



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

15/11/16

CASE NUMBER: A889/15

REPORTABLE: NO  
OF INTEREST TO OTHERS JUDGES: NO

15/11/16.....  
DATE

  
SIGNATURE

In the matter between:

CHRISTINE ELIZABETH LAUBSCHER

1<sup>ST</sup> APPELLANT

MARIA PETRONELLA COETZER

2<sup>ND</sup> APPELLANT

and

TANYA BEZUIDENHOUT

RESPONDENT

---

JUDGMENT

---

MPHAHLELE, J:

[1] The appellants noted an appeal against the judgment of Magistrate Deo Saran which was delivered on 30 July 2015.

[2] The appellants sought condonation for the late filing of the appeal record on 04 December 2015 and opposed the respondent's application for a postponement of the hearing of the appeal. According to the appellants the delay was caused by the confusion at the offices of the transcribers, namely iAfrica Transcriptions. Apparently when the appellants' attorneys instructed the transcribers to prepare the record, the instruction was allocated to a wrong client which resulted in the appellants being provided with incorrect invoices and an incorrect record. After various requests and correspondence, the appellants received the correct complete quote on 26 November 2015.

[3] The appellants submitted that it is patently evident that at all material times they intended to prosecute the appeal and that the delay in obtaining the court record lay at the hands of the transcribers.

[4] The appellants aver that the transcribers informed them that, due to the nature and duration of the trial in the court *a quo*, it would take a while to transcribe the record. For fear of the appeal lapsing, the appellants compiled a record comprising of the pleadings, notices and discovered documents from the court *a quo* as well as the record of the incorrect proceedings initially provided to them by the transcribers. These documents, together with an affidavit stating the reasons for the filing of an incorrect record, were provided to the Registrar on 04 December 2015. The transcribers only informed the appellants on 04 February 2016 that the correct record was prepared and ready for collection.

[5] The respondent, in a letter dated 19 February 2016, requested a copy of the court record from the appellants. The respondent, amongst others, indicated that, should she not

receive the copy of the court record by 22 February 2016, she would lodge an objection against the appeal process. Two copies of the court record were thereafter made available to the respondent on 20 February 2016. These records were also filed with the registrar.

[6] The appellants submitted that the respondent has not been prejudiced in her preparation for the appeal and had tacitly condoned the late filing of the record, moreover she has not raised any prejudice. In her application for postponement of the hearing of the appeal, the respondent submitted that the complete record of the proceedings has yet to be served on her. According to her, on 22 March 2016 the appellants served four bundles of documents consisting of an incomplete record on her.

[7] The respondent submitted further that the attorney for the appellants was negligent in filing the incorrect record at court, thereby probably causing the appeal to lapse and had failed to provide a satisfactory explanation for his conduct. The respondent maintains that, even if the complete correct record was delivered on 20 February 2016, there would still have been insufficient time to properly prepare for the appeal as the record was voluminous.

[8] The appellants maintain that the respondent displays an obvious disdain for the relevant rules of this court. The appellants aver that the four bundles of documents alleged to have been served on the respondent on 22 March 2016 are in fact the record filed on 04 December 2015 and that they never served any documents on the respondent on 22 March 2016. The complete record was collected by one Mr Joel Mashilo, the driver for the respondent's attorneys. Mr Mashilo signed for and collected the record from the offices of the appellants' attorneys.

[9] The appellants submitted that the respondent never indicated to them in any manner whatsoever that only a portion of the record was received. The respondent further sent a letter to the appellants on 11 May 2016 indicating that she failed to file her heads of

argument due to her attorney of record being sick and tendered costs for the postponement. The appellants only agreed to the postponement if the costs of both their junior and senior counsel were tendered. The appellants maintain that both counsel have been briefed on this appeal from its inception and have done extensive preparation as evident from the signed practice note and the heads of argument.

[10] Taking into account that the respondent only delivered its application for postponement two days before the hearing of the appeal, the appellants maintain that the respondent was seeking an indulgence due to its blatant disregard for the rules of this court. The respondent failed to timeously oppose the appellants' application for condonation for the late filing of the court record nor is there any application seeking condonation of same. Therefore, the appellants maintain there is no opposition to the condonation application before court. The respondent submitted that she could not have filed her heads of argument timeously due to the failure of the appellants to provide her with the correct complete record of the trial proceedings.

[11] The appellants maintain that they have properly prosecuted the appeal. There is however no evidence as to when requests were made to the transcribers for the copy of the court record. The first quotation was issued on 02 April 2015 and the second one on 04 November 2015. The first quotation was issued one month before the commencement of the trial. Both quotations were issued for the attention of the attorneys for the respondent. The respondent conceded that they indeed applied for the small portion of the trial proceedings. This supports the version by the appellants that the confusion emanated from the offices of the transcribers.

