



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not reportable

Case no: 056/2021

In the matter between:

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH, EASTERN CAPE PROVINCE**

APPLICANT

and

Y N obo E N

RESPONDENT

Neutral citation: *The Member of the Executive Council for Health, Eastern Cape Province v Y N obo E N* (056/2021) [2023] ZASCA 32 (30 March 2023)

Coram: SCHIPPERS, GORVEN and GOOSEN JJA and KATHREE-SETILOANE and UNTERHALTER AJJA

Heard: 14 March 2023

Delivered: 30 March 2023

Summary: Application for condonation for late filing of record of appeal and reinstatement of appeal – gross non-compliance with rules and failure to provide reasonable explanation – no basis to consider prospects of success – record incomplete – application dismissed.

ORDER

On appeal from: Eastern Cape Division of the High Court, Mthatha (Tokota J, Dukada and Dunywa AJJ), sitting as court of appeal:

- 1 The application for condonation of the late filing of the record of appeal is dismissed.
 - 2 The applicant is ordered to pay the respondent's costs of the application and of the appeal.
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JUDGMENT

Goosen JA (Schippers and Gorven JJA and Kathree-Setiloane and Unterhalter AJJA concurring):

[1] The applicant is the Member of the Executive Council for Health, Eastern Cape Province (the MEC) who seeks to prosecute an appeal against an order of the Eastern Cape Division of the High Court, Mthatha (the full court), which was delivered on 23 July 2020. The first hurdle which the MEC must overcome, is that the appeal has lapsed in terms of rule 8(3) of the Rules of this Court (the SCA rules). This Court is accordingly required to decide whether to reinstate the appeal.

[2] The respondent instituted an action for damages against the MEC in the Eastern Cape Division of the High Court, Mthatha (the high court). The claim was founded upon the alleged failure of medical staff employed by the MEC at Sipetu Hospital (the hospital) in the Eastern Cape, to provide adequate care and treatment to the respondent during the delivery of her daughter. The child was

born at the hospital on 1 January 2010. It is common cause that the child was diagnosed as suffering from spastic non-ambulatory cerebral palsy after sustaining a hypoxic ischaemic insult intrapartum, ie, during labour and the birth.

[3] The high court (Mjali J) in a judgment delivered on 30 October 2018, found the MEC liable. Leave to appeal was refused. However, on 19 August 2019, this Court granted leave to appeal to a full court. On 23 July 2020, the full court dismissed the appeal. This Court granted special leave to appeal to it on 16 October 2020.

[4] A party who wishes to pursue an appeal to this Court is required to file a notice of appeal within one month of the date on which leave to appeal is granted.¹ The notice was filed on 13 January 2021.² In accordance with SCA rule 8(1), the MEC was required to lodge with the registrar the record of the proceedings before the court a quo (in this case, the full court), within three months of filing the notice of appeal. The MEC was therefore required to file the record on or before 21 April 2021.³

[5] No extension of the period for lodging of the record was agreed between the parties, nor was any extension granted by the registrar.⁴ The record was not lodged within the prescribed period. Therefore, in terms of SCA rule 8(3), the appeal lapsed.⁵

¹ SCA Rule 7.

² The notice of appeal refers to special leave granted on 9 December 2020. This is incorrect. That is the date on which the registrar of this Court dispatched a copy of the order granting leave to appeal to the parties. The delay in doing so, arose because of an administrative problem in the registrar's office, for which the registrar apologised.

³ It is not apparent from the record why this date was set.

⁴ On 7 May 2021, the State Attorney made application to the registrar for an extension of the time for filing of the record. The registrar refused the request on the basis that such application should have been made before 21 April 2021 when the record was due.

⁵ The registrar formally advised the State Attorney on 14 June 2021 that the appeal had lapsed on 21 April 2021.

[6] On 29 June 2022, one year and two months after the expiry of the period within which it had to be lodged, the record was lodged with the registrar. An application for condonation and reinstatement of the appeal was filed on the same date.

[7] In order to reinstate a lapsed appeal, a party must obtain condonation for its failure to comply with the SCA rules. The principles governing an application for condonation, in the context of reinstatement of an appeal, have been stated on many occasions. It suffices to refer to *Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd and Others*, where Ponnann JA stated:

‘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 to enable the Court to understand clearly the reasons and to assess the responsibility. Factors which usually weigh with this court in considering an application for condonation 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.’⁶

[8] The touchstone for such an application is the interests of justice, which depends on the facts and circumstances of each case. The factors relevant to this enquiry include the nature of the relief sought, the extent and cause of the delay, the reasonableness of the explanation of the delay, the effect of the delay on the administration of justice and other litigants, and the prospects of success.⁷ The applicant must give a full explanation for the delay, which must be reasonable and cover the entire period of the delay.⁸

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

⁷ *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC) para 3; *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC) para 20.

⁸ *Van Wyk* fn 7 above para 22.

[9] Before dealing with the MEC's explanation for the failure to comply with the SCA rules, an aspect relating to the record itself must be highlighted. The record that was eventually filed does not include a transcript of the evidence of two witnesses, who presented evidence on behalf of the MEC at the trial. They are the midwife and senior nurse who attended to the respondent during the delivery of her baby. Although it was submitted that the attorneys had agreed to its exclusion, no such agreement is recorded in the practice note filed by the MEC. The respondent's practice note merely states that the record is incomplete. The exclusion of this vital evidence from the record is inexplicable, given that one of the grounds of appeal is that the full court had erred in holding that the nursing staff were negligent in failing to monitor the foetal heart rate; and that they could have taken steps to avoid the harm suffered by the child. Counsel for the MEC rightly conceded that this Court would not be able to consider the appeal without this evidence.

[10] To remedy this situation, the respondent's attorney, of his own accord, filed a supplementary bundle to the appeal record. This document, however, is not certified by the registrar of the court a quo in accordance with SCA rule 8(5). It is therefore not properly before this Court. The upshot is that the record of appeal is still not a complete record.

[11] The State Attorney's explanation for the failure to lodge the record within the three-month period is that 'the delay was occasioned by the hold up in having the record transcribed, by Inlexso, the company responsible for the transcription'. He asserts that the person responsible for preparing the record encountered unforeseen and personal difficulties. As will become apparent, this is no explanation.

[12] An appeal was prosecuted before the full court, which had before it a transcribed record prepared for that appeal. It should therefore not have been difficult to prepare a record for this Court within the prescribed time. The delay is explained by way of a litany of dates of telephone calls and emails between the attorney, counsel and Inlexso, the company engaged to ‘convert’ the record. It is not necessary to recount this chronology. It divides the period of delay into three periods. The first is the period from January 2021 up to September 2021, when there was an attempt to file the record. However, the State Attorney in Bloemfontein advised the applicant’s attorney that the record did not comply with the SCA rules. The second is the period from the end of September 2021 to February 2022, when a corrected record was submitted to the registrar but rejected for non-compliance with the SCA rules. The third is the period from February 2022 until the record was lodged on 29 June 2022.

[13] In each of these periods there are months of delay which are unexplained. For example, the affidavit states that ‘counsel started working on the record from 1 March 2021’ – six weeks after the notice of appeal had been filed. The affidavit states that the record was dispatched to Inlexco for cross referencing on 1 April 2021, before the expiry of the period for the filing of the record. Yet there is no explanation for why this could not be done in the available time or within a reasonable time thereafter. There is no explanation for a delay of one month between 14 June and 14 July 2021. In September 2021 the State Attorney in Bloemfontein pointed out the deficiencies in the appeal record. These included the absence of colour photographs, illegible pages, the use of the incorrect appeal case number and the absence of proper cross-referencing of exhibits. There is no explanation for why these deficiencies were not corrected forthwith. Instead, it took a further four months before the corrected record was submitted to the registrar but rejected for non-compliance with the SCA rules.

In that period, a delay of one month from 28 October to 26 November 2021 was not explained at all. After the registrar rejected the record on 4 February 2022, it took another four months before the record was finally filed. This encompassed a six-week delay between 24 April and 7 June 2022, apparently because counsel had not been paid and hence could not continue to work on the preparation of the record.

[14] Although the prospects of success on appeal is generally an important consideration in relation to the reinstatement of an appeal, it is not decisive.⁹ Where the degree of non-compliance is flagrant and substantial, condonation may be refused irrespective of the prospects of success.¹⁰ If the explanation for such flagrant and substantial non-compliance is manifestly inadequate or there is no explanation at all, the prospects of success need not be considered.¹¹ This is such a case.

[15] The effect of the delay in the filing of the record upon the administration of justice and upon the interests of the respondent, is self-evident. At issue in this case is liability for harm caused to a child, who is permanently disabled, and whose interests are paramount.¹² She was born on 1 January 2010. Liability was determined by the trial court on 30 October 2018 and confirmed on appeal on 23 July 2020. The interests of the respondent and the minor child cannot be ignored. The quantum of the loss suffered by them is yet to be determined and they are yet to receive compensation in accordance with the loss.

⁹ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532; *Commissioner: South African Revenue Service, Gauteng West v Levue Investments (Pty) Ltd* [2007] 3 All SA 109 (SCA) para 11.

¹⁰ *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799 D-E; *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281J-282A.

¹¹ *Darries v Sheriff, Magistrate's Court, Wynberg, and Another* 1998 (3) SA 34 (SCA) at 44H-I; See also *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA) at 652 B-F; *Minister of Finance and Others v Gore NO* [2007] 1 All SA 309 (SCA); 2007 (1) SA 111 (SCA) para 2; *Mulaudzi* fn 6 above para 35.

¹² Section 28(2) of the Constitution provides that '(a) child's best interests are of paramount importance in every matter concerning a child'.

[16] Counsel for the applicant conceded that a proper case for condonation was not made out. Finally, it must be said that the way in which the State Attorney, Mthatha dealt with this matter is to be strongly deprecated. There was a flagrant disregard of the SCA rules. This Court, on more than one occasion, has stated that in such cases punitive personal costs orders may be appropriate.¹³

[17] In the result:

- 1 The application for condonation of the late filing of the record of appeal is dismissed.
- 2 The applicant is ordered to pay the respondent's costs of the application and of the appeal.

G G GOOSEN
JUDGE OF APPEAL

¹³ *Reck v Mills en 'n Ander* 1990 (1) SA 751 (A) at 753J-754F, 760C-D; *Napier v Tsaperas* 1995 (2) SA 665 (A) at 671E-J; *Darries* fn 11 above at 44J-45A.

Appearances

For the appellant: B J Pienaar SC and T M Jikwana

Instructed by: State Attorney, Mthatha

State Attorney, Bloemfontein

For the respondent: P Uys

Instructed by: Enzo Meyers Attorneys, East London

McIntyre Van der Post Inc, Bloemfontein.