

**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)**

APPEAL CASE NUMBER: A35/2020

COURT A QUO CASE NUMBER: 2817/2018

(1) REPORTABLE: **Yes**

(2) OF INTEREST TO OTHER JUDGES: **Yes**

(3) REVISED.

DATE: **01 February 2024**

SIGNATURE

In the matter between: -

GRETCHEN BARKHUIZEN-BARBOSA N.O.

Applicant

and

CHRISTINA PHELEMBA

First Respondent

OCCUPANTS OF THE HOUSE KNOWN AS

8[...] D[...] ROAD, HAZEYVIEW VAKANSIE DORP

Second Respondent

MBOMBEL LOCAL MUNICIPALITY

Third Respondent

JUDGMENT

GREYLING-COETZER AJ

[1] The applicant, and executrix of a deceased estate seeks the re-instatement of an appeal which lapsed. The application is in terms of Uniform Rule 46(6)(a).

Background

[2] The applicant unsuccessfully instituted an eviction application brought in terms

of Section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Lands Act 19 of 1998 (“PIE Act”) . The applicant seeks to appeal the judgment of Jansen van Rensburg AJ, sitting as court of first instance.

- [3] The eviction application was instated during 2018. Judgment in respect of the eviction application was handed down on 22 May 2020. Leave to appeal was granted on 6 August 2020 to the Full Court of the Mpumalanga Division of the High Court (Mbombela).
- [4] Per paragraphs [91] and [92] of aforementioned leave to appeal judgment, it appears that leave to appeal was only granted in respect of the issue identified in paragraph [91].¹ However, the applicant contends the leave to appeal was granted against the whole of the judgment. This is however not an issue to be decided in these proceedings.
- [5] The applicant, pursuant to obtaining leave to appeal, filed her notice of appeal on 7 September 2020, this being 22 (twenty-two) court days after to leave to appeal was granted. To date there has been no indication that the applicant has sought an extension of time as contemplated in Rule 49(2). Rule 49(2) provides:

“If leave to appeal to the full court is granted the notice of appeal shall be delivered to all the parties within 20 days after the date upon which leave was granted or within such longer period as may upon good cause shown be permitted.”

¹

“[91]. This application for the eviction of me Phelemba and other occupiers of the property at 85 Drawwers Road Hazyview Vakansie Dorp raised the following questions – [91.1]. When and under which circumstances would an executor/executrix be liable to personally be liable for the payment of cost in a case such as that of me Phelemba and/or other respondents when its application is dismissed where there was no mala fide actions, gross negligence or any other aspect which would render a cost order against such executor/executrix? Provision is made for payment of cost by the official in person where the official personally acted ‘unreasonable’. [91.2]. It exercising its discretion and based on the facts before the court, did the court apply its discretion correctly in that the applicant ‘unreasonable’ under the circumstances or did the court exceeded (sic) its power in granting a cost order against the applicant on a party-and-party scale as an executrix in her official capacity? ORDER [92]. In order the clarify on the issues raised above I am of the view that – [92.1]. Leave to appeal is granted to the applicant to the full court of the Ahigh(sic) Court of South Africa Mbombela Division. ...”

[6] The applicant further failed to comply with the provisions of Rule 49(6)(a), in that she did not make written application to the Registrar for a date of hearing of the appeal, nor did the applicant at the same time as making application for the hearing of the appeal, file copies of the record as contemplated in Rule 49(7)(a). The 60 days period lapsed (if calculated from the date of delivering the notice of appeal) expired on 6 December 2020.

[7] Rule 49(6)(a) and (b) provide: -

“(a) *Within 60 days after delivery of a notice of appeal, an appellant shall make written application to the registrar of the division where the appeal is to be heard for a date for the hearing of such appeal and shall at the same time furnish him with his full residential address and the name and address of every other party to the appeal and if the appellant fails to do so a respondent may within 10 days after the expiry of the said period of 60 days, as in the case of the appellant, apply for the set down of the appeal or cross-appeal which he may have noted. If no such application is made by either party the appeal and cross-appeal shall be deemed to have lapsed: Provided that a respondent shall have the right to apply for an order for his wasted costs.*

(b) *The court to which the appeal is made may, on application of the appellant or cross appellant, and upon good cause shown, reinstate an appeal or cross-appeal which has lapsed.” (own underline)*

[8] Rule 49(7)(a) to (d) provides: -

“(a) At the same time as the application for a date for the hearing of an appeal in terms of subrule (6)(a) of this rule

the appellant shall file with the registrar three copies of the record on appeal and shall furnish two copies to the respondent. The registrar shall further be provided with a complete index and copies of all papers, documents and exhibits in the case, except formal and immaterial documents: Provided that such omissions shall be referred to in the said index. If the necessary copies of the record are not ready at that stage, the registrar may accept an application for a date of hearing without the necessary copies if—

- (i) the application is accompanied by a written agreement between the parties that the copies of the record may be handed in late; or*
- (ii) failing such agreement, the appellant delivers an application together with an affidavit in which the reasons for his omission to hand in the copies of the record in time are set out and in which is indicated that an application for condonation of the omission will be made at the hearing of the appeal.*

(b) ...

(c)

(d) If the party who applied for a date for the hearing of the appeal neglects or fails to file or deliver the said copies of the record within 40 days after the acceptance by the registrar of the application for a date of hearing in terms of subrule (7)(a) the other party may approach the court for an order that the application has lapsed.”

record of proceedings on the first respondent. Sixty percent of the record was illegible. The record be it illegible was not filed at court.

[10] On 23 July 2021 the applicant provided the first respondent's legal representatives with the requisite Form F in terms of this court's practice directive, for the purpose of case managing the appeal. In reply the first respondent's legal representatives indicated that they are not in possession of the application for a hearing date, which had to be filed in compliance with Rule 49(6)(a), thus they hold the view that the appeal had lapsed. As there is no pending appeal they regarded themselves not in a position to complete a Form F.

[11] According to the applicant, her attorney was under the mistaken belief that the record of proceedings had to be filed simultaneously with the application for a hearing date. Further, that said attorney failed to appreciate and apply the provisions of Rule 49(7), which cater for the late filing of the record with either the consent of the first respondent, or with the filing of an application for condonation when applying for said hearing date.

[12] Not appreciating the remedy per Rule 49(7), and ostensibly also not aware that appeal was directed against a n application therefore the record was merely the documents filed by the respective parties and the judgment, the compellation of the record took 9 months.

Enrolments before the motion court

[13] Seven months after the record became available and fourteen months after the record was due to be filed, and on 7 February 2022, the founding affidavit to the current application for condonation and re-instatement of the appeal was deposed to. The application was not served until 6 April 2022, a further two months later. The condonation application was thus launched one year and six months after the appeal lapsed.

[14] This application was enrolled by the applicant on the unopposed motion court for hearing on 20 June 2022. During said hearing there was an

appearance on behalf of the first respondent, who had filed her notice to oppose, belatedly so, on 14 June 2022. The parties were directed to case manage the matter for the purpose of exchanging affidavits and for the enrolment on the opposed motion roll .

- [15] During the unopposed hearing of 20 June 2022, the issue of whether this application ought to be dealt with by the appeal court, opposed to the motion court, was raised. It was submitted on behalf of the applicant that the application was launched and enrolled on the motion court roll as the Registrar was not inclined to enroll the matter absent the required Form F and that Form F had not been completed due to the stance adopted by the first respondent that the appeal had lapsed.
- [16] The applicable directives of this Division provides that appeal matters are enrolled and managed in terms of Form F. In this respect paragraph 21.5 provides that the management of appeal matters will be by completion of a Form F by the parties or their legal representatives, and Form F will be completed only when the parties are sure and have verified that all sets of court papers are complete and available, including the record of proceedings in the court *a quo*. Therefore, according to the applicant the application was *sui generis* in that the appeal first had to be revived in order for Form F to be completed and for the appeal to be enrolled.
- [17] The court was not called upon to make a determination whether the applicant was entitled to have the matter adjudicated by a single judge on the motion court roll, and no such determination was made.
- [18] There appeared to be no attempt before that court to give effect to the applicant's present view that the application was to be dealt with by the full court. The court seemed content that the application was to remain on the motion court roll. This is indeed where it was enrolled, when it came before the opposed motion court.
- [19] The matter was however finally enrolled for hearing as an opposed motion

by the first respondent, pursuant to the applicant failing to comply with the practice directive of filing heads of argument, oral written document and a practice note. The first respondent complied with aforementioned.

- [20] It must be mentioned that the first respondent did not file her answering affidavit as agreed to in terms of a Case Management of Opposed Motions - Form B. She filed same only on 29 September 2023, being 8 court days before the roll closed. The first respondent anticipated that the applicant would potentially seek a postponement and sought to file a supplementary affidavit on 11 October 2023. Therein the first respondent sets out the events during the period 28 September 2023 and for as far as the applicant would seek a postponement of the application on the basis that the first respondent's answering affidavit was filed late.
- [21] On the hearing date the applicant appeared and sought a postponement of the application. The applicant contended that considering that the roll closed on 11 October 2023, she was only afforded 8 (eight) court days from receipt of the answering affidavit to file a replying affidavit, practice note, heads of argument and written oral argument. The applicant further contended that the truncation of the time periods was unjustified, and the matter was not ripe for hearing and ought to be postponed, together with a punitive costs order against the first respondent.
- [22] Pursuant to lengthy address in respect of the history of the matter, and particularly considering that three years have passed since leave to appeal had been granted, the first respondent sought to remove the obstacle the applicant was complaining of, being the belated opposition. She withdrew her opposition to the condonation application to avoid a further postponement and ensure the condonation is dealt with. Having done so, the application was unopposed basis, and could be dealt with as such.
- [23] Counsel for the applicant however contended that he was not in a position to address the court on the condonation application, even on an unopposed basis, as he was only briefed to seek a postponement. The applicant was

consequentially allowed time to prepare, the matter was stood down to the next day for address pursuant to opposition being withdrawn.

[24] The following day, counsel for the applicant confirmed that he held instruction not to proceed with the condonation application on the motion court roll, but to seek that the condonation application be dealt with by the appeal court. In this respect he placed reliance on the matter of ***Lipschitz N.O. v Saambou Nationale Bouvereniging*** 1979 (1) SA 527 (T).

[25] Counsel for the first respondent submitted that the enrollment on the motion roll was the election of the applicant, and that considering the unopposed nature of the application, convenience and extensive time lapse since the leave to appeal was granted, the court was empowered to invoke its inherent jurisdiction and determine the application, in the interest of justice.

[26] It was suggested on behalf of the applicant that the reason for the matter still before the motion court was the order granted in the unopposed motion court. Save for the fact that the issue was raised, no determination was sought or made.

[27] Having already in June 2022 formed the view that the matter has not been correctly enrolled on the motion court roll before a single judge, the applicant could have enrolled it before the appeal court. Although the contention was that the Registrar would not do so absent a jointly agreed to Form F, nothing was before court demonstrating same, nor was any attempt made to persuade the registrar otherwise such as presenting a Form F completed only by the applicant and setting out the circumstances that gave rise to same on affidavit. The latter is a recognized practice in this division where parties are faced with a refusal of another to cooperate with case management of trials, motions and appeal.

Issues to be determined

[28] What stands to be determined is whether this court is empowered to adjudicate the now unopposed condonation application in terms of Rule

49(6). If this is answered in the negative this application will have to be referred to the Full Court for determination. If answered in the affirmative, this court has to determine whether the applicant has made out a case for condonation and re-instatement of the appeal.

Rule 49(6)(b)

[29] The court a *quo* granted leave to appeal to the Full Court of this Division. In terms of Rule 49(6)(b), the court to which the appeal is made may on application and upon good cause shown, reinstate an appeal which has lapsed.

[30] In the present matter there cannot be any question of the fact that such court to which the appeal is made means the Full Court, which is a court consisting of three judges, in accordance with Section 1 of the Superior Courts Act, 10 of 2013.

[31] The hearing of the application for reinstatement by the Full Court is in conformity with the rules of practice whereby applications for condonation of procedural shortcomings in appeals are heard by a court comprising of as many judges as would constitute the court of appeal.² ***Trans-African Insurance Co. Ltd v Maluleka*** 1956 (2) SA 273 (A) said:

"No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."

