Case No: 462/92 IN

THE SUPREME COURT OF SOUTH AFRICA APPELLATE DIVISION In the matter between:

JULIUS BLUMENTHAL ..... 1st Appellant

HYMIE MEDALIE ..... 2nd Appellant

and

MIRIAM THOMSON N O ..... 1st Respondent

MASTER OF THE SUPREME COURT ..... 2nd Respondent

Coram: JOUBERT, NESTADT, EKSTEEN J J A et HOWIE,

KRIEGLER A J J A.

Date of hearing: 5 November 1993

Date of filing reasons: 30 November 1993

REASONS FOR JUDGMENT

JOUBERT J A :

On 5 November 1993 this Court granted and order (a) dismissing with costs an application by the appellants for condonation of (1) the late filing of the notice of appeal with the Registrar of this Court, and the failure to serve it timeously on the 1st respondent, (2) the late filing of the necessary power of attorney, (3) the late furnishing of security for costs and (4) the late filing of the record. The Court also ordered (b) the 1st respondent's costs of appeal to be paid by the 1st and 2nd appellants. In both instances (a) and (b) the costs were ordered to include the costs of two counsel. (I may add in parenthesis that the 3rd and 4th appellants were not parties

to the application for condonation, since they have reached a settlement with the 1st respondent in consequence of which they are no longer parties to the appeal against the judgment of the Court a quo). This Court also intimated that its reasons for granting the orders would be filed later. The reasons now follow.

At the outset I feel constrained to record my utter disapproval of the unwieldy nature of the entire collection of separate documents which comprise the application. They have not been bound collectively in a separate cover. Nor have they as a single body been paginated consecutively with an index. To find one's way about them is a frustrating, annoying and time-consuming experience like entering an intricate labyrinth without an experienced guide.

In the Transvaal Provincial Division SCHABORT J on 4 May 1990 dismissed the plaintiffs' action with costs. On 5 September 1990 the Court a quo granted

all the plaintiffs leave to appeal to this Court.

The appellants now petition this Court for an order condoning :

1. the late filing of the notice of appeal with the Registrar of this Court and the failure to serve one on the 2nd respondent,

2. the failure to file the necessary power of attorney,

3. the late filing of the record, and

4. the late furnishing of security for costs.

The 1st respondent opposed the grant of the relief claimed on the following grounds :

5. the gross acts or failures by the 1st and 2nd appellants as well as their attorneys to prosecute the appeal as required by the Rules of this Court,

6. their failure to prosecute the appeal properly delayed and prejudiced the timeous liquidation and distribution of the estate of the late Abram Thomson who died on 30 September 1984, and

3. the absence of reasonable prospects of success on appeal.

Let us examine the nature of non-compliance with the Rules of this Court in the instant matter.

1. Appellate Division Rule 5(1)(a) requires a notice of appeal to be filed with the Registrar of this Court within 20 days after an order for leave to appeal has been granted i.e. within 20 days after 5 September 1990 in this matter. On 25 September 1990 a notice of appeal was served by the appellants' attorney on the Registrar of the Transvaal Provincial Division and on the attorneys of the 1st respondent but not on either the Registrar of this Court or the 2nd respondent.

The Rule was eventually only complied with on 10 July 1992, as regards 2nd respondent and on 28 July 1992 in so far as the Registrar of this Court is concerned.

2. In terms of Appellate Division Rule 5(3)(b) a power of attorney authorising an appellant's attorney to

prosecute the appeal must be lodged with the Registrar of this Court within 20 days after the notice of appeal has been lodged. In fact this only took place on 14 May 1992.

7. According to Appellate Division Rule 5(4)(c) and (d) an appellant must lodge with the Registrar of this Court copies of the record of the proceedings within 3 months of the date of the judgment or order appealed against, or an order granting leave to appeal, or within an extended period agreed to by the respondent. In the present matter the record should therefore have been lodged within 3 months after 5 September 1990, i.e. by not later than 4 December 1990. It was lodged on 15 June 1992, some 18 months after leave to appeal was granted on 5 September 1990.

8. Appellate Division Rule 6(2) provides that before lodging of the record with the Registrar of this Court security for the respondent's costs must be lodged by

the appellant. The security for the costs of the 1st respondent was furnished on 15 April 1992.

