THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NUMBER: 25/96

In the matter between:

OMAR BARRIES APPELLANT

and

THE SHERIFF OF THE
MAGISTRATES' COURT, WYNBERG 1st RESPONDENT
GLEN RICHARD KANNEMEYER 2nd RESPONDENT

CORAM: HEFER, EKSTEEN, OLIVIER,
PLEWMAN JJA and MELUNSKY AJA

DATE OF HEARING: 17 MARCH 1998

REASONS: 25 MARCH 1998

REASONS FOR ORDER

PLEWMAN.TA

The petitioner's applications for condonation of the late filing of the notice of appeal, of the late filing of a power of attorney and of the late furnishing of security were dismissed with costs on 17 March 1998. In so ordering the Court also ordered that such costs include the respondents' costs on appeal and of such costs the costs of the applications for condonation were to be paid by appellant's attorneys, Papier Charles and Associates, de bonis propriis. It was intimated that the Court's reasons would be furnished later. These reasons now follow.

A brief reference to the facts of the case must be made. Appellant is a cabinet maker. He conducted his business from hired premises. In 1991 he fell into arrear with his rent. He also fell into debt. Judgments were granted against him in the Wynberg Magistrates' Court in respect of his debt and for his ejectment from the leased premises - a factory.

The respondents are the Sheriff and Deputy Sheriff respectively

for the area. In August 1991 the clerk of the court, pursuant to the judgments, issued (a) a warrant of execution authorising the seizure of sufficient property of appellant to satisfy the judgment debt of some R16 449,20 and (b) a warrant of ejectment. The warrant of ejectment authorised and requested the sheriff to put the plaintiff in the ejectment proceedings into possession of the premises described in the warrant as Factory No 3, Protea Road, Phillipi. It was common cause that the warrants were validly and properly issued. On 15 and 16 August 1991 the second respondent (to whom I will refer simply as "the sheriff") proceeded to execute both warrants. He found the factory unattended and locked. It was one of several factories in a complex. The complex was sited in what is described as a compound. It was surrounded by a security fence and access was obtained via a gate in the security fence. The sheriff since he found no one in charge of the factory, had to break the door lock to gain access to the factory. He laid under attachment under the warrant of execution and removed

from the premises to his own warehouse for storage pending the sale thereof a large number of articles of equipment and machinery in order to satisfy the judgment debt. What remained of appellant's belongings he deposited outside the factory and some ten or fifteen meters from the main door but within the compound. The litigation related to goods other than those placed under attachment in execution. Certain of these (so it was alleged) were removed by "... persons whose identities (were) to the (appellant) unknown".

The claim, in essence, was founded upon an allegation that the sheriff "...by permitting the aforesaid other unknown persons to remove some of the said goods acted unlawfully and wilfully alternatively negligently in the execution of his duties as deputy sheriff'. At the close of the evidence of both parties Motala AJ ordered absolution from the instance and awarded respondents their costs. On 12 December 1995 leave to appeal to this Court was granted.

Appellant was at all times represented by Mr Charles of the firm referred to above. He failed to prosecute the appeal in accordance with the procedure prescribed by the rules of this Court. This resulted in appellant filing three (separate) petitions seeking orders condoning the failure to comply with the rules I now discuss.

The first rule with which the Court is concerned is Rule 5(1) - which obliged appellant to lodge a notice of appeal, within 20 days of the order granting leave to appeal, in which it was stated whether the whole or part only of the judgment was appealed against and, if part only, then what part. This period, extended because of public holidays, elapsed (at the latest) on 11 January 1996. The notice of appeal was actually lodged on 22 January 1996 - some 11 days late. The petition for condonation was filed on 30 January 1996.

The next is Rule 5(3)(b). This obliged the attorney representing the appellant to lodge with the registrar a power of attorney, authorising him to prosecute the appeal, within 20 days of the lodging

the notice of appeal. This 20 day period elapsed (at the latest) on

9 February 1996. The date upon which the power of attorney was actually lodged with this Court does not appear from the petition but it was only signed in Cape Town on 27 February 1996. The petition was filed on 6 March 1996.

The third rule with which the Court is concerned is Rule 6(2). This must be read with Rule 5(4). Rule 5(4) obliged the appellant after the appeal had been noted, to lodge with the registrar six copies of the record of the proceedings in the court appealed from within three months of the date of the order granting leave to appeal (a period which could be extended by an agreement in writing with the other parties). The registrar's date stamp on the record is 6 May 1996. I will accept this as the date of the lodging of the record. It appears from the court file (though there is no mention of the fact in the affidavits filed in support of the petitions) that the explanation for what would otherwise have been late filing is to be found in an

agreement between the parties to extend the period. Rule 6(2) obliges an appellant before lodging the record with the registrar to enter into good and sufficient security for the respondents' costs of appeal. This means that security had to be provided (at the latest) by 6 June 1996. Security (in an unusual form which has, however, not been questioned by respondents) was in fact lodged on 27 August 1996. The petition for condonation of this delay was filed on 3 October 1996.

The petitions are in a standard or like form. In each case the supporting affidavit is attested to by appellant's attorney, R Charles. This firm's letterhead shows that the firm has two partners and two professional assistants.

Although there appears to have been no reaction to the first two petitions by respondents the third provoked opposition and led to the filing of an opposing affidavit by respondents' attorney to which is annexed correspondence which passed between the attorneys' firms. In the affidavit in support of the third petition (attested to on 9

October 1996) appellant's attorney incorporated by reference his affidavit in support of the first petition. This led the respondents' attorney to deal with the facts stated in all three petitions. In no case did the appellant himself depose to a supporting affidavit. Nor did Mr Charles file (or tender) a replying affidavit in any of the cases.

The number of petitions for condonation of failure to comply with the rules of this Court, particularly in recent times, is a matter for grave concern. The reported decisions show that the circumstances which have led to the need for applications for condonation of breaches of the rules have varied widely. But the factors which weigh with the Court are factors which have been consistently applied and frequently restated. See Federated Employers Fire and General Insurance Co Ltd and Another v McKenzie 1969 (3) SA 360 (A) at 362 F-H; United Plant Hire (Pty) Ltd v Hills and Others 1976 (1) SA 717 (A) at 720 E-G.

I will content myself with referring, for present purposes, only

to factors which the circumstances of this case suggest should be repeated. Condonation of the non-observance of the Rules of this Court is not a mere formality (see Meintjies v H D Combrinck (Edms) Bpk 1961 (1) SA 262 (A) 263H-264B; Saloojee and Another NN.O. v Minister of Community Development 1965 (2) SA 135 (A) 138 E-F.

In all cases some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a rule of court apply for condonation as soon as possible. See Commisioner for Inland Revenue v Burger 1956 (4) SA 446 (A) at 449 F-H; Meintjies's case, supra, at 264 B; Saloojee's case, supra, at 138 H. Nor should it simply be assumed that where non- compliance was due entirely to the neglect of the appellant's attorney that condonation will be granted. See Saloojee's case, supra, at 141 B-G. In applications of this sort the appellants' prospects of

success are in general an

important though not decisive consideration. When application is made for condonation it is advisable 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's case, supra, at 265 C-E; Rennie v Kamby Farms (Pty) Ltd 1989 (2) SA 124 (A) at 131 E-F; Moraliswani v Mamili 1989 (4) SA 1 (A) at

10 E. But appellant's prospect of success is but 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. Where non-observance of the rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be. See Ferreira v Ntshingila 1990 (4) SA

271 (A) at 281 J - 282 A; Moraliswani v Mamili, supra, at 10 F;

Rennie v Kamby Farms (Pty) Ltd (supra, at 131 H; Blumenthal

and

Another v Thomson NO and Another 1994 (2) SA 118 (A) at 1211

-

1 122 B.

I turn to the petitions. Appellant's attorney does not in the three affidavits attested to by him assert that he was unacquainted with the rules. In relation to the petition for condonation of the late filing of the notice of appeal (surely the most fundamental and elementary requirement relating to the prosecution of an appeal) he says as follows:

> "I discussed (the appeal) with the advocate who had, to that date dealt with the matter Advocate S.S. Majiedt, and assumed that he would prepare the Notice of Appeal for timeous lodging." (My underlining.)

