



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable
Case No: 1214/2019

In the matter between:

**THE CHAIRPERSON OF THE NORTH WEST
GAMBLING BOARD** First Appellant

THE NORTH WEST GAMBLING BOARD Second Appellant

and

SUN INTERNATIONAL (SA) LIMITED Respondent

Neutral citation: *The Chairperson of the North West Gambling Board & Another v Sun International (SA) Limited (1214/2019) [2021] ZASCA 176 (14 December 2021)*

Coram: VAN DER MERWE, SCHIPPERS and MBATHA JJA and PHATSHOANE and WEINER AJJA

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 14 December 2021.

Summary: Appeal – condonation for late filing of appeal record and reinstatement of appeal and condonation for late filing of heads of argument – prospects of success assumed – whether good cause shown – dilatory conduct of the appellants – failure to explain blatant disregard of rules and inordinate delays – condonation and reinstatement refused.

ORDER

On appeal from: The North West Division of the High Court (Gutta J sitting as a court of first instance)

1 The application for condonation for the late filing of the record of appeal is dismissed, with no order as to costs.

2 The application for condonation for the late filing of the appellants' heads of argument is dismissed, with no order as to costs.

3 The main matter is struck from the roll with costs.

JUDGMENT

Weiner J (Van Der Merwe, Schippers and Mbatha JJA and Phatshoane AJA concurring)

Introduction

[1] After hearing counsel for the appellants on 5 November 2021, we made the order set out above and indicated that reasons for the order would follow. These are the reasons.

[2] The appellants, the Chairperson of the North West Gambling Board and the North West Gambling Board (herein collectively referred to as the Board) and the respondent, Sun International (SA) Limited (herein referred to as SISA), were in dispute over whether Free Play, which was a credit given by SISA to its most valuable customers, ought to be included or excluded from the calculation of gross gaming revenue. This issue has a bearing on the calculation of the correct amount of levy which a casino was obliged to pay for the benefit of the provincial revenue fund. SISA's view was that such credits ought to be excluded, whilst the Board's view was

that they should be included. The North West High Court (Gutta AJ) found in favour of SISA. The Board brought this appeal with the leave of the court a quo.

[3] Before this Court were two applications for condonation brought by the Board. They related, firstly, to its failure to file the record of appeal timeously, and secondly, to the late filing of the heads of argument, practice note and certificate (the heads of argument), in terms of Rule 10 of this Court's Rules (the Rules), six months after they were due. It was common cause that the appeal had lapsed upon the failure of the Board to file the record on the extended date of 14 April 2020. The Board thus sought condonation in respect of both breaches of the Rules, as well as the reinstatement of its appeal. SISA initially opposed the applications for condonation and the reinstatement of the appeal. It withdrew its opposition shortly before the hearing. This did not, of course, relieve the Board of the duty to make out a proper case for condonation and reinstatement.

The applicable Rules

[4] In terms of Rule 8(1) of this Court's Rules, an appellant is required to lodge with this Court's Registrar (the Registrar) six copies of the record of the proceedings in the court below within three months of the lodging of the notice of appeal. In terms of Rule 8(2), this period may be extended either by the written agreement of the parties or by the Registrar following a request by the appellant, with notice of the request being given to the other parties. Rule 8(3) provides that if the record is not lodged within the period prescribed by Rule 8(1), or an extended period in terms of Rule 8(2), the appeal shall lapse.

[5] Rule 10 provides that heads of argument must be filed within six weeks from the lodging of the record; if the appellant fails to lodge heads of argument within the prescribed period or within the extended period, the appeal shall lapse.

The late filing of the appeal record

[6] In order to properly assess the Board's submissions regarding the delays and its failure to comply with the Rules, it was necessary to traverse the chronology of

events in this matter. The Board's attorney, Ms Makhetha, of Maponya Inc, Bloemfontein, deposed to the Board's application for condonation.

[7] The judgment of Gutta AJ was delivered on 25 May 2018. The application for leave to appeal should have been filed by 15 June 2018. The Board did not file such application by that date, nor did they seek an extension. The application for leave to appeal was only lodged on 12 July 2018, with an application for condonation. The condonation application and application for leave to appeal were set down for hearing on 31 May 2019. However, on that day, the Board brought an application seeking a postponement of the application for leave to appeal, which was granted, with an order that the Board was to file a replying affidavit by 17 June 2019 and heads of argument by 15 July 2019. The replying affidavit was filed a day late, and the heads of argument were filed three days late.