Factors which usually weigh with this Court in considering applications for condonation have been summarised in Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie 1969(3) S A 360 (A) at p 362 G to "include the degree of non-compliance, the explanation therefor, the importance of the case, the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice - - -"

The prosecution of the appeal was initially in the hands of the attorney who represented the appellants at the trial. He, a certain Mr F P N Hennop, continued to act until 16 September 1991 when the appellants terminated his mandate. During this period he seriously neglected his duties; indeed there is no dispute that his breaches of the Rules were flagrant and gross. On 5 October 1990 the

attorneys of the 1st respondent alerted him to the fact that the notice of appeal had not been filed with the Registrar of this Court. He was also informed that it could no longer be filed without applying for condonation. Since his attention had been directed to his non-compliance with a Rule of this Court it was his duty to have applied without delay for condonation. Ferreira v Ntshingila 1990(4) SA 271 (A) at p 281 D - E and the authorities referred to. This warning, however, failed to arouse Hennop from his state of inactivity to properly prosecute the appeal or to apply for condonation. All he did was to advise the appellants that an application would be made and that its grant would be automatic. In a letter, dated 16 April 1991, the attorneys of the 1st respondent pointed out to Hennop that his failure to prosecute the appeal had caused it to lapse in terms of Appellate Division Rule 5 (4A)(b) and to be deemed to have been withdrawn (because the record had not been lodged within the prescribed period). Formal

demand was also made for payment of the 1st respondent's taxed costs of this trial. This letter likewise failed to stir Hennop into activity. In McKenzie's case (supra) at p 362 - 363 it was pointed out that "the late filing of the record in a civil case more closely concerns the respondent, who is allowed to extend the time under Rule 5(4)(c) [now (d)]. The late filing of a notice of appeal particularly affects the respondent's interest in the finality of his judgment - the time for noting an appeal having elapsed, he is prima facie entitled to adjust his affairs on the footing that his judgment is safe - - -"

Hennop gives no satisfactory explanation for his failure to observe the Rules. In his affidavit, dated 20 December 1990, he disclosed that he conducted a one-man practice which related mainly to conveyancing and administration of deceased estates. He candidly confessed his ignorance in regard to Rules of this Court concerning the prosecution of an appeal. It was of course his duty to

acquaint himself with the relevant Rules of this Court. See Moaki v Reckitt and Colman (Africa) Ltd and Another, 1968(3) S A 98 (A) at p 101 G - H, Kqobane and Another v Minister of Justice and Another, 1969(3) 365 (A) at p 369 in fine - 370 A, Mbutuma v Xhosa Development Corporation Ltd, 1978(1) S A 681 (A) at p 685 A. He claimed to have enlisted on 1 October 1990 the services of attorneys Niemann & De Swart of Pretoria to assist him in the prosecution of the appeal. What assistance, if any, they then gave does not appear from the papers. In any event such a step, did not release him from his duties and responsibilities as an attorney of the appellants. Moreover, his neglect to observe the Rules of this Court persisted even after he had become aware of the fact that he did not know them.

In September 1991 a certain T G Fine took over as appellants' attorney. He too was remiss in the prosecution of the appeal. There was a delay of about ten months before the application for condonation was brought.

And, as indicated, many months went by before the other breaches were remedied. Here too there is no satisfactory explanation by the attorney. It may be that Fine had not been provided with the necessary funds. However he does not say so.

Even the appellants themselves are not free from blame. Early on they were made aware of Hennop's non-prosecution of the appeal. This happened in consequence of the first respondent's writ of execution for the payment of her taxed costs of trial which was served on the second appellant on 18 May 1991. The deputy sheriff of Benoni produced a nulla bona return. Only on 6 September 1991 did the first appellant remind Hennop of having neglected his professional duties as an attorney and call on him to proceed forthwith with the application for condonation.

But to return to the neglect of Hennop and Fine. On this basis alone the application for condonation was bound to fail. This Court has often said that in cases

of flagrant breaches of the rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal are; this applies even where the blame lies solely with the attorney (Tshivhase Royal Council and Another v Tshivhase and Another 1992(4) SA 852 (A) at 859 E - F). As I have said, the facts in casu show that the rules were flagrantly breached; nor is there any acceptable explanation for such breaches. In these circumstances it is unnecessary to make an assessment of the prospects of success since the cumulative effect of the factors already mentioned including the first respondent's interest in the finality of the Court a quo's judgment is such as to render the application for condonation unworthy of consideration (see too Rennie v Kamby Farms (Pty) Ltd 1989(2) S A 124 (A) at 131 I - J and Ferreira's case (supra) at 281 J - 282 A).

For these reasons the appellants' petition for condonation was dismissed in terms of the orders granted on 5 November 1993.

C P JOUBERT J A.

NESTADT J A

EKSTEEN J A Concur.

HOWIE A J A

KRIEGLER A J A