Case No 225/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

R S NAPIER Appellant

and

HARALAMBOS TSAPERAS Respondent

CORAM: HOEXTER, E M GROSSKOPF, VAN DEN HEEVER, JJA

HEARD: 21 NOVEMBER 1994

DELIVERED: 23 February 1995

J U D G M E N T

E M GROSSKOPF, JA

The appellant in this matter represents an insurer which had insured the respondent's motor vehicle against, inter alia, theft. The respondent instituted an action in the Witwatersrand Local Division under the policy, alleging that the insured vehicle had been stolen. The action succeeded. Thereafter the judge a guo granted leave to appeal. When the matter came before us on 21 November 1994 we ordered that the appeal be struck from the roll. No reasons were furnished at the time. In addition judgment was reserved on the question of costs, and, in particular, whether an order of costs on the scale as between attorney and client should be awarded, and whether an order of costs against the appellant's attorney de bonis proprlis was justified. The parties, and the appellant's attorney, were given an opportunity to file affidavits and further written argument on the question of costs. Affidavits and additional heads of argument were filed by both parties. This judgment serves to

record our reasons for striking the matter from the roll and our findings on the question of costs.

It will be convenient to commence with a chronology of the proceedings. On 29 October 1993 judgment was given. On 25 January 1994 the judge a quo gave leave to appeal. In terms of AD rule of court 5(1) notice of appeal had to be delivered within 20 days after leave to appeal had been granted, i e, on or before 24 February 1994. Within 20 days after the lodging of the notice of appeal the appellant's attorney had to file a power of attorney authorizing him to prosecute the appeal (rule 5(3)(b)). And, unless the respondent consented to an extension of time, the appellant had to lodge copies of the record with the registrar and deliver copies thereof to the respondent within three months of the date of the order granting leave to appeal, i e, on or before 24 April 1994 (rule 5(4)(c)).

Notice of appeal was delivered on 11 April 1994,

e, approximately six weeks late. It does not appear from the papers when a power of attorney was filed, but the respondent makes no separate point of this, and I assume it was filed together with or soon after the notice of appeal.

On 11 May 1994 an application for the condonation of the late filing of the notice of appeal and the power of attorney was launched. The grounds were briefly as follows. During February 1994 the appellant's attorney, Mr S C Thomson ("Thomson") was preparing to leave his then firm to join a different firm. The appellant decided to retain him as his attorney. A notice of appeal was in the file, but the previous firm of attorneys had a lien over it for unpaid fees. Pending release of the file it was handled on a caretaker basis by another member of the previous firm, who did not know that a notice of appeal had to be filed. There was a delay in the payment of the outstanding fees. When filing of the notice of appeal

was overdue, the respondent started taking steps to enforce his judgment. This came to the attention of Thomson, and he then took steps to have the notice of appeal filed. However, the notice reflected that an appeal was noted to "the Appellate Division of the Transvaal Provincial Division of the Supreme Court of South Africa". The respondent moved to have it set aside. The appellant withdrew the defective notice of appeal and substituted the proper one which was finally filed on 11 April 1994.

The respondent strenuously opposed the application for condonation in an affidavit filed on 6 July 1994. It is not necessary to say much about the merits of this application for condonation except that there is no clear explanation why Thomson did not, before leaving his previous firm at the end of February, see to the filing of the notice of appeal, which had been due by 24 February. However, I do not propose expressing a view on whether this application would

have been granted had there been no other irregularities in this matter.

A much more serious problem arose with the lodging of the record. In this regard rule 5(4A)(b) provides:

> "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."

After judgment had been given in the court a quo the respondent's attorney wrote to Thomson on 26 November 1993 about various matters connected with the case. Inter alia he urged him to expedite the application for leave to appeal (the respondent consented to the granting of such an order), and asked him whether he had "obtained a transcription of the record and what stage your appeal has reached." He added:

> "We intend keeping you strictly to the days as laid down by the Court Rules."

In reply Thomson wrote (on 30 November 1993):

> "... we do not intend taking any steps in regard to the appeal until such time as we have received leave to appeal. After leave to appeal has been obtained we will then take steps to obtain a transcript of proceedings and comply with the rules of court relating to the appeal procedure."

As already stated, leave to appeal was granted on 25 January 1994. Only on 22 February 1994 did Thomson request a record from the transcription service, Datavyf (Pty) Ltd ("Datavyf"). There was then correspondence between him and Datavyf about certain exhibits. Judging purely from the dates of the letters, Thomson seemed very slow in reacting to requests from Datavyf. His explanation in his latest affidavit for the various delays is that his previous firm of attorneys, who were exercising a lien over the file, delayed in transmitting one important letter to him, and that the appellant's principal, which had undergone a change of management, took time to pay their attorneys' account.

