stated:-

> "Quite a number of persons at the trial did keep notes of the evidence, but none of the notes are presently available other than the notes of Advocate Broster. The notes kept by other

persons.....

> persons have apparently been lost or destroyed. We have studied Advocate Broster's notes but these are extremely cryptic and do certainly not contain sufficient detail to use as a basis for reconstructing a record for an Appeal".

The trial Judge granted the request and his handwritten notes of the evidence at the trial were made available to MBLW on 22 October 1985. Meanwhile, and still on 17 October 1985, MBLW sent a copy of their aforementioned letter to the trial Judge to GLDL. In the concluding paragraph of their covering letter to GLDL they wrote:-

> "Please be patient, failing which we will have no alternative but to apply to the Appellate Division for confirmation (condonation). We hope that you will not put us in the position that we have to do so, unless of course it becomes clear that we are being dilatory in our efforts which we assure you we are not."

The above letter evoked a sharp response from the defendant's attorneys. On 22 October 1985 GLDL wrote to MBLW:-

> "We have noted the comments you have made in your

letter.....

> letter to Judge Nienaber with some astonishment, more specifically where you stated that the only notes are those of Advocate Broster in that the notes kept by other persons have apparently been lost or destroyed. You have been trying to reconstruct the record for the past approximately seven months and we ask you to now urgently let us know from what you have been trying to recon= struct the record....."

In response to the above MBLW wrote a further letter to GLDL on 28 October 1985 stating that Mr Broster's notes were insufficiently detailed for an adequate reconstruction of the record. The letter conceded that there had been "a long delay in dealing with this matter" which it attributed to a combination of factors which it listed. It expressed understanding for the "frustration" experienced by GLDL but gave an assurance "that we are now doing our utmost to put the matter right."

On 8 November 1985 GLDL addressed a letter in the following terms to MBLW:-

> "Our client considers that the appellant has had

a .....

> a more than reasonable time to reconstruct and file the record and is accordingly not prepared to grant any further extension for the filing thereof. Under the circumstances your client will have to make a substantive application for condonation and it is our instructions that such application will be opposed....."

MBLW experienced difficulty in trying to decipher the trial Judge's handwritten notes which had been made available to them on 22 October 1985. At some time thereafter (the date does not appear from the petition) MBLW requested GLDL to assist in this undertaking; and the latter agreed to do so after the Christmas vacation. On 20 January 1986 GLDL wrote to MBLW as follows:-

> "We confirm that you have delivered to us the judge's notes which we in turn have handed to Advocate Broster with a view to reconstructing the missing portions of the record.
> .....
> Needless to say our co-operation in reconstructing the missing portions of the record must in no way be construed as a waiver of our client's rights, more specifically its refusal to grant

any.....

> any further extension as previously conveyed to you."

According to the affidavit filed in support of the petition by the plaintiff's Pietermaritzburg attorney the trial Judge, Mr Broster and Mr De Villiers (who had appeared as junior counsel for the plaintiff at the trial) met in Durban and on the strength of the trial Judge's notes "they managed to reconstruct the said missing evidence in telegram form." Mr De Villiers then spent some weeks in casting the reconstruction "into a more detailed and understandable record." On 18 June 1986 GLDL wrote a letter to MBLW in the following terms:-

> "It is apparent that your client has no serious intention of pursuing the appeal as the record has not been filed and no application for condonation has been submitted. We accordingly call upon your client to effect payment of the costs which have already been taxed within fourteen (14) days from date hereof failing which application will be made for leave to execute.
>
> We reiterate that our client is not prepared to

> grant any extension for the filing of the record and that any application for condonation will be opposed."

On 4 July 1986 GLDL wrote a further letter to MBLW pointing out that some three months had expired since the discussions between the trial Judge and counsel. The letter proceeded to say:-

> "Advocate de Villiers communicated with writer last week and informed us that the record is now ready and would be filed forthwith. We reiterated to him that we are not prepared to condone the late filing and that we have been instructed to oppose any application for condonation.
>
> The record has not yet been filed and we are now applying to Court for leave to execute."

On 19 August 1986 MBLW wrote to GLDL enclosing a copy of the record of the proceedings which included the reconstructed portion, with a request that it be submitted to Mr Broster for his approval. The record was approved by Mr Broster on 19 September 1986.

The.....

The plaintiff's petition for condonation was served on GLDL on 14 October 1986. In opposition thereto the defendant filed an answering affidavit to which the deponent was Mr R Liebetrau, a partner in GLDL.

In resisting the application for condonation Mr Broster, who appeared for the defendant (respondent), was content to base his opposition thereto on the following grounds: (1) that, affecting the merits of the appeal, the plaintiff had no reasonable prospects of success; and (2) that in a case in which the lodging of the record was already hopelessly out of time there supervened after 19 September 1986 (on which date the reconstructed record had been approved by the defendant) and 21 November 1986 (on which date the record was ultimately lodged) a lengthy and wholly unexplained delay.

The issue of the plaintiff's prospects of success will be touched upon later. In regard to the delays in the

case there is much force in Mr Broster's second contention. It is a serious criticism of the plaintiff and his Pietermaritzburg attorneys that after the defendant had approved the reconstructed record there was a further delay of more than two months before the record was lodged; and that no explanation whatever for this further and lengthy delay is proffered. But there is, I consider, a further example of unexplained dilatoriness on the part of the plaintiff and MBLW which represents an even greater stumbling block in the way of condonation. Whenever an appellant realises that he has not complied with a Rule of Court he should apply for condonation without delay. See: Croeser Standard Bank 1934 AD 77 at 79; Reeders v Jacobsz 1942 AD 395 at 397; CIR v Burger 1956(4) SA 446(A) at 449G/H; Meintjies v H D Combrinck (Edms) Bpk 1961(1) SA 262(A) at 264B. In the present case the defendant's attorneys agreed in December

1984.....

1984 to allow the plaintiff's attorneys "a reasonable exten= sion of time" in which to obtain the record. An examination of the correspondence shows, I think, that the defendant's attorneys exercised considerable patience. They were prepared to wait for more than a year before informing the plaintiff's attorneys (in November 1985) that they considered that the plaintiff had had more than a reasonable time to reconstruct the record; that the plaintiff should make a substantive application for condonation; and that such application would be opposed. The fact that the defendant would oppose any application for condonation was stressed in subsequent letters (on 18 June 1986 and 4 July 1986) by GLDL to MBLW. The plaintiff nevertheless waited for more than a year before presenting his petition for condonation; and for this inordinate delay no explanation is offered.

Nor do the petitioner's problems end here. Mention

has.....

has already been made of the fact that the record eventually lodged in November 1986 was incomplete. It is necessary here to indicate the extent of the deficiency and its unfortunate practical consequences. At the trial various photographic exhibits were handed in. The record was lodged under cover of a letter dated 21 November 1986 written by BMLW's Bloem= fontein correspondents to the Registrar of this Court. I preface what follows by pointing out that no blame attaches to the Bloemfontein attorneys who were acting on instructions of their Pietermaritzburg correspondents. In par 1.3 of the letter to the Registrar the Bloemfontein attorneys stated that, whereas six copies of the record were being lodged, but a single copy of each of exhs "B", "C", "D", "E" and "F" accompanied the record, the reason for this step being:-

> ".....ons verstaan van ons opdraggewende korrespondente dat hulle met Mev Botha gereël het dat, vanweë die grootte van hierdie betrokke bewysstukke,....

> bewysstukke, slegs een eksemplaar van elk ..... ingedien mag word vir gebruik deur al die Regters." (My underlining.)

The record also comprised, as exh "H", seven colour photographs taken from various vantage points visited during the inspection in loco. Concerning exh "H" par 1.4 of the letter to the Registrar said:-

> "In elke afskrif van die Oorkonde is fotostatiese afdrukke van hierdie bewysstuk wel ingesluit, maar die fotostatiese afdrukke is beswaarlik leesbaar en die oorspronklike word dus afsonderlik ingehandig; die betrokke fotos kan ongelukkig nie gedupliseer word nie."

Certain comments are necessary. As far as exh "H" is concerned the plaintiff's legal representatives in fact managed to produce, very shortly before the date of the hearing of the appeal, three perfectly acceptable duplicates or copies of the seven photographs. Of the remaining photographic exhibits the most important is exh "E", which is a composite

aerial.....

aerial photograph of "Penavon" and the properties to the north of it, upon which photograph the extent of the area devastated by the fire is to be seen. During the trial reference by witnesses to exh "E" was facilitated by super-imposing a grid upon it. In fact the single exhibit originally lodged in this Court as exh "E" was not the original exhibit but a smaller version of it without a grid. None of the five exhibits mentioned in para 1.3 of the letter to the Registrar was in fact in any way larger or bulkier than the average photographic exhibits which, in the proper fashion, are regularly lodged in sufficient number with the appeal record in many of the innumerable appeals heard by this Court; and there was no valid or sufficient reason for not lodging the required number of exhibits in the instant case. The failure to do so seriously hampered the members of this Court in their reading and understanding of the evidence at the trial. I

should.....

should mention that for a reason which was not explained the original of exh "E" was unearthed only very shortly before the hearing of the appeal. It was found in the possession of the defendant's attorneys and was brought to Bloemfontein by counsel on the very eve of the appeal. The preparation of an appeal record requires closer attention than was given to it in this case.

By way of summary, the woeful picture which so far emerges is the following: (1) The record of the proceedings, in incomplete form, was lodged with the Registrar of this Court more than two years after the trial had ended. (2) Photographic exhibits handed in during the trial constitute an integral part of the record of proceedings on appeal. In the present case the photographic exhibits were quite essential for a proper understanding of the evidence. These fundamental considerations notwithstanding the record lodged was signifi-

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cantly incomplete in the respects mentioned. (3) The plaintiff's Pietermaritzburg attorneys appreciated as early as October 1985 (a) that an application for condonation of the late lodging of the record had become an essential proceeding in the prosecution of the appeal and (b) that such an application would be resisted by the defendant; but BMLW nevertheless waited for more than a year before presenting the application for condonation. No explanation whatsoever for this extraordinary procrastination is offered. (4) Even if full allowance be made for the difficulties presented by reconstruction of portion of the record, the steps initially taken to this end were characterised by more than a little torpor and tardiness. (5) The record as reconstructed was ready for lodging on 19 September 1986. In fact it was only lodged on 21 November 1986; and there is no explanation for such further and lengthy delay.

I .....

I turn to the matter of the petitioner's prospects of success in the appeal. Here again the petition is defective. Where application is made for condonation of an appellant's failure to lodge the record timeously it is advisable (more particularly where, as in the present case, the explanation is palpably wanting) that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success. See Meintjies v H D Combrink (Edms) Bpk (supra) at 265C. The sole averment made in this respect (which is to be found in the supporting affidavit by the plaintiff's Pietermaritzburg attorney) is:-

> "....that the Appellant has a reasonable prospect of success for reasons set out in the Appellant's Notice of Appeal."

The notice of appeal, however, states no reasons for concluding that the appeal is likely to succeed. It does no more

than to recite that the trial Court erred in making the findings on which its judgment is based; and to list those findings which, so it is suggested, the learned Judge should have made.

In applications of this sort the prospects of success are in general an important, although not decisive, consideration. It has been pointed out (Finbro Furnishers (Pty) Ltd v Registrar of Deeds Bloemfontein and Others 1985(4) SA 773(A) at 789(C)) that the Court is bound to make an assessment of the petitioner's prospects of success as one of the factors relevant to the exercise of the Court's discretion unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. It seems to me that in the instant case the cumulative effect of the factors which I have summarised in paragraphs (1) to (5) above is by itself sufficient to render the application unworthy of consideration; and that this is a case in which the Court

should.....:

should refuse the application irrespective of the prospects of success. (Cf Mbutuma v Xhosa Development Corporation Ltd 1978(1) 681(A) at 687A; P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980(4) SA 794(A) at 799D/E). For the sake of completeness, however, I mention the following. In this instance the Court adopted the usual procedure of permitting counsel on both sides to canvass the merits at length as part of the application for condonation. The judgment of the Court below is a careful and reasoned one. Having considered everything said on behalf of the appellant by Mr Gordon in the course of his full and fair argument, I have formed the impression that the case for the plaintiff is a flimsy one and that the prospects of success on appeal are slender in the extreme.

For the reasons aforegoing I conclude that the petitioner has not shown sufficient cause for the condonation

of.....

of the plaintiff's non-compliance with the Rule governing the lodging of the record of the trial proceedings; and that the application must fail. Counsel for the defendant (respondent) had to come to Court prepared to argue not only the application for condonation but the appeal as well. The costs to be borne by the appellant will therefore include the respondent's costs of the appeal.

In the result the petition for condonation is dismissed with costs.

G G HOEXTER, JA

GROSSKOPF, JA)
STEYN, JA) Concur