[12] The respondent maintains that the delay in noting the appeal was not caused by the offices of the transcribers, but it was gross negligence on the part of the attorneys for the appellants. Therefore, the respondent maintains the notice of appeal (served on 28 August

and filed on 31 August 2015) has lapsed. The respondent in both her papers in support of the application for postponement of the hearing of the appeal as well as in opposition of the appellants' condonation application failed to raise the issue of the late filing of the appeal.

[13] The appellants failed to state the date on which the request was made for the quotation issued by the transcribers on 26 November 2015 in relation to the correct record of the trial proceedings. I nevertheless noted in the aforementioned quotation that reference is made to the appellant's letter dated 23 November 2015. Further the appellants failed to mention the date on which payment was made in settlement of the transcription costs as set out in the transcriber's quotation dated 26 November 2015. All we know is that the appellants were only advised on 04 February 2016 that the record was ready for collection.

[14] There is no doubt the appellants experienced challenges in obtaining the correct record from the transcribers. The appellants have demonstrated the desire to prosecute the appeal. Out of frustration and in order to prevent the lapsing of the appeal the appellants not only filed the affidavit explaining its predicament but also attached the incorrect record obtained from the transcribers.

[15] In her letter dated 19 February 2016 the respondent indicated that she will only lodge an objection against the appeal process should the appellants fail to provide her with a copy of the court record on Monday, 22 February 2016. Further the respondent, in her answering affidavit has admitted that the appellants made available two copies of the record on 20 February 2016 and also admitted that she had the correct record. The respondent raised for the first time the issue of the lapsing of the appeal on the date of the hearing of the matter. I find this argument by the respondent to be opportunistic.

[16] The prosecution of civil appeals from the magistrates' court is regulated by Uniform Rule 50. Rule 50(1) provides that an appeal shall be prosecuted within 60 days after the noting of such appeal, and unless so prosecuted it shall be deemed to have lapsed. Rule 50(4)(a) requires the appellant to within 40 days of noting the appeal, apply to the registrar in writing and with notice to all other parties for the assignment of a date for the hearing of the appeal. The respondent may apply to the registrar for the assignment of a date for the hearing of the appeal under certain circumstances (see Rule 50(4)(b)). Upon receipt of such an application from the appellant or the respondent (as the case may be) the appeal shall be deemed to have been duly prosecuted (see Rule 50(4)(c)). In terms of special rules applying in the Gauteng Division and the Gauteng Local Division the periods of 60 and 40 days are extended to 14 weeks and 12 weeks respectively.

[17] Rule 50(7)(a) provides *inter alia* that the applicant for the date for hearing of the appeal shall simultaneously with the lodging of the application for a date for the hearing of the appeal lodge with the registrar two copies of the record. Rule 50(7)(c) *inter alia* stipulates that the record shall contain a correct and complete copy of the pleadings, evidence and all documents necessary for the hearing of the appeal.

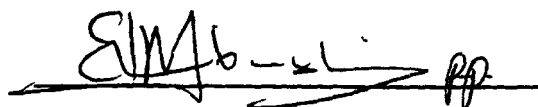
[18] In prayer 1 the appellants seek condonation for the filing of the incorrect record on 04 December 2015. I fail to understand the purpose of this application. It is common cause that the record that was filed on 04 December 2015 is incorrect, irrelevant to the appeal and will not add any value. A court cannot justify an order condoning the filing of irrelevant and unnecessary documents.

[19] It is clear from the papers that the appellants took reasonable steps to comply with the requirements of Rule 50 but could not file the correct record timeously due to the transcription problems alluded to above. Notwithstanding that, the appellants are required by the court rules to apply for condonation of the late filing of the correct record. The court is

not in a position to grant such an order in the absence of a proper application. The respondent's application for a postponement has become moot.

In the end, the following order is made:

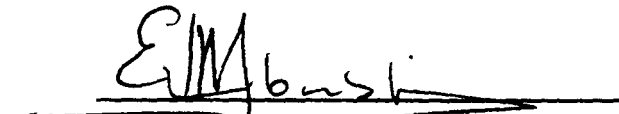
[20] The application for condonation of the filing of the incorrect record is refused with costs.



SS MPHAHLELE

JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA

I agree



EM KUBUSHI

JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA

Counsel for Appellants:

Adv. J Roux

Adv. M Fourie

Instructed by:

ML SCHOEMAN ATTORNEYS

Counsel for Respondent:

Adv. M Coetsee

Instructed by:

COUZYN HERTZOG & HORAK

Date heard:

17 May 2016

Date of judgment: