IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: A243/2018

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

17/11/2021

In the matter between:

NAIDOO, NEELAN	Appellant
and	
HESSLEWOOD, PETER DAVID	First respondent
HTSA POWER (PTY) LTD	Second respondent

JUDGMENT

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van der Westhuizen, J (Munzhelele, J and Noko, AJ concurring)

[1] The appellant launched an appeal, with leave of the court *a quo*, against the whole order and judgment delivered by Rabie, J., on 7 March 2017. The respondents opposed that appeal. Due to the fact that the appellant

did not file the appeal record timeously, and failed to supply the required security for costs timeously, the appeal lapsed.

[2] The appellant sought, in two separate applications, condonation for the late filing of the record of appeal and the late filing of security for costs. In addition the appellant sought re-instatement of the appeal on the granting of condonation. The respondents opposed the aforesaid applications.

[3] The principles relating to applications for condonation are trite. Suffice to state that an applicant for condonation is required *inter alia* to address the following: the degree of non-compliance with the rules; the explanation therefor; the importance of the case; the respondent's interest in the finality of the judgment of the court *a quo*; the convenience of the court and the avoidance of unnecessary delay in the administration of justice.[1]

[4] The issue of condonation is skimpily addressed in the heads of argument filed on behalf of the appellant. The primary submissions in that regard are simply curt and unconvincing. The main thrust of the submissions contained in the appellant's heads of argument is directed at the merits of the appeal. The closing submission in respect of condonation is simply stated to be: '*In the circumstances it is just and equitable to reinstate the appeal.*' Nothing is said in respect of why it would be just and equitable. The distinct inference and impression is that of a *laisser-faire* approach to the appeal on the part of the appellant and his legal representative. This will become clear from what follows.

[5] The dispute between the parties arose in respect of an agreement entered into between the parties relating to the purchasing of shares in a company. The matter went to trial and judgment was delivered in

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[1] *Federated Employers Fire and General Insurance Co Ltd et al v McKenzie* 1969(3) SA 360 (A) at362F-G; See also *Uitenhage Transitional Local Council v South African Revenue Service* 2004(1) SA 292 (SCA) at [6]

March 2017. The trial was heard by the court *a quo* on 23 and 24 August 2016. The judgment went against the appellant. An application for leave to appeal was filed timeously.

[6] However, the respondents were obliged to chase up the application for leave to appeal and succeeded in having it set down for hearing some 16 months later. During that period, the appellant did nothing to expedite the hearing of his application for leave to appeal. On 7 June 2018 leave to appeal was granted by the court *a quo*. The notice of appeal was timeously filed on 12 June 2018. Thereafter a relaxed attitude on the part of the appellant and his attorney ensued.

[7] On 14 June 2018, the respondents' attorney was obliged to draw the appellant's attorney's attention to the provisions of Rule 7(3)(c) of the Supreme Court of Appeal rules in terms whereof a certified copy of the court order granting leave to appeal was to be delivered together with the notice of appeal. The appellant's attorney was oblivious to that requirement. In response, and on 15 June 2018, the appellant's attorney forwarded a copy of the order granting leave to appeal to the respondents' attorney. On 19 June 2018, the appellant's attorney was again advised by the respondents' attorney that the rule required a certified copy of the order granting leave to appeal. The appellant's attorney thereafter, on 20 June 2018, requested his correspondent attorney to obtain a certified copy of the order granting leave to appeal. On 25 June 2018 a certified copy of the order granting leave to appeal was obtained. On the same date the appellant's attorney requested an appeal record from the transcribers. That record of appeal was only obtained on 19 September 2018. The appellant's attorney, who deposed to the applications for condonation of both the late filing of the appeal record and the late filing of the security for costs, lists in his founding affidavit difficulties in obtaining the required digital recordings. The main reason advanced on behalf of the appellant was that the location of the correct court room where the digital recordings were made during the trial in the court *a quo* was difficult to ascertain and had taken inordinate

time to locate. No explanation was provided why the counsel who appeared on behalf of the appellant, or the correspondent attorney, or the respondents' attorney were not approached in that regard.

[8] Only on 9 October 2018 did the appellant's attorney commence the process to obtain a date for the hearing of the appeal. What transpired in the period since obtaining the record and the process to obtain a date for the hearing of the appeal was not explained.

[9] Due to the fact that a period in excess of 60 days had lapsed since the filing of the notice of appeal and the obtaining of the record, the appeal lapsed on 6 September 2018. The appeal had lapsed on the date on which the appellant's attorney sought a quote for the preparation of the appeal record. The appellant's attorney seemed oblivious to the fact that the appeal had lapsed.

[10] Although it seems that the appellant's attorney had realised that a condonation application had to be brought in respect of the lateness of the filing of the appeal record, that application was only finalised during February 2019. On 15 January 2019 the appellant's attorney advised the respondents that the condonation application would be filed by 31 January 2019. Despite that undertaking, the condonation application was only finalised in February 2019. The appeal record and condonation application for the late filing were only filed during March 2019. That further delay was not explained.

[11] In the same correspondence in which the appellant undertook to file the condonation application by 31 January 2019, the respondents were advised that security for costs would be set and an amount was requested. On the following day the respondents indicated the amount that would be suitable. By that date, the setting of security for costs in terms of Rule 49(13)(a) had passed, and a condonation application in respect of the late setting of security for costs was required.