Inherent power of the High Court

[32] Having said that, I am of the view that this court is empowered, provided the

² ***De Sousa v Cappy's Stall*** 1975 (4) SA 959 (T); ***Lipshitz N.O. v Saambou Nationale Bouvereniging*** 1979 (1) SA 527 (T); ***PAF v SCF*** 2021 (6) SA 162 (SCA)

circumstances of the case justifies same, to determine the matter on the basis of its inherent power to protect the interest of justice and regulate its own process. It will not be in all cases that that it is justify that the court invoke its inherent power to do so.

[33] **Section 173** of the Constitution provides: █

“The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common-law, taking into account the interests of justice.”

[34] Section 173 of the Constitution has been described by the Constitutional Court as an important one. In **South African Broadcasting Corp Ltd v National Director of Public Prosecutions** 2007 (1) SA 523 (CC)³ the court held:

“the only qualification on the exercise of that power contained in section 173 is that courts in exercising this power must take into account the interests of justice.” (own underlining)

The court went on to state that the power in terms of section 173 is the authority a court has to prevent possible abuse of process.⁴

[35] In **Eke v Parsons** 2016 (3) SA 37 (CC)⁵, the constitutional court held that:

“Under our constitutional dispensation, the object of court rules is twofold. The first is to ensure a fair trial or hearing. The second is to 'secure the inexpensive and expeditious completion of litigation and . . . to further the administration of justice'.I have already touched on the inherent jurisdiction vested in the superior courts in South Africa. In

³ para 36

⁴ para 90

⁵ para 39-40

terms of this power, the High Court has always been able to regulate its own proceedings for a number of reasons, including catering for circumstances not adequately covered by the Uniform Rules and generally ensuring the efficient administration of the courts' judicial functions."

- [36] In the ***Social Justice Coalition and Others v Minister of Police and Others*** 2022 JDR 2047 (CC)⁶ the constitutional court stated:

"The inherent power of this Court and other superior courts to protect and regulate their own processes, is closely associated with and inextricably linked to the manner and fashion in which a litigant may exercise the right of access to courts."

- [37] The court's inherent power is not unlimited. In ***S v Molaudzi*** 2015 (2) SACR 341 (CC), the court held that the inherent power to regulate its own process applies to procedural right rather than substantive rights. Furthermore, that a court may exercise inherent power to protect and regulate its own process when confronted by inadequate procedures and rules in the sense that they do not provide a suitable mechanism to deal with the particular scenario the court is faced with.

- [38] The matter at hand is one such case where the circumstances does not justify the referral of the matter to the Full Court for determination. It will not be in the interest of justice considering the inordinate delay in finalisation of this application and the intended appeal with has presented itself. Notwithstanding the leave to appeal being granted as far back as August 2020, the appeal having lapsed on 6 December 2020, and this application being served in April 2022, it still has not been adjudicated upon.

- [39] In ***Cassimjee v Minister of Finance*** 2014 (3) SA 198 (SCA)⁷ the Supreme Court of Appeal dealt with the inordinate delay in prosecuting a claim and

⁶ para 71

⁷ para 10

held that:

"an inordinate or unreasonable delay in prosecuting an action may constitute an abuse of process"

[40] This principle equally find application where an inordinate and unreasonable delay has occurred in prosecution of an appeal and/or reinstatement of such an appeal.

[41] The applicant acts in her capacity as executrix of a deceased estate. The estate cannot be finalised while the appeal is pending. More so, the first respondent is faced with uncertainty for as long as the matter does not reach finality. The applicant has elected to enrol the matter on the motion roll on two occasions in the circumstances as set out above. Other than contending from the bar that the Registrar would not enrol the matter absent a completed Form F, it has up until this hearing never made any further attempt to enrol it before the appeal court. The re-instatement is now unopposed. The applicant previously in its practice note filed in the unopposed motion court acknowledged the practice directive of this division providing for unopposed applications to be dealt with on paper. Moreover, for the reasons set out below, there is no justification to burden an appeal court with this application.

Merits of the application for re-instatement of the appeal

[42] Having found that this court is empowered to hear and consider the re-instatement application, I now turn to the merits of that application.

[43] The applicant's case in support of the application for condonation and re-instatement has already been set out above. The appeal has lapse in terms of the deeming provisions of Rule 49(6)(a).

[44] The explanation for the delay is based on the applicant's attorney harboring under the erroneous impression that an application for a date of hearing could only be made once the appeal record was available. Further to this the

applicant's attorney of record failed as the applicant stated, "*to appreciate and apply the provisions of Rule 49(7)*". The latter affords an appellant a remedy in circumstances where the record is not available. The record can be filed after written application has been made to the registrar for a hearing date either by agreement between the parties or failing such agreement, the appellant delivers an application together with an affidavit in which the reasons for his omission to hand in the copies of the record in time are set out and in which is indicated that an application for condonation of the omission will be made at the hearing of the appeal.

- [45] It was further explained that, notwithstanding the applicant's attorney engaging Digital Audio on 9 October 2020 enquiring as to the process in order to file the judgment and record, no response was received until 10 December 2020. Between the period 9 October 2020 and 10 December 2020, the applicant's attorney sent two follow-up e-mails, on 4 November 2020 and 10 December 2020 respectively.
- [46] In the correspondence from Digital Audio dated 11 December 2020, it requested a case number in order for it to request the dates from court. The applicant's attorney of record only responded to this enquiry two months later, on 9 February 2021. The attorney of record should have in its first email to Digital Audio provided the case number and if not due to an oversight she would have been able to immediately respond providing same together with full detail of the matter.
- [47] In the approximate 180 days between the period February 2021 and June 2021 the applicant's attorney of record and Digital Audio exchanged e-mails on 10 days. Notably from these exchanges the applicant's attorney of record did not appreciate the fact that the judgment was a written judgment provided to the parties electronically and that the appeal against an application consists of the application as it served before court only. In addition, the judgment in the application for leave to appeal was a written judgment. As all these proceedings were conducted virtually, the court held copies of the recordings of the virtual hearings and the Judge's secretary

could have been approached with ease, directly by the applicant's attorney of record or by Digital Audio to obtain the recording. The difficulty experienced by the applicant's attorney in compiling the appeal record was therefore wholly avoidable.

[48] On 15 July 2021 the record of proceedings was served on the first respondent. However, 60% of the documents were illegible. To date hereof no appeal record has been filed with the registrar. The explanation proffered for this was that it would be done once condonation and reinstatement of the appeal had been obtained.

[49] Further, the applicant avers that she was unable to complete the requisite Form F in terms of the court's practice directives, due to the stance adopted by the first respondent that the appeal had lapsed. No attempts were made by the applicant to submit a Form F, completed by the applicant only, together with an affidavit explaining why same was not completed by both parties. In my view, had the applicant done so, this matter would have from the outset been enrolled before the Full Court.

[50] According to the applicant, it was only when the first respondent's attorneys expressed their view that the appeal has lapsed, that the applicant appreciated that an application for condonation would be necessary. This was during July/August 2021.

[51] As set out above, the affidavit to the application was deposed to on 7 February 2022, and only served during April 2022. There is thus no explanation before court for the period July 2021 to February 2022, nor for the period that lapsed between deposing to the affidavit and serving the application.

[52] The basic principle is that a court considering a condonation application has a discretion to be exercised judicially, upon a consideration of all the facts,

and in essence it is a matter for fairness between the parties.⁸ Amongst the factors usually relevant are (a) the degree of lateness; (b) the explanation therefor; (c) prospects of success and (d) the importance of the case.

[53] In **Aurecon South Africa (Pty) Ltd v City of Cape Town** 2016 (2) SA 191 (SCA) at paragraph [17] it was held that the relevant factors in the enquiry generally include the nature of the relief sought; the extent and cause of the delay; its effect on the administration of justice and other litigants; the reasonableness of the explanation for the delay, which must cover the whole period of delay; the importance of the issues to be raised; and the prospect of success.