[8] On 25 October 2019, condonation and leave to appeal were granted by the court a quo. The Board served its notice of appeal on 13 November 2019. On 14 November 2019, the Registrar sent a letter to the Board, stating that the record was to be lodged by 13 March 2020.

[9] Mr Baloyi, the instructing attorney at Maponya Inc in Mahikeng, had arranged to courier the record to Bloemfontein on 11 March 2020. The documents were, however, only received on 13 March 2020. Ms Makhetha stated in a letter to the Registrar that due to this delay, the attorneys were unable to bind and deliver the record to the court timeously. She, however, stated that the record had been served on SISA's attorney.¹ However, on 13 March 2020, when she went to the court with copies of the record, they were not in order, as several documents were missing. Mr Baloyi addressed a letter to SISA requesting an extension until 27 March 2020. On 14 March 2020, he also sought a 30-day extension from the Registrar. On 16 March 2020, the Registrar granted an extension until 14 April 2020 for the record to be filed, failing which the appeal would lapse.

¹ It appears that the record was only served on SISA's attorneys on 19 May 2020. This discrepancy is not explained in the affidavit.

[10] In the application for condonation, Ms Makhetha stated that the Covid-19 lockdown, which was announced on 23 March 2020 and commenced on 26 March 2020, made it impossible to travel over provincial boundaries. This explanation was unconvincing, as Ms Makhetha was based in Bloemfontein and did not have to travel over any provincial boundaries. The Board and its attorney did nothing to enquire whether or not the record could be filed, despite the lockdown; they simply disobeyed the Rules, without seeking a further extension or communicating with SISA or the Registrar. The record was not filed on 14 April 2020. No correspondence in this regard was addressed to the Registrar or SISA's attorneys either before or after this date.

[11] On 23 April 2020, SISA's attorney enquired from Mr Baloyi whether the record had been filed, as ten days had lapsed from the extended date upon which the record was to be filed, with no correspondence from the Board. In response, on 24 April 2020, Mr Baloyi explained that it was impossible to file the record because of the lockdown, which had commenced on 23 March 2020.

[12] On 29 April 2020, SISA's attorneys addressed a letter to the Registrar requesting confirmation that the appeal had lapsed as the record had not been filed. The Registrar confirmed, to the attorneys, that no communication in respect of the filing of the record had been received and that the Registrar's office had been open for the duration of the lockdown to receive all documents in hard copy or electronically. The appeal had accordingly lapsed.

[13] Level 4 lockdown was announced on 3 May 2020. On the following day, the record was filed, but there was no application for condonation. The Board's attorneys stated that an application for condonation in respect of the filing of the record would be filed before 21 May 2020 and it did so. SISA opposed the application and the opposing affidavit was filed on 22 June 2020.

Late filing of the heads of argument

[14] The Board, for some reason, stated that the heads of argument were due to be filed on 3 July 2020. But the record had finally been filed on 4 May 2020, and the

heads of argument were thus due six weeks after the record was filed, being 15 June 2020. In any event, both 15 June 2020 and 3 July 2020 came and went – no heads of argument were filed. No extension was applied for. In September 2020, Ms Makhetha was informed by the Registrar that the appeal had lapsed on 14 April 2020. Ms Makhetha did not respond.

[15] Other than the filing of the record and the application for condonation for its late filing, on 4 May 2020, nothing further was heard from Ms Makhetha, Mr Baloyi or the Board, until 21 December 2020 – some seven months later – when the heads of argument and the further application for condonation were filed. SISA filed an answering affidavit to the second condonation application on 16 February 2021.

[16] In an attempt to explain this disregard of the Rules, and its failure to communicate its intentions (despite the appeal having lapsed), Ms Makhetha stated that the reason for not further prosecuting the appeal at the time was that a Full Court of the Western Cape had pronounced on a similar matter against the Western Cape Gambling and Racing Board on 29 April 2020. There were also judgments handed down in similar matters in the Eastern Cape and Northern Cape (22 September 2017), which found against the respective Boards.

[17] The Board, it was said, wanted to discuss these judgments and the way forward with the other Boards involved. No detail was given of these discussions. The Court was not informed what the discussions concerned, who took part in the discussions, and the result of such discussions. No confirmatory affidavits were tendered by the participants to these discussions. It, however, appeared from the application that a decision had been made (on an undisclosed date) that the Western Cape and Eastern Cape Boards would also apply for leave to appeal against the judgments granted against them. It was contemplated that if leave was granted in the Western Cape matter, that case and the present one would be consolidated.²

² Leave to appeal was granted in the Western Cape Matter on 22 October 2021. An application by the Western Cape Gambling and Racing Board to intervene in the present appeal was filed in this Court on 29 October 2021. Such application was dealt with at the hearing of this matter and dismissed by this Court.

[18] Ms Makhetha stated that she had monitored the progress of the Western Cape matter, but decided to hold the present matter in abeyance. For five months, the Board did nothing. It did not inform the Registrar or SISA of its unilateral decision to hold the matter in abeyance. It did not ask for an extension based upon this reasoning that there should be a consolidation of the matters in this Court. However, as the judgment had still not been handed down in the application for leave to appeal in the Western Cape matter by 20 November 2020, the Board instructed Ms Makhetha that the heads of argument and other documents required for the appeal should be filed. There was no explanation as to precisely what Ms Makhetha or the Board did, in these five months, other than to decide on or about 20 November that the heads of argument be filed.

[19] The unilateral decision by the Board to place this matter on hold whilst it was deliberating what to do, without communicating with SISA or the Registrar, was unacceptable. To further aggravate its conduct, despite being informed by the Registrar in September 2020 that the appeal had lapsed on 14 April 2020, the Board did not even consider requesting an extension or seeking condonation for the late filing of the heads of argument. As stated above, the heads of argument and application for condonation were only filed on 21 December 2020. Thus, another unexplained delay of a month occurred. This cavalier attitude cannot be countenanced.

Applicable legal principles

[20] Rule 12 makes provision for applications for condonation in the event of non-compliance with the Rules. It is trite that in applications for condonation and reinstatement:

- '(a) The applicant must provide a proper explanation of the causes of the delay and explain each of the periods of delay.³
- (b) It is not sufficient for an applicant to set out a 'number of generalised causes without any attempt to relate them to the time-frame of its default or to enlighten the court as to the materiality and effectiveness of any steps taken by the Board's legal

³ *SA Express Ltd v Bagport (Pty) Ltd* [2020] ZASCA 13; 2020 (5) SA 404 (SCA); [2020] JOL 47309 (SCA) para 34; *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as amicus curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) para 22; *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* [2009] ZACC 12; 2009 (10) BCLR 1040 (CC); [2009] JOL 23546 (CC); 2012 (2) SA 637 (CC) para 15.

representatives to achieve compliance with the Rules at the earliest reasonable opportunity.⁴

- (c) The court has a discretion which the applicant must show should be exercised in its favour.’

[21] In order to obtain condonation, several factors come into play. As Ponnar JA stated in *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others*,⁵ such factors:

‘...include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent’s interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice (per Holmes JA in *Federated Employers Fire & General Insurance Co Ltd & another v McKenzie* 1969 (3) SA 360 (A) at 362F-G).’

[22] In the present case, the major delay can be laid at the door of the Board itself. And it is in any event responsible for the delay caused by its attorneys. In *Saloojee and Another, NNO v Minister of Community Development*,⁶ after considering the explanation given for the delay, and concluding that it was not even ‘remotely satisfactory’, Steyn CJ held:

‘I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. 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. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court.’⁷

[23] In *SA Express Ltd v Bagport (Pty) Ltd*,⁸ Plasket JA referred to various authorities dealing with this issue. He cited Plewman JA’s comments in *Darries v Sheriff, Magistrate’s Court, Wynberg and Another*,⁹ where it was stated:

‘Condonation of the non-observance of the Rules of this Court is not a mere formality. In all cases, some acceptable explanation, not only of, for example, the delay in noting an

⁴ *Uitenhage Transitional Local Council v South African Revenue Service* [2003] 4 All SA 37 (SCA); [2003] JOL 11450 (SCA); 2004 (1) SA 292 (SCA) para 7.

⁵ *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] ZASCA 5; [2013] JOL 30158 (SCA); [2013] 2 All SA 251 (SCA) para 11.

⁶ *Saloojee and Another, NNO v Minister of Community Development* 1965 (2) SA 135 (A); [1965] 1 All SA 521 (A).

⁷ *Ibid* at 140H and 141B-C.

⁸ *SA Express Ltd v Bagport (Pty) Ltd* (note 3 above)

⁹ *Darries v Sheriff, Magistrate’s Court, Wynberg and Another* 1998 (3) SA 34 (SCA) at 40I-41E, cited in *SA Express* (note 3 above) para 14. (References omitted.)

appeal. . . . must be given. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. In applications of this sort the applicant's 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. 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.'