He goes on to recount that he "misunderstood Advocate Majiedt as he was not able to attend to the matter as he was giving up practise". This "misunderstanding" he says was compounded by "the fact that his (that is the attorney's) office was closed for the Christmas and New Year holidays and only re-opened on 12 January". The explanation tendered is as bald as the above extracts suggest. There

is no statement as to precisely when his office closed; there is no statement of where he was between 12 December and 15 January (12 December was a Tuesday); there is no statement as to what he did to diarise or note the date on which the notice of appeal was due to be filed; there is no statement as to why, if the office was to be closed, he or his partner or one of his two assistants could not have dealt with the preparation and lodging of a notice of appeal; there is no statement of what efforts he made to ascertain whether counsel, whom he knew to be giving up practice, would be able timeously to undertake the task of preparing the notice. But there is a more fundamental difficulty. No effort is made to explain how he, as an admitted and practising attorney in a country where the division between Bar and Side Bar is acknowledged, could "assume" that counsel would (or would be entitled) to prepare a document without his having been formally briefed to do so. The necessity for a formal brief is also an elementary requirement. It is clear that counsel had

not been so briefed because it is not said that he was. Apart from that, drafting a notice of appeal is, in any event, normally an attorney's work so no one would "assume", without special arrangements and a brief, that counsel could undertake it. But the real question is why was the time constraint not recognised, planned for and complied with. In this regard the affidavit is silent.

The petition is also defective in that appellant's prospects of success are not adequately addressed. There is a submission, in general terms (which appears in the supporting affidavit filed with each of the petitions) in the following form:

> "12. In the premises, I respectfully submit that it is quite clear that:
>
> 12.1 no fault exists on Appellant's part; and
>
> 12.2 such delay as has been incurred has not been through any wilful default or disregard on my, or Appellant's, part (sic) or of the Rules of this Honourable Court; and

12.3 there will be no prejudice to the Respondents; and

12.4 Appellant's prospects of success on the merits are good."

This does not, in so far as a discussion of the merits is concerned meet this Court's requirements. It is a mere bald assertion.

The attorney's attempt to explain his failure to note the appeal is lame. It is difficult to believe that matters took the suggested course and it is impossible to accept in the light thereof that the failure to timeously lodge the notice of appeal can be condoned.

The second petition relates to the failure of the attorney to timeously procure and file a power of attorney authorising him to prosecute the appeal. The excuse offered is the following:

> "I submit that due to the frenetic effort on my part to comply with the rules of this Honourable Court, and having focussed my entire effort towards the filing of the Notice of Appeal and the concomitant Petition for Condonation thereof, it has now (that is on 6 March 1996) transpired that I have failed to file the Power of

Attorney timeously."

This is not an excuse which can bear examination. The "frenetic efforts" (if they were frenetic) came to an end on 23 January 1996 when the petition for condonation of the failure timeously to note the appeal was completed. The power of attorney was obtained on 27 February 1996 (that is the date upon which the power of attorney was executed). Here too the affidavit is quite insufficient. The attorney fails to explain a delay of approximately a month with regard to a well known and elementary requirement for an appeal to this Court. In regard to this petition too therefore there is no adequate explanation.

However the major concern with the petitions arises with the supporting affidavit attested to by the attorney to the third petition. The substance of the affidavit in relation to his failure to give security for the respondents' costs of appeal is found in the following paragraphs:

"5. 5.1 I was aware prior to the record in this matter being filed, of the requirements contained in Rule 6(2) of the rules of this Honourable Court and in order to comply therewith I contacted Respondents' attorneys of record (hereinafter referred to as Watkin and Kaplan), on or about 2 May 1996, to ascertain what they considered good and proper security. I wish to point out at this juncture that this is the first occasion that I have been involved in an appeal to this Honourable Court.

5.2 During the conversation aforesaid we agreed that the quantum of security was the sum of R20 000.00 and, as I recall, after having discussed clients financial state with Watkin and Kaplan I then gave an undertaking in respect of the security agreed upon. It was my intention to confirm the undertaking in writing. However I, together with the rest of the office, was in the process of preparing to relocate our offices to new premises and as such I did not attend to same.

6. 6.1 Thereafter followed certain correspondence

between Watkin and Kaplan and our offices wherein they, inter alia, drew my attention to the fact that, as far as they were concerned, due and proper security had not been supplied.

6.2 On or about 8 July 19961 addressed a letter to Watkin and Kaplan, a copy of which is annexed hereto marked "RC1", enquiring whether they required a bond of security to which they replied in the affirmative.

7. Due to the fact that our moving of offices, and the attendant disruption, had not gone ahead at the end of May 1996 but only at the end of June 1996 and the fact that I was having problems with my eyes (which necessitated a short operation on both eyes on 11 September 1996) I was not able to respond to Watkin and Kaplan's requirements relating to the security with the promptness that I would have wished." (My underlining throughout.)

There is in these paragraphs a serious omission of relevant facts and an attempt is made in paragraph 6 to gloss over correspondence

which gives the lie to what is said. In the opposing affidavit of respondents' attorney it is said:

> "8.2 During or about late April 1996,I, on behalf of the Respondents, was telephonically contacted by the Petitioner's instructing attorney, Mr Charles, to discuss the security the Petitioner was required to furnish for the costs of the appeal, in accordance with the Appellate Division Rule 6(2). I advised the said attorney that I would revert to him.
>
> 8.3 On 2 May 1996, I telephonically contacted the said attorney advising that Respondent required security in the amount of R20 000,00 and I confirmed this in a letter of 7 May 1996, a copy of such letter being annexed hereto marked "A". I was advised by the said attorney that he would obtain instructions from the Petitioner in this regard." (Again my underlining.)

The letter of 7 May 1996 reads:

> "We refer to the telephone conversation between

> Mr Charles and the writer on 2 May 1996. In respect to Security for Costs, we require an amount of R20 000.00."

The version of appellant's attorney in his affidavit cannot be reconciled with this statement. But another and more serious matter emerges only from the opposing affidavit. On 2 May 1996 appellant's attorneys had written to the registrar of this Court in the following terms:

> "Appeal: O Dairies/The Sheriff of the Magistrate's Court Wynberg and Glen Richard Kannemeyer.
> Appellate Division Rule 6 - Security for Respondents' Costs of Appeal.
>
> With reference to the above, it is hereby confirmed that the appellant has entered into good and sufficient security for respondents' costs of appeal as contemplated in terms of the above Rule of Court."

This should be read with a later letter to respondents' attorney on 8 July after the latter had, on 23 May 1996 and 28 June 1996, written to appellant's attorney recording that they had had no reply to their letter

of 7 May (quoted above) and demanding that appellant's attorney settle "the aspect of security for costs of the appeal". The letter of 8 July contain the following paragraph:

> "We submit that in terms of Rule 6(1) it is not a requirement that we file a bond of security as initially intimated. We submit that we are in a position to give you an undertaking on our client's behalf that security in the sum of R20 000 will be available."

This letter puts it beyond doubt that the letter of 2 May to the registrar contained a representation that was not in accordance with the facts. In short what was said to the registrar was not true. That said it is also (regrettably) so that the explanation to this Court is not a truthful one. The attorney's failure to annex (and perhaps attempt to explain) the further correspondence to which I have referred (and which shows his assertions to be untrue) warrants serious censure.

The third petition was furthermore itself unduly delayed without any explanation. However, what I have said above, means that in this instance too, there is no proper explanation.

Counsel for the appellant, for the aforegoing reasons found it difficult, to avoid the obvious conclusion namely that this is a case of flagrant and gross non-observance of the rules. He submitted however that appellant should not be prejudiced because of the negligence of his attorney. This is a contention often advanced in this Court but as Steyn CJ said in Saloojee's case, supra, at 141 C:

> "There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered."

The present is a case where sympathy for the litigant must yield to the more important principle that flagrant disregard for the court's rules cannot be countenanced. The only qualification to be made in this case is that in any costs order the main offender should suffer the severest penalty.

One further aspect calls for comment. There seems to be an assumption in the attorney's supporting affidavits that the petitions would be heard simultaneously with the appeal itself. This is a

2 misconception. Strictly the date for the appeal should not have been

set until condonation for non-compliance with rule 6 had been granted. See Moraliswani v Mamili, supra, at 8 B-C.

In what I have said above, I did not deal with appellant's prospects of success on appeal. As in Moraliswani's case, supra, there are two reasons for this. The first is the failure (I have pointed out) to address this aspect properly in all three petitions. The second is that, in any event, the circumstances of the present case are such that the Court should in accordance with the principles followed in Rennie v Kamby Farms Pty Ltd supra, at 131 I-J; Moraliswani case, supra, at 10 D-F; Ferreira v Ntshingila, supra, at 282 A, and Blumenthal and Another,supra, at 1211- 122B hold the applications unworthy of consideration irrespective of the prospects of success.

There remains the costs order. While appellant is obliged in so far as the Court and the respondents are concerned to shoulder the burden of his attorney's gross neglect of his duties, as between

3 appellant and his attorney there is no reason why the main offender,

the attorney, should not bear an appropriate share of the costs. It is an appropriate case for an order that the attorney pay the costs of the applications for condonation de bonis propriis.

Condonation was therefore refused in each case and the costs orders referred to in the opening paragraph of these reasons was made.

C PLEWMAN JA

CONCUR

HEFER JA)
EKSTEEN JA)
OLIVIER JA)
MELUNSKY AJA)