

SOUTH AFRICA / JUDGMENT

Ferreira v Ntshingila (552/87)

[1989] ZASCA 149; [1990] 2 All SA 47 (A) (21 November 1989)

[1989] ZASCA 149

COURT

Supreme Court of Appeal

BEFORE

Hefer, Nestadt, Friedman

CASE / FILE NUMBER

552/87

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Source record**Case no 552/87****IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)****In the matter between****GEORGE FREDERICK FERREIRA Appellant and MARIA****NTSHINGILA Respondent****GEORGE FREDERICK FERREIRA****MARIA****NTSHINGILA****CORAM: HEFER, NESTADT JJA et FRIEDMAN AJA.****CORAM:****HEARD: 21 NOVEMBER 1989.****HEARD:****JUDGMENT DELIVERED: 21 NOVEMBER 1989. REASONS FILED: 30 NOVEMBER 1989.****JUDGMENT DELIVERED:****REASONS FILED:**

REASONS FOR JUDGMENT

FRIEDMAN AJA./

FRIEDMAN AJA.

2.FRIEDMAN AJA:

FRIEDMAN AJA:

On 21 November 1989 this Court made an order dismissing with costs an application for the condonation of the late noting of an appeal and an application for the condonation of the late filing of the record and the late furnishing of security, and ordering that the costs were to include the respondent's costs of appeal. The Court indicated that reasons would follow. These are the reasons.

On 17 February 1980 Paulus Mahlangu

(hereinafter referred to as the "deceased") was shot and killed by the applicant. The respondent who was a partner to a customary union as defined in section 35 of the Black Administration Act 38 of 1927, with the deceased, sued the applicant for damages in the

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Witwatersrand Local Division in her personal capacity as well as in her capacity as mother and natural guardian of the three minor children born of the customary union between herself and the deceased. For convenience I shall refer to the applicant and the respondent as defendant and plaintiff respectively. The defendant admitted in his plea that he had shot and killed the deceased, but pleaded that he had acted in self-defence.

The only issue at the trial was whether the killing of the deceased was justified. The trial court (COETZEE AJP) found that it was not and granted judgment in favour of the plaintiff in the agreed sum of R13 022-00 with costs. An application for leave to appeal against this judgment was refused by the

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court aquobut on petition to the Chief Justice, leave to appeal to this Court was granted. The plaintiff failed to file his notice of appeal timeously. He also failed to file the record or to furnish security within the time limits prescribed by the rules of court. His applications to condone the late noting of the appeal as well as the late filing of the record and the late furnishing of security, were opposed by the plaintiff. It was common cause at the trial, and rightly so in view of the decision of this Court in *Mabaso v Felix* 1981(3) SA 865 (A), that the onus was on the defendant to prove that the fatal shooting of the deceased was justified. The learned judge found that the deceased's attack upon the defendant was unlawful. He was,

Mabaso v Felix

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however, not satisfied that there was no other reasonable alternative open to the defendant, except to kill the deceased. Judgment was accordingly granted in favour of the plaintiff with costs, on 20 November 1985. The history of the matter from the date of judgment until leave to appeal was obtained, sets the scene for what subsequently occurred and what led to the defendant having to make two applications for condonation. On 2 December 1985 the defendant's attorneys, who were at that stage Messrs Goosen and

Goosen of Johannesburg, filed a notice of application for leave to appeal. On 5 December 1985 the registrar of the Witwatersrand Local Division wrote to the defendant's attorneys advising them that a date for the hearing of the application for leave to appeal would

not be arranged until the judgment had been transcribed and filed in the court records. The defendant's attorneys were told to advise the registrar as soon as the judgment was filed. On 16 January 1986, by which date Messrs Goosen and Goosen had been replaced by Mr Clifford St John Wills, the latter wrote to the plaintiff's attorneys stating that he had been instructed by the defendant to proceed with an appeal against the judgment of the court *a quo*. By 3 March 1986 nothing had been done in the matter; the plaintiff's attorneys accordingly addressed a letter to defendant's attorney on that date enquiring what steps were being taken to prosecute the appeal. This letter met with no response. The plaintiff's attorneys accordingly addressed a further letter to the defendant's attorney, dated 27 May 1986, enquiring

7. what had been done and requesting an urgent reply. This letter likewise met with no response. The plaintiff's attorneys accordingly addressed a further letter to the defendant's attorney on 8 July 1986 stating that they would be pleased to learn, as a matter of urgency, what steps had been taken with regard to prosecuting the appeal. The plaintiff's attorneys stated further:

"Should we not hear from you within seven (7) days from date hereof, we shall apply to the Court for leave to execute on the judgment pending the outcome of the appeal".