[24] The Board contended that the prospects of success in the appeal were good, and therefore, the delays occasioned in the filing of the record and heads of argument should be condoned, and the appeal should be re-instated. We were prepared to accept that the Board had prospects of success with the appeal. However, as set out above, condonation has been refused even in circumstances where the prospects of success might be good, but the explanation for the delay was unsatisfactory and displayed a flagrant disregard for the Rules.

[25] In *Madinda v Minister of Safety and Security*,¹⁰ this Court, in dealing with the balance required when considering the explanation for the delay and the prospects of success, stated that:

' . . . In addition, that the merits are shown to be strong or weak may colour an applicant's explanation for conduct which bears on the delay: an applicant with an overwhelming case is hardly likely to be careless in pursuing his or her interest, while one with little hope of success can easily be understood to drag his or her heels. . . .'¹¹

[26] This statement applies equally in the present case. The Board had simply been careless and lackadaisical in its approach to this appeal. Assuming that the Board had good prospects on appeal, the following dictum applied: 'Where non-

¹⁰ *Madinda v Minister of Safety and Security* [2008] ZASCA 34; [2008] 3 All SA 143 (SCA); 2008 (4) SA 312 (SCA).

¹¹ *Ibid* para 12.

observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be'.¹²

Delay in applying for condonation

[27] The Board's dilatory conduct was exacerbated by its failure to apply for condonation as soon as reasonably possible. It waited until 21 December 2020 to file such an application. This again demonstrated the brazen disregard of the Rules. In *Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd*,¹³ this Court dealt with the issue as follows:

'What calls for an explanation is not only the delay in the timeous prosecution of the appeal, but also the delay in seeking condonation. An appellant should, whenever he realises that he has not complied with a rule of this court, apply for condonation without delay. A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility. . . .'

[28] Similarly, in *SA Express*,¹⁴ Plasket JA, confirmed that '[a]n appellant should, whenever he realises that he has not complied with a Rule of Court apply for condonation as soon as possible.'

[29] In view of SISA's withdrawal of its opposition to these applications for condonation, it was not necessary to deal with the manner in which the delays may have prejudiced it. However, there were other issues to consider, as stated by this Court in *Commissioner, South African Revenue Service v Van der Merwe*:¹⁵

' . . . Not only is the conduct of the applicant prejudicial to a party in the position of SARS – the applicant first failed to lodge a notice of appeal in the High Court in time and then repeated that remissness before this court - but to tolerate the type of conduct encountered here would be prejudicial to the administration of justice, the integrity of any appeal process and the functioning of our highest courts of appeal.'

¹² *Darries* (note 9 above).

¹³ *Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd and Others* [2017] ZASCA 88; [2017] 3 All SA 520 (SCA); 2017 (6) SA 90 (SCA) para 26. (References omitted.)

¹⁴ *SA Express* (note 3 above) para 14.

¹⁵ *Commissioner, South African Revenue Service v Van der Merwe* [2015] ZASCA 86; 2016 (1) SA 599 (SCA); [2015] 3 All SA 387 (SCA) para 18. (References omitted.)

Conclusion

[30] Having accepted that there might be prospects of success, the question remained whether the Board had provided a convincing and adequate explanation for its non-compliance with this Court's Rules. This must be answered in the negative.

[31] The Board blatantly failed to comply with the Rules of Court in virtually every instance. It was late in seeking leave to appeal from the High Court. It was late in seeking a postponement of the application for leave to appeal. It was late in filing its heads of argument and replying affidavit in the application for condonation before the High Court. It was two months late in filing the record of appeal in this Court, and the record was still incomplete. It was, furthermore, six months late in filing its heads of argument and application for condonation in this Court. Its explanations for each of these delays were wholly unsatisfactory. The Board displayed a blatant disregard for the Rules of this Court and the administration of justice. The Board's lackadaisical way in dealing with this matter had to be dealt with in a manner that demonstrated that condonation was not just for the asking. The Board flagrantly breached the Rules in such a manner and on so many occasions that this Court could not grant condonation and reinstatement of the appeal.

[32] For these reasons we granted the order set out at the commencement of this judgment.

S E WEINER
ACTING JUDGE OF APPEAL

Appearances:

For appellant: J De Waal SC
Instructed by: Maponya Inc., Bloemfontein

For respondent: A Cockrell SC (with him N Ferreira)
Instructed by: Cliffe Dekker Hofmeyr Inc., Johannesburg
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