[54] A court considering a condonation application exercises a discretion in the true sense, upon considerations of all the circumstances of each case.⁹ The *onus* is on the applicant to satisfy the court that condonation should be granted.¹⁰

[55] Much of the blame for the delay in making written application to the Registrar for a hearing date and filing of the record can be attributed to the applicant's attorney. Although the transcribers took their time responding to e-mails, the ultimate obligation to ensure that Rule 49 is complied with, and that the record is timeously available to be filed at court, befalls the applicant's attorney. The applicant's attorney's "lack of appreciating" the Rules of court, which clearly set out the course to be followed by an appellant intending to appeal, is not only an inadequate explanation but amounts to a complete disregard for the rules of court. The explanation that she lacked appreciation can only mean that she did not acquaint herself with the content of the Rules, for as far as she did not know the content of Rule 49.

[56] The facts of this matter and that in **PAF v SCF** 2022 (6) SA 162 (SCA)¹¹ are

⁸ **Melane v Santam Insurance Co Ltd** 1962 (4) SA 531 (A) at 532B-E

⁹ **PAF v SCF** 2022 (6) SA 162 (SCA) and **Mabaso v Law Society of the Northern Provinces** 2005 (2) SA 117 (CC) at par [20] as referred to therein

¹⁰ **Glazer v Glazer NO** 1963 (4) SA 464 (AD) at 702H

¹¹ At para 13 - 23

similar. In said matter the appeal had lapsed, and the explanation proffered by the applicant was that its attorney of record was under an erroneous impression that the application for the allocation of a hearing date could only be made once the appeal record was ready for filing. The delay in finalizing the preparation was attributed to the transcribers. The Full Court was critical of the applicant's attorney for failing to take steps to compel the transcribers to complete the appeal record timeously, and for the applicant's failure to explain this in an affidavit. At paragraph [17] Makgoka JA, after dealing with what the Full Court held, stated that:

“[17] Even allowing for the fact that the delay in the preparation of the record was occasioned by the transcribers, and that there was not much the applicant's attorney could do about it, there is still no proper explanation as to what the attorney 'misconstrued' about Rule 49(7)(a). The rule requires the application for a date to be filed simultaneously with copies of the record. But it has an important proviso

[18] The proviso is clear. If the record was not available, the applicant's attorney could have requested the respondent's attorney to agree to file the record later, failing which, she could have deposed to an affidavit explaining to the Registrar the difficulties experienced by the transcribers to finalise the preparation of the record.”

[57] Notwithstanding being notified by the first respondent's attorney as early as July 2021 that the appeal had lapsed, the applicant and/or her attorney appears did not act to rectify the situation. In July 2021 the applicant already had the record available, be it to some extent illegible, yet the condonation application was only served in April 2022. In **Maoki v Reckitt and Coleman (Africa) Ltd and Another** 1968 (3) SA 98 (A) at 101G it was held:

“An attorney who is instructed to prosecute an appeal ... is duty bound to acquaint himself with the procedure prescribed by the rules of court

to which a matter is being taken on appeal.”

- [58] In terms of Clause 3.13 of the Code of Conduct of Legal Practitioners, Candidate Legal Practitioners and Juristic Entities, practitioners must ‘remain reasonably abreast of legal developments, applicable laws and regulations, legal theory and the common law, and legal practice in the fields in which they practice.’ A lack of knowledge or flagrant neglect to acquaint yourself with the applicable rules governing appeals amounts to a breach of the code of conduct. Thus, when an applicant intends to rely on a lack of knowledge or ‘appreciation’ of the rules it should be explained with specificity how it came to be that the practitioner did not have knowledge of said rule or what caused the practitioner to neglect to acquaint itself with it.
- [59] It is a requirement that an application for condonation must be made as soon as possible after the party becomes aware of its failure to comply with the rules.¹² In the present matter it appears that the applicant or her attorney was of the view that condonation was simply there for the asking.
- [60] In ***Unitrans Fuel & Chemical (Pty) Ltd v Dove-Co Carriers CC*** 2010 (5) SA 340 (GSJ) at 344F-G a full court directed that the High Court should in the future require that (a) the entire period of the delay be thoroughly explained, regardless of the length of the delay; and (b) where the delay was occasioned by transcribers contracted to the Department of Justice failing to make records available timeously, that applicants must show (i) that they were not at fault, and (ii) what attempts were made at compelling the transcribers to provide the transcription, including, but not limited to, the bringing of an application to court compelling compliance. At 343J-344A the court further held that “*this measure is aimed at reducing the burden on judges in appeal courts having to wade through voluminous applications for condonation required to explain substantial delays*”.
- [61] In ***Mulaudzi v Old Mutual Life Insurance Company (South Africa)***

¹²

P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A) at 800A-C

Limited and Others 2017 (6) SA 90 (SCA) at paragraph [26], dealing with the principles governing an application for condonation in the context of reinstatement of an appeal, it was 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 realizes that he has not complied with the rule of this court, apply for condonation without delay. A full, detailed and accurate account of the causes of the delay and the effects must be furnished to enable the court to understand clearly the reason and to assess the responsibility. Factors which usually weigh with the court in considering an application for condonation include the degree of non-compliance, explanation therefore, 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.”

[62] As expressed by Goosen JA in **The Members of the Executive Council for Health, Eastern Cape Province v YN obo EN**¹³ the touchstone for a condonation application in the context of the reinstatement of an appeal is the interest of justice.

[63] The degree of lateness in the present matter can be divided into the initial period from 6 December 2020, when written application had to be made to the Registrar and the record filed, up until July 2021, when the applicant avers to have been made aware that the appeal had lapsed. The second period is between July 2021 to February 2022, when the founding affidavit to the condonation application was deposed to. The third period is between February 2022 when the founding affidavit was deposed to and April 2022 when the application was issued. The delay between the first enrolment on the unopposed roll in June 2022 and the enrolment before the oppose motion court more than a year later is discounted for the present purpose. In

each of the first three periods there are weeks and/or months unexplained. For example, but for sending emails on 13 days nothing more was explained or done in the 6 months between December 2020 and July 2021. No explanation as provided for the delay in launching the application between July 2021 and April 2022, nor was any explanation provided for why it took two months from deposing to the founding affidavit to issue the application.

- [64] In the present matter the applicant's attorney's failure to appreciate what is set out in Rule 49(6) and (7) does not amount to an adequate explanation. It still remains unexplained how she failed to appreciate same, and why she did not apply the provisions provided by the rule, before and after her attention as drawn to it. An exacerbating circumstance is that the applicant herself is a senior legal practitioner. Although she does not act in her capacity as attorney in these proceedings, she, as an informed client, ought to have weighed in on the matter when she engaged her attorney of record on the noting of the appeal and when receiving feedback in respect of the record, which can reasonably be assumed did happen.
- [65] The degree of lateness is extreme and the explanation for non-compliance, as already held herein above, is inadequate.
- [66] Generally, an important consideration in relation to the reinstatement of an appeal would be the prospect of success on appeal. Although important, it is not decisive.¹⁴ As held in ***The Member of the Executive Council for Health, Eastern Cape Province v YN obo EN (supra)*** at paragraph [14]¹⁵, where the degree of non-compliance is flagrant and substantial, condonation may be refused irrespective of the prospect of successful the explanation for flagrant and substantial non-compliance is manifestly inadequate, or there is no explanation at all, the prospect of success need not be considered.¹⁶

¹⁴ ***Commissioner: South African Revenue Service Gauteng West v Levue Investments (Pty) Ltd*** [2007] 3 All SA 109 (SCA) at par [11]

¹⁵ See the authority referred to therein

¹⁶ ***Darries v Sheriff, Magistrates' Court, Wynberg and Another*** 1998 (3) SA 34 (SCA) at 44H-I

[67] This is such a case. The eroding effect on the administration of justice caused by the delay in the prosecution of the appeal is self-evident.

Costs

[68] As this matter is considered on an unopposed basis, and the applicant sought no order of costs in circumstances where it is unopposed no cost order is made.

Order

[69] On the basis set out above, the following order is made: -

1. *The applicants condonation application and re-instatement application is dismissed;*
2. *No order as to costs.*

GREYLING-COETZER AJ

DATE OF HEARING: 24 and 25 October 2023

DELIVERED ON: This judgment was delivered electronically by circulation to the parties' representatives by way of email and by release to SAFLII. The date and time for delivery is deemed to be at 09h00 on 01 February 2024.

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