On 29 July 1986 the defendant's attorney, Mr Wills, advised Mr Hoyland of plaintiff's attorneys, telephonically, that the defendant intended to proceed with the appeal but that he was waiting for the

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defendant to supply him with funds. On 30 July 1986 Mr Hoyland addressed a letter to the defendant's attorney referring to the telephone conversation of the previous day and stating:

"We have received a memorandum from the Supreme Court to the effect that the application for leave to appeal will not be arranged until the judgment has been transcribed and filed in the Court Records. Should we not receive confirmation from yourselves that the judgment has been transcribed and filed by no later than the 29th August 1986 we shall forthwith apply to execute on the

judgment

pending the appeal. Kindly give this matter your most urgent attention."

Notwithstanding the defendant's attorney's intimation that he intended to proceed with the appeal

and notwithstanding Mr Hoyland's threat to apply for leave to execute on the judgment, nothing was heard from the defendant's attorney. Mr Hoyland accordingly addressed a further letter dated 1 October 1986 to the defendant's attorney, advising him that as he had not received any indication that the judgment had been filed, he was proceeding to launch an application for execution of the judgment. In response to this letter Mr Hoyland received a telephonecall from one Linda Oosthuizen, an articled clerk

in the employ of the defendant's attorney, requesting a

further extension of two weeks in order to enable the necessary steps to be taken to prosecute the application for leave to appeal. That request was made on 7 October 1986, as appears from Mr Hoyland's letter to the defendant's attorney dated 24 October

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1986. By the latter date nothing had been done and in his letter dated 24 October 1986 Mr Hoyland stated:

"Unless we have written confirmation from yourself that the appeal has been proceeded with, that steps have been taken to obtain a date for the hearing of the application for leave to appeal and that a copy of the record has been obtained within seven (7) days from date hereof we shall proceed without further notice to you. We confirm that this is our final extension and no further extensions in time will be entertained".

The application for leave to appeal was eventually heard on 28 November 1986 and was dismissed. In his judgment dismissing the application COETZEE AJP described as unsatisfactory the fact that more than a

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year had elapsed since the judgment had been given. He also stated that it appeared from the papers that the registrar had written to the plaintiff's attorney asking what the plaintiff's intention was and that it has taken two months for the defendant's attorney to reply to that letter. The application for leave to appeal having been refused by the court aquo, a petition for leave to appeal was filed with this Court on 19 December 1986. Mr Hoyland states in his opposing affidavit

to the application for condonation of the late noting

of the appeal that he was advised by his Bloemfontein correspondents that the petition would not be considered until such time as the court aquo's reasons

for refusing leave to appeal had been furnished. In view of the lengthy delay which had already taken

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place he took it upon himself to obtain, at his firm's expense, a copy of the judgment dismissing the application for leave to appeal and forwarded it to the defendant's attorney in order to assist in speeding the proceedings up. A copy of that judgment was forwarded to the plaintiff's attorney under cover of a letter dated 16 March 1987. On 24 March 1987 leave was granted by the Chief Justice to the defendant to appeal to this Court. It was stated by the registrar of this Court in a

letter to the defendant's Bloemfontein attorneys that leave to appeal had been granted "onderworpe aan die nakoming van die betrokke reëls". According to Appellate Division Rule 5(1)(d) the defendant's notice of appeal should have been filed within twenty-one days after the order for leave to

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13. appeal had been granted, i.e. within twenty-one days after 24 March 1987. The defendant's attorney failed to file a notice of appeal and failed to request the plaintiff's attorneys to grant an extension of time. As no communication had been received from the defendant's attorney by August 1987, Mr Hoyland made enquiries through his Bloemfontein correspondents and discovered that not only had a notice of appeal not been filed, but copies of the record had also not been filed. He considered that the appeal was deemed to have been withdrawn in terms of Appellate Division Rule , 5(4) bis (b) and he accordingly addressed a letter to the defendant's attorney advising him of this fact and calling upon the defendant to pay the judgment debt within seven days, failing which a writ of execution would be issued. The date of this letter does not

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appear from the papers.

