

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

PRESIDENT INSURANCE COMPANY LIMITED Applicant

and

ANNA CATHARINA JONKER Respondent

Coram: E M GROSSKOPF, NESTADT, STEYN J J A

Heard: 30 August 1990

Delivered: 13 September 1990

JUDGMENT

E M GROSSKOPF: J A

This is an application for condonation of the late lodging of the applicant's power of attorney to note and prosecute an appeal; of the late lodging of security for the respondent's costs of appeal; and of the late lodging of the record of the proceedings. The facts are briefly as follows.

The respondent claimed damages from the applicant in the Witwatersrand Local Division in her personal capacity as well as in her capacity as mother and natural guardian of her minor children, for losses arising from the death of her husband in a motor car accident. In a judgment of 3 March 1989, amplified on 21 April 1989, the court (SCHABORT J) found in her favour. He awarded a sum of R356 763,00. Included in this sum was an amount of R9 833,00 to compensate the respondent for the loss of purchasing power of the money

making up her award for loss of support between the date of the deceased's death and the trial. This amount was awarded on the strength of Everson v Allianz Insurance Ltd 1989(2) SA 173 (C), and I shall refer to the principle laid down in that case as the Everson principle.

The applicant considered that the Everson principle was unsound and it intended testing its correctness on appeal. The Court a quo granted leave to appeal on 16 May 1989.

Because of the relatively small amount involved, the respondent contemplated abandoning the decision on the Everson principle in her favour so as to avoid a possible costs order on appeal against her. However, the applicant wanted to keep the appeal alive in order to obtain an authoritative decision on the Everson principle. It therefore advised the respondent that it was prepared to pay the respondent's costs should the matter go on appeal and should the applicant be

successful.

On 9 June 1989 the applicant's attorneys filed and served a notice of appeal. In terms of the A D Rules of Court a power of attorney authorizing the attorneys to prosecute the appeal should then have been filed within 21 days (Rule 5(3) bis (a)): the record should have been lodged within three months of the date of the order granting leave to appeal (Rule 5(4)(b)) and the applicant should have lodged security for the respondent's costs of appeal before lodging the record (Rule 6(2)).

In the meantime the applicant had been involved in another matter in the Witwatersrand Local Division (before PREISS J) in which the plaintiff relied on the Everson principle, viz. Moekoena v President Insurance Co Ltd (Case No 16170/87). On 13 June 1989 PREISS J delivered judgment, declining to follow Everson's case. The applicant then

learnt that the validity of the Everson principle was to be tested on appeal to this Court from a judgment in the Cape Provincial Division, Hartley v S A Eagle Insurance Co Ltd 1989(2) S A 927 (C). Applicant also believed that the Everson case itself was to go on appeal.

In view of the dissent by PREISS J, and the fact that the Everson principle was to be tested on appeal in one or more other cases, the applicant's attorneys advised the respondent's attorneys that the necessity for an appeal had fallen away and suggested that the parties await the judgment of this Court in the Hartley matter. It was further suggested that the sum of R9 833, 00 be placed in an interest bearing account pending the decision on appeal of the Hartley matter (the rest of the respondent's award had already been paid).

The respondent's attitude was uncompromising : on 7 July 1989 her attorneys wrote inter alia as follows:

2. "We confirm your advises (sic) that your client no longer wishes to proceed with the appeal.
3. We have discussed the matter with our client's senior counsel.
4. We are instructed that should your client no longer wish to proceed with the appeal, our client requires that she be paid the amount of R9 833,00 being the value of the portion of the judgment appealed against by your client."

There was no immediate reaction to this letter despite reminders on 17 July, 20 July, 26 July, and 31 July.

On 4 August 1989 the attorneys of the parties met.

What happened at the meeting, and what the respondent's attitude was, appears from the following extract from a letter written by respondent's attorney on 11 August 1989.

"We confirm that your Mr van Oudtshoorn informed the writer that your client no longer wished to proceed with the appeal but that notwithstanding this it would not pay to our client the portion of the judgment which was subject to the appeal. Your client apparently further intends withdrawing

its offer to indemnify our client in respect of any adverse costs order in the appeal as well as its undertaking to pay our client's costs in the appeal.

We have obtained our client's instructions in regard to the aforesaid and advise that should your client no longer intend proceeding with the appeal our client requires your client to make payment to our client of the portion of the judgment which was subject to the appeal."

Further correspondence followed which I need not set out. The applicant repeated its proposal that the parties, in effect, accept the decision to be given on appeal in the Hartley matter, whereas the respondent persisted with her attitude that the applicant should either appeal or pay. Finally, on 25 October 1989, the applicant filed its petition for condonation.

The principles on which condonation is granted are well known and need not be repeated. The applicant's

initial purpose was to test the Everson principle. This was clearly a matter of importance to the applicant, and it was common cause that its prospects on success are reasonable, if not good. However, when the applicant decided rather to await the decision in the Hartley case, the present case ceased being one of principle, and the applicant's only concern was to avoid paying the sum of R9 833,00. In fact the Hartley appeal was argued a few days before the hearing of the present application, and judgment will no doubt be given fairly soon.

While the prospects of appeal in the present matter are accordingly good, the amount in issue is relatively small and the importance of the matter does not extend beyond the amount in issue.

I turn now to the reason for the delay. The applicant was eager to persuade the respondent to accept the decision in the Hartley matter. However, from the beginning

the respondent firmly refused to do so. This left the applicant with no alternative but to appeal if it was not prepared to pay the amount in issue. This, for some reason which it did not disclose, the applicant seemed unwilling to do. Perhaps it was considering paying the amount rather than incur the costs of appeal, perhaps its attorneys were merely dilatory. We do not know. But be that as it may, time was elapsing : the power of attorney should have been filed in the first weeks of July, the record should have been lodged by the middle of August, and security should have been lodged before then. Only on 16 October 1989 did the applicant's attorney enquire whether the respondent required security for her costs. Before then no active step was taken in the prosecution of the appeal. And, as I have stated, the petition for condonation was filed only on 25 October 1989.

The position then is that the prospects of success on appeal are substantial but that the amount in issue is relatively small, the matter is not one of particular importance for the parties and the applicant has been guilty of a long and unexplained delay in prosecuting its appeal. Weighing up these various factors I do not consider that condonation should be granted.

As far as costs are concerned: the respondent successfully opposed the application and I can see no reason why she should not be awarded her costs.

The application is dismissed with costs.

E M GROSSKOPF, JA

NESTADT, JA
STEYN, JA

Concur