[12] On 29 January 2019 the appellant's attorney was advised by the respondents that despite the undertaking to set security for costs, that had not happened. The appellant was further advised to address the non-compliance with the requirement of setting security for costs in its application for condonation for the late filing of the appeal record which was due on 31 January 2019.

[13] No security for costs was set, nor was the condonation application for late filing of the appeal record filed by 5 February 2019. This is also the date on which the respondents' attorney advised that a warrant for execution was to be proceeded with. By the time that the answering affidavit to the founding affidavit in the condonation application relating to the late filing of the record of appeal was filed, i.e. 8 March 2019, no security had been set, despite an undertaking that it would be set by 8 February 2019. The appellant further undertook to file the condonation application by 13 February 2019. Neither of the two undertakings were honoured. In the founding affidavit of the application for condonation for the late filing of the appeal record, it was pertinently stated that security had already been set, which statement was false. That fact was set out in correspondence from the respondents to the appellant on 4 March 2019, which further indicated that by that date no security for costs had been set.

[14] Security for costs were only set by 17 April 2019 despite the fact that the appellant had in his possession a signed guarantee which was dated 18 March 2019. No explanation for the intervening period was proffered. The original guarantee was not provided to the respondents by the date that the answering affidavit in the application for the late setting of security was filed. On 27 June 2019 the respondents advised the appellant that security had by that date not been set. On 3 July 2019, the appellant merely indicated that he would uplift the original copy of the security and that it was filed at court on 23 April 2019.

[15] On 20 June 2019, the respondents advised the appellant that the appeal had lapsed due to the fact that security for costs had not been set in accordance with the provisions of the relevant court rule. The appellant was further advised that no application for condonation of the late setting of security for costs was pending and that the respondents intended to proceed with a warrant of execution.

[16] Presumably, that approach on the part of the respondents precipitated the launch of a further condonation application in respect of the issue relating to the setting of security for costs. That application was only then launched on 28 June 2019.

[17] From the foregoing it is clear that the attorney for the appellant was out of his depth in respect of the prosecuting of an appeal. He was advised throughout by the respondents' attorney of the correct procedure that had to be followed. This was conceded by counsel appearing for the appellant. It was further conceded that the appellant's attorney was not a one-man-show. Accordingly, the appellant's attorney could have sought assistance from his fellow partners which he failed to do. The overall impression is that a lackadaisical approach to the prosecuting of the appeal was adopted. At no stage did the appellant himself enquire as to the process of the appeal. Unsurprisingly, he was equally unconcerned that the respondents remained out of pocket although they had a court order to their advantage.

[18] What is further concerning is the stance taken by the appellant in the founding affidavit in the application for condonation for the late setting of security. In that regard, it is stated that in respect of the prospects on appeal the court *a quo* had granted leave and thus the prospects of success in the appeal are good. The logic of that statement is not followed.

[19] In view of the fact that the appeal had lapsed and that application was made for the re-instatement thereof, this court cannot pronounce on the

issue of the prospects of appeal. That can only be considered once the appeal has been re-instated.

[20] Furthermore, the statement in the founding affidavit in the condonation application for the late setting of security and for re-instatement, was that the appellant has shown a *bona fide* intention to proceed with the appeal is gainsaid by the true facts revealed in the two applications for condonation. No such intention can be gleaned from either of the two applications. On the contrary, the opposite is revealed, namely an attitude to frustrate and to procrastinate.

[21] The authorities are rife with condemnation of the lackadaisical approach of attorneys in prosecuting appeals. Condemnation of clients in not showing an interest in the speedily adjudication of their appeals is also rife. In this regard it is apposite to refer to the dictum in *Blumethal v Thomson NO.*[2]

[22] It follows from all the aforesaid that the appellant has not addressed any of the trite requirements for condonation, or at least in an adequate manner. There is consequently no basis upon which condonation can be granted for the late filing of the record of appeal and for the late setting of security. Accordingly, there is no basis upon which this court can re-instate the appeal.

[23] There remains the issue of costs. The respondents sought a punitive cost order to be granted against the appellant. It is further sought on behalf of the respondents that the costs should include the wasted costs occasioned by the abortive appeal. It is to be recorded that no oral reply was offered in respect of the oral address on behalf of the respondents. No address was proffered in respect of the request for the awarding of costs on a punitive scale. In my view, it is more than apparent that the

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[2] 1994(2) SA 118 (A) at 121C-D and 121I-122D; see also *Darries v Sheriff, Magistrate's Court, Wynberg* 1998(3) SA 34 (SCA) at 40I-41E

appellant was tardy in his prosecution of the appeal and was dilatory in the extreme. The granting of a punitive costs order is warranted.

The following order is granted:

1. The application for condonation for the late filing of the record of appeal is dismissed with costs;

2. The application for condonation for the late setting of security for costs of the appeal is dismissed with costs;

3. The application for the re-instatement of the appeal is dismissed with costs;

4. The appellant is ordered to pay the costs on the scale of attorney and client and shall include the wasted costs of the abortive appeal.

C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

Date of Hearing:	20 October 2021
On behalf of Appellacant: Instructed by:	A Bester SC Fairbridges Wertheim Becker Attorneys
On behalf of Respondent: Instructed by:	G Kairinos SC Eugene Marais Attorneys
Judgment Delivered:	17 November 2021