On 21 October 1987 the defendant's attorney launched an application, on petition, for condonation of the late filing of the notice of appeal. Simultaneously therewith a notice of appeal was filed. Before dealing with the facts I feel constrained to mention that the application was presented in a thoroughly sloppy and unacceptable manner. The petition was tagged on at the end of the record, the pages being numbered from 153 onwards. It was also filed separately with the pages being numbered from 1 onwards. The opposing and replying affidavits were likewise each numbered from page 1 onwards. In other words the application as a whole was neither bound in a separate cover, nor paginated consecutively, nor was the Court favoured with an index. This did not

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facilitate the Court's task in reading the papers and assimilating the factual issues involved.

In his petition the defendant stated that he was without the necessary funds to prosecute the appeal and was indebted to his attorney in respect of outstanding fees relating to the trial and the petition to the Chief Justice. He had been informed by his

attorney that it was necessary for him to place his

attorney in funds for a continuation of the appeal.

He explained that his business as a building contractor

and part-time farmer had not been successful and that

on 24 July 1987 he had sold his farm for R56 000-00. After repayment of the bond he was left with R8 000-00. He stated that from the proceeds of the sale he "has

now been able to furnish his attorney with the necessary funds to continue with the appeal and in

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order to pay outstanding legal fees". He added that "it was simply a lack of funds that caused him not to proceed with the noting of appeal and the further prosecution of the appeal." An opposing affidavit was filed by Mr Hoyland in which he set out the history of the matter as outlined above. That affidavit was filed on 13 November 1987. A replying affidavit was filed on 19 January 1988 by Linda Oosthuizen. She stated that she had taken over the file in or about January 1987. What struck her, on perusing the file, was that "there had been continuous difficulty in obtaining funds from Client". She went on to state:

"At the time of taking over the file I had instructions from my principal, Mr Clifford St John Wills, that I was not to do any

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further work in the matter until such time Client had placed us in funds. From correspondence in the file it appears that the appellant was at all times aware that funds were outstanding in the matter and that we, as his attorneys, were not going to proceed any further with the matter until such (sic) as we were placed in funds".

In his opposing affidavit Mr Hoyland had stated that the costs involved in filing a notice of appeal would not have been significant. In response to this statement Linda Oosthuizen stated that -

"One has to draw a line somewhere and the line was drawn after the filing of the petition".

She reiterated that:

"Appellant was aware of the situation and, as appears from his affidavit, he was simply not

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in the position to provide us with funds".

Linda Oosthuizen's affidavit was filed, as indicated above, on 19 January 1988. A further petition for condonation of the late filing of the record and the late furnishing of security was filed almost a year later, namely on 21 December

1988. In this petition the defendant referred to his financial position as set out in his previous petition and referred, further, to the supporting affidavits of Linda Oosthuizen and one Hendrik Petrus Bensch, the latter being another articled clerk in the employ of the defendant's attorney, and asked that the late filing of the record and late furnishing of security be condoned. By the time the second petition was launched Linda Oosthuizen was an attorney and a professional

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assistant to the defendant's attorney. She stated in her supporting affidavit that between November 1986 and August 1987 no funds were made available by the defendant and that funds were finally furnished by the defendant during September 1987 to enable her to proceed with the petition for condonation of the late noting of the appeal. She briefed counsel to draw the petition. Counsel did not, however, advise her that it was necessary to file the record. Moreover when her correspondents in Bloemfontein wrote to her on 26 November 1987 suggesting that an affidavit be filed in response to Mr Hoyland's opposing affidavit, they did not mention that copies of the record should have been filed with the petition. She went on to state:

"I am aware that according to the rules of this Honourable Court, after an appeal has

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been noted, the Appellant is required in each case to lodge copies of the record within 3 months of the date of Order granting leave to appeal. Had the Appeal Court (sic) been properly noted therefore, the record should have been lodged by the 24th June 1987".