Be that as it may, by due date (24 April) the record had not been lodged. On 21 June 1994 the registrar of this court wrote to the appellant's Bloemfontein attorneys mentioning the filing of the notice of appeal, noting that no consent from the respondent for an extension of time for the filing of the record had been received, and informing the appellant's attorneys that "the matter is regarded as withdrawn". The letter proceeded:

> "If, however, you wish to continue with the appeal, you must approach the respondent(s) for the necessary consent and notify him and this office immediately of your intention to file an application for condonation if the consent is refused."

On 24 June 1994 the appellant's Bloemfontein attorneys telefaxed the registrar's letter to Thomson. Thomson did not react to this letter.

Also, coincidentally, on 21 June 1994, the respondent's attorney faxed a letter to Thomson relating to certain exhibits still required for the

preparation of the record. After stating that he did not have the documents, the author of the letter wrote that the matter was in any event futile since, in terms of rule 5(4A)(b) the appeal was deemed to have been withdrawn because the record had not been lodged timeously. The author then referred to the application for condonation for the late filing of the notice of appeal. He said that he was preparing an opposing affidavit, and continued

> "... but ... this must not be construed as any form of consent on the part of our client, to the late filing of the court record, neither does our client in fact consent thereto."

In a reply dated 24 June 1994 Thomson queried whether the record should already have been filed. In this regard he purported to rely on Rule 49(7)(a) of the rules of court. The respondent's attorney responded in a telefax dated 28 June 1994:

> "We are unable to understand your reference to rule 49 as there are only 13 Appellate Division Rules. We refer you to Appellate Division Rule

5(4) and Rule 5(4)bis(b)".

The latter reference should have been to rule 5(4A)(b), but this error is immaterial. Even a cursory glance at AD rule 5 would have informed Thomson of his duties in regard to the record.

In the opposing affidavit to the condonation application, dated, as I have said, 6 July 1994, the respondent again emphasized that he did not consent to the late lodging of the record.

The record was finally lodged on 31 August 1994, more than four months late. No application for condonation was made.

When the matter was called in court on 21 November 1994, Mr Luitingh, who appeared for the appellant, proceeded to address us on the merits of the appeal. He had not been briefed on the opposed application for condonation, and was unaware that there was any problem concerning the late lodging of the record. After he had been granted a short postponement to receive

instructions, he applied for a longer postponement to enable an application for condonation to be filed. Mr Eloff, who appeared for the respondent, contended that we had no power to grant a postponement. Since, he said, the appeal was deemed to be withdrawn, there was nothing before us which could be postponed. I do not propose expressing an opinion on the correctness of this contention. Even assuming that we have a discretion to order a postponement in a matter such as this, we did not consider that we should exercise it in favour of the appellant. In terms of the rules the appeal was deemed to have been withdrawn. The appellant's attention had been drawn specifically to the terms of the rule by his opponent and by the registrar of this court. The latter had also told him what he should in any event have known, namely that in the absence of consent by the respondent a successful application for condonation was necessary to resuscitate the appeal. The delay in the lodging of the

record was a substantial one, and should be seen gainst a background of other infringements of the rules. Despite all of this the appellant not only failed to apply for condonation, but even failed to brief his counsel on the application for condonation which was made in respect of a relatively minor infringement of the rules. No explanation for these failures was given to us. In the result there was nothing before us which could justify a postponement of the matter. The striking from the roll was then inevitable since the appeal was deemed to have lapsed.

In his affidavit which has now been filed Thomson again does not give any acceptable explanation for his failure to apply for the condonation of the late lodging of the record. He says:

> "... had I applied the requisite diligence, the necessary Application for Condoning the Late Filing of the Appeal Court Record could and should have been made... I did not understand and perceive ... that a separate Application for the Late Filing of the Appeal Court Record should have

> been made, despite it being drawn to my attention by both the Registrar of the Appellate Division as well as my opponent in this matter ... I ascribe the failure in this regard simply to the fact that I did not pay sufficient care and attention to the
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> wording of the letters, nor did I read the Rules to which I had been referred."

Despite this candid admission by Thomson, he submits that there were mitigating circumstances. Thus he suggests that in a telephone conversation on 25 July 1994 the respondent's attorney created an impression that "the Applications for Condonation were not going to be proceeded with." Since Thomson was not aware of any need for an application for condonation relating to the record, any such impression created by the respondent's attorney could hardly have been relevant. In any event, Thomson's note of the telephone conversation does not bear him out. The conversation again concerned missing exhibits. The note reads:

> "Asked about annexures. Said Late Filing. Asked if I was happy about this. I said that we should deal with the merits and get appeal over with. He

> agreed but said that he had instructions from his client that he will not grant any further indulgences. I said I was dealing with the AD record. He was concerned by the delay in the typing of the record..."

This conversation hardly suggests that the respondent's attorney had changed his long standing attitude and was now agreeing to the late lodging of the record.

Then Thomson suggests that his Bloemfontein correspondents might have told him more pertinently that an application for condonation was necessary. As I have pointed out, the Bloemfontein attorneys telefaxed the Registrar's letter of 21 June 1994 to Thomson. On 3 August 1994 they again conveyed the registrar's concern about the failure to file the record and referred once more to the letter of 21 June. There is no reason to suppose that any further reminders would have enjoyed greater success.

A further matter raised in mitigation was a personal tragedy which occurred in Thomson'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 somebody else.

The main extenuating circumstance raised by Thomson was that he experienced many problems in causing a proper appeal record to be prepared. It is difficult to see the relevance of this feature. If it is correct that Thomson had a good excuse for not lodging the record in time he would have stood a good chance of succeeding with an application for condonation. That is, however, no excuse for not bringing such an application.

I must not, however, be taken to express, in this judgment, any firm views on the merits of an application for condonation. For present purposes it suffices to say that there appear to be several

weaknesses in the explanations offered for the late lodging of the record, and that the court, in deciding on condonation, may also have regard to the appellant's failure to bring the application timeously. In Rennie v Kamby Farms (Pty) Ltd 1989 (2) SA 124 (A) at 129 G it is said that an appellant, when he realises that

he has not complied with a rule of court, should apply for condonation without delay. His inaction may also be relevant, in my view, when he should have realised, but did not, that he has not complied with a rule. The

matters to be taken into account in an application for condonation include the respondent's interest in the finality of a judgment, the avoidance of unnecessary delay in the administration of justice and, last but not least, the convenience of the court. See Federated Employers Fire & General Insurance Co I, Ltd and Anotner v McKenzle 1969 (3) SA 360 (A)at 362G and Blumenthal and Anotner v Thomson N O and

Anotner 1994 (2) SA 118 (A) at 120F.

However, I am not now deciding an application for condonation. What is most important for present purposes is that none of the explanations tendered for the late filing of the record can justify or extenuate the failure to apply for condonation.

I come now to the question of costs. The striking of the matter from the roll resulted in wasted costs for which the appellant and his attorney were entirely to blame. It would clearly be unfair to expect the respondent to bear any part of them. It is indeed conceded by the appellant that this is a proper case for an award of costs on the attorney client scale.

The further question then arises whether Thomson should be ordered to pay such costs de bonis propriis. Thomson has accepted full responsibility for the failure to apply for condonation for the late lodging of the record. We accordingly do not have the difficulty experienced in Immelzman v Loubser en 'n Ander 1974 (3) SA 816 (A) at 825A-D of deciding which

of the attorneys representing the appellant caused the wasted costs. Certainly Thomson has been guilty of "nalatige en gebrekkige optrede" (Immelman's case, supra, at 825A) and there is every justification for ordering him to pay costs de bonis propriis. See also MacAwnela v Santam Insurance Co Ltd 1977 (1) SA 660 (A) at 664B-C.

On the other hand, the appellant has, with full knowledge of Thomson's neglect, offered to pay, on the scale as between attorney and client, the wasted costs occasioned by this matter being struck off the roll. The respondent does not know whether Thomson would be able to pay an award of costs, and might be prejudiced by an order only against him. I consider therefore that we should accede to the respondent's request and to make an order against the appellant and Thomson jointly and severally.

Finally I have to consider what costs are to be included in the special order. In principle the order

should cover all costs wasted by the appellant's failure to comply with the rules. This would clearly include the costs of the appearance on 21 November 1994, the costs of preparing for the appearance (including the preparation for arguing the appeal) and the costs of the further material submitted to us pursuant to our order of 21 November 1994. General costs of the appeal, such as the cost of preparing the record, should not be included. Save as aforesaid, I propose not to define the concept of wasted costs, but to leave the matter in the discretion of the taxing master, to be exercised in the light of the above considerations.

In the result the following order is made:

The appellant and attorney s C Thomson are ordered to pay, jointly and severally, the one paying the other to be absolved, on the scale as between attorney and own client, the costs wasted as a result of this matter

being struck from the roll on 21 November 1994.

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E M GROSSKOPF, JA

CONCUR

HOEXTER JA
VAN DEN HEEVER JA