She explained that she was under the impression that the petition for condonation of the late noting of the appeal would be decided separately and that only after that matter had been disposed of, would it have been necessary for the record to be filed. Two months after the filing of her replying affidavit in the application for the condonation of the late noting of the appeal, she had heard nothing from her correspondents or from the registrar of this Court. She again perused the rules but could find nothing regarding the time for the hearing of the application

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for the condonation of the late noting of the appeal. She decided, however, that it would be prudent to arrange for the record to be prepared "to avoid any possibility of future delay with the appeal". She accordingly on 14 April 1988 instructed Lubbe Recordings of Johannesburg to prepare the record for the appeal and on 28 April 1988 she was notified that it was ready for collection. She stated that she had never seen a record prepared for this Court and she accepted that what Lubbe Recordings had prepared was correct. She was then advised by her correspondents in Bloemfontein that the record was incomplete as only copies of the two

judgments of the court aquohad been furnished. She thereupon communicated with Lubbe Recordings who advised her that there had been an oversight and that the balance of the record could be

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22.collected at once, which was done. She received a letter dated 3 May 1988 from her Bloemfontein correspondents enclosing a copy of a communication which the plaintiff's attorneys in Bloemfontein had addressed to the registrar of this Court. That letter referred to the fact that the record had not been filed and that security had not been furnished. The writer stated that the Chief Justice had indicated that the condonation application would be heard together with

the appeal. The letter also stated that in terms of rule 5(4) (b), the record should have been lodged and the provisions of rule 6 in regard to security should

have been complied with and that in terms of rule 5(4) bis (b) the defendant must be deemed to have withdrawn his appeal. Linda Oosthuizen stated in her affidavit that that was the first notification that

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she had had to the effect that the application for the condonation of the late noting of the appeal was to beheard with the appeal.With regard to the delay in filing the record and furnishing security, she pointed out that:

"Appellant has continually found it difficult to furnish his attorney with sufficient funds to enable the appeal to proceed as it should and I was reluctant to place any further financial burden upon him, not being surethat this was necessary".

However, after receipt of the letter from her correspondents dated 3 May 1988, she immediately took steps with regard to the filing of the record and the furnishing of security and when further copies of the record were received from Lubbe Recordings these were

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sent to her correspondents in Bloemfontein on 17 May 1988. She was advised by her correspondents, however, that once again the copies furnished did not comply with the rules. She went on to state that at that stage it became clear that she had insufficient funds to cover the disbursements involved in obtaining the necessary copies of the record. She stated that during May 1988 she discussed the matter of security with Mr Hoyland and that that was subsequently

settled by the person who took over the file. That person is Mr Bensch. She stated that "at this juncture" she handed the matter over to Mr Wills. On a proper reading of this affidavit the words "at this juncture" suggest that the matter was handed over by her to her principal during May 1988.

In his affidavit Mr Bensch stated that he

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took over the file at the direction of Mr Wills in about July

1988. He found that the record had not been filed and that agreement with regard to security for costs had not been reached. He stated that the defendant was indebted to his attorney in terms of a statement of account drawn in May 1988, in an amount of R2 584-07. His affidavit proceeded as follows:

"I further found that Mr Wills had repeatedly written to client in order to get sufficient funds to further prosecute the appeal properly. After I have ascertained the price of the record from Lubbe Recordings I found that it was impossible to proceed with the requirements of the Appellate Division in terms of the record because there wasn't anywhere near sufficient funds available to pay for it. Thereafter further letters were written to the appellant and phone calls made to him to obtain the

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necessary funds. Notwithstanding the absence of funds and in August 1988 I went ahead and ordered the record and my firm paid the necessary costs out of our business account in order to get the work done. During October 1988 as appears from annexure 'A' hereto the amount of security for costs was settled with the Respondent's attorneys."

(Annexure "A" is a letter dated 18 October 1988 which was addressed by Mr Bensch to Mr Hoyland.)

With regard to the first application namely

the application for condonation of the late filing of the notice of appeal, the following points need to be noted:

1. The application was preceded by an unexplained delay in proceeding with the application for leave to appeal. This delay covered the period

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from the beginning of December 1985 (when the defendant's attorneys were advised by the registrar of the Witwatersrand Local Division that their application for leave to appeal would not be heard until the judgment of the court had been transcribed and filed) until 24 November 1986

when the defendant's attorneys were given a final seven days within which to file the transcribed judgment.² There was a delay from 24 March 1987 when leave to appeal was granted by the Chief Justice until 21 October 1987, when the application for condonation of the late filing of the notice of appeal was launched.³ Throughout this period of just under seven months no approach was made to the plaintiff's attorneys in order to explain the problem that existed

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because of the defendant's failure to place his attorney in funds, nor was any effort made to seek the plaintiff's attorneys' consent to an extension of time.

4. There is no suggestion on the papers that the defendant's attorney was not aware of the fact that the notice of appeal had not been filed timeously and that it would be necessary to make an application for condonation. The defendant's attorney's attitude was that he was simply not prepared to take any steps because of his client's failure to pay his fees or to place him in funds.

5. When Mr Hoyland referred to the fact, in his opposing affidavit, that there had been no approach to the plaintiff's attorneys, Linda Oosthuizen's reply was to query whether the plaintiff's attorneys had the power to grant an extension of the time limits laid

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down in the rules. That, she said, was "a matter for debate".

6. Although, as appears from Linda Oosthuizen's affidavit in the second application, the defendant's attorney was placed in funds in September 1987 to proceed with the application for condonation of the late noting of the appeal, that application was not launched until 21 October 1987. For this delay there is no explanation.⁷ The defendant's attorney appears to have left the matter in the hands of an articled clerk who was obviously inexperienced in handling an appeal of this nature. (She said in her affidavit that she had never seen a record prepared for this Court, from which it may be inferred that she has not previously handled an appeal to this Court.)

6. Although, as appears from Linda Oosthuizen's affidavit in the second application, the defendant's attorney was placed in funds in September 1987 to proceed with the application for condonation of the late noting of the appeal, that application was not launched until 21 October 1987. For this delay there is no explanation.

Although, as appears from Linda Oosthuizen's affidavit in the second application, the defendant's attorney was placed in funds in September 1987 to proceed with the application for condonation of the late noting of the appeal, that application was not launched until 21 October 1987. For this delay there is no explanation.

7. The defendant's attorney appears to have left the matter in the hands of an articulated clerk who was obviously inexperienced in handling an appeal of this nature. (She said in her affidavit that she had never seen a record prepared for this Court, from which it may be inferred that she has not previously handled an appeal to this Court.)

The defendant's attorney appears to have left the matter in the hands of an articulated clerk who was obviously inexperienced in handling an appeal of this nature. (She said in her affidavit that she had never seen a record prepared for this Court, from which it may be inferred that she has not previously handled an appeal to this Court.)

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8. There is no satisfactory explanation for the failure to file a notice of appeal. Mr Hoyland's contention that the cost of filing a notice of appeal would have been negligible, was not denied by Linda Oosthuizen in her replying affidavit. Her answer that her principal had decided to "draw the line after the filing of the petition", is not a satisfactory explanation. Had he not been prepared to take this step, he should not have continued to act for the defendant.

9. The defendant sold his farm on 24 July 1987.

He does not state when he received the purchase price or why it took him until September 1987 to place his attorney in funds.

I proceed to deal with the second application.

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Appellate Division Rule 5(4)(b) provides, in so far as is relevant, that -

"After an appeal has been noted in a civil case the appellant shall -(b) within three months of the date of an order

granting leave to appeal ; lodge with the registrar six copies of the record of the proceedings in the court appealed from and deliver such number of copies to the respondent as may be considered necessary . . "

As indicated above a notice of appeal was filed on 21 October 1987. Rule 5(4) is not entirely clear. The opening words of the Rule relate the time within which the record is to be lodged, to the noting of an appeal, whereas sub-rule (b) fixes the time by

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32.reference to the date of an order granting leave to appeal. If the record was required to be lodged within three months of the order granting leave to appeal, it should have been lodged by not later than 23 June 1987 (leave to appeal having been granted on 24 March 1987). However, on the assumption that, in a case such as the present, the reference to the noting of an appeal in the opening words of the rule includes a reference to the purported noting of an appeal where that occurs inconjunction with an application for condonation of the

failure to note the appeal timeously, the record should

have been lodged by not later than 20 January 1988 (that being three months after the purported noting of the appeal on 21 October 1987). The record was in fact lodged only on 27 October 1988. Whatever impression Linda Oosthuizen may have been under as to

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when the application for condonation of the late noting of the appeal would be heard, had she consulted the Rules she would have realised that, at best for the defendant, the record was required to be lodged within three months of the date on which she purported to note the appeal, ie by 20 January 1988. In any event, how she could have thought that this Court could consider the application for condonation of the late noting of the appeal without access to the record (there was noreference in the application to the merits, except the

submission that there was "more than a reasonable

prospect of success"), is just not explained. In his opposing affidavit to the first application Mr Hoyland stated that the record had not been lodged and referred to Rule 5(4) bis (b) which provides:

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"If an appellant has failed to lodge the record within the period prescribed and has not within that period applied to the respondent or his attorney for consent to an extension thereof and given notice to the registrar that he has so applied, he shall be deemed to have withdrawn his appeal".

Mr Hoyland's affidavit in which he referred to this rule was filed on 13 November 1987. Linda Oosthuizen's replying affidavit was filed on 19 January 1988 and in her affidavit she admitted the contents' of the relevant paragraph in Mr Hoyland's affidavit. This could not have failed to alert her to the rules dealing with the lodging of the record. To suggest, as she has done, that counsel did not refer her, when the first application was drafted, to the necessity for filing the record and that her

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Bloemfontein correspondents likewise did not tell her that it was necessary to file the record, is simply not acceptable, having regard to the fact that she had been specifically alerted to the relevant rule by Mr Hoyland's affidavit. She stated in her affidavit that she was aware of the rule

that "after an appeal has been noted the appellant is required to lodge copies of the record within three months of the date of the order granting leave to appeal" and that had the appeal been properly noted the record should have been lodged by 24 June 1987. Her assumption that it was not necessary to file the record until the first application for condonation had been disposed of, is not a satisfactory explanation. In view of her inexperience she should have taken the trouble to enquire from counsel or from her principal, what she was required to

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do in regard to the lodging of the record. Her principal, Mr Wills, has somewhat surprisingly not filed an affidavit. The Court is consequently left completely in the dark as to what supervision, if any, he was giving to the work being done - or not done - by his articulated clerk(s) in regard to this appeal with which he had been instructed by the defendant to proceed, and which instruction he had, according to his letter to the plaintiff's attorneys on 16 January 1988, clearly accepted.

With regard to the filing of security,

Appellate Division Rule 6(2) provides as follows:

"If the execution of a judgment is suspended pending appeal and, unless the respondent waives his right to security, the appellant shall, before lodging with the registrar copies of the record, enter into good and

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sufficient security for the respondent's costs of appeal".

All that Linda Oosthuizen states in her affidavit in regard to the furnishing of security is that she discussed the matter with Mr Hoyland during May 1988 and that the question was subsequently settled by Mr Bensch who took over the file after she had handed it back to her principal. Mr Bensch took over the file at the direction of his principal in about July 1988. All he says about the furnishing of security is that during October 1988 the amount of security for costs was settled with the plaintiff's attorneys. It appears from the letter which Mr Bensch wrote to plaintiff's attorneys on 18 October 1988 that the plaintiff's attorneys had written to defendant's attorneys on 31 August 1988 and that a telephone

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discussion had taken place between Mr Bensch and Mr Hoyland. There is no explanation from Linda Oosthuizen why she discussed the question of security only in May 1988 and why this was not done earlier. There is likewise no explanation why it took until October 1988 for security to be furnished. Nor is there any explanation as to why the defendant or his attorney waited until 21 October 1988 in order to launch an application for condonation of the failure to furnish security when it must have been known as early as May 1988 that it would be necessary for such an application to be lodged. Finally, although Mr Bensch has annexed to his affidavit a copy of his letter dated 18 October 1988 addressed to the plaintiff's attorneys, there is no explanation as to

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what was discussed in the telephone conversation between himself and Mr Hoyland, nor has the letter dated 31 August 1988, to which he refers in his letter, been placed before the Court.

It was conceded by the defendant's counsel -and quite rightly so - that the defendant's attorney had been grossly negligent in the handling of this matter. He submitted, however, that the merits of the appeal were so strong that the condonation sought

should be granted. The principles applicable to applications of this kind have been stated many times and it is therefore not necessary to set them out again. See, however, *Federated Employers Fire and General Insurance Co Ltd and Another v McKenzie* 1969(3) SA 360 (A), where a useful summary occurs at 362-363. Of particular

Federated Employers Fire and General Insurance Co Ltd and Another v McKenzie

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relevance to the present matter are the following. An application for condonation is required to be made as soon as the party concerned realises that the rules have not been complied with. See *De Beer en 'n Ander v Western Bank Limited* 1981(4) SA 255(A) at 257; *Rennie v Kamby Farms (Pty) Ltd* 1989(2) SA 124(A) at 129 G. Negligence on the part of a litigant's attorney will not necessarily exonerate the litigant. See *Saloojee and Another, NN.O. v Minister of Community Development*

De Beer en 'n Ander v Western Bank Limited

Rennie v Kamby Farms (Pty) Ltd

Saloojee and Another, NN.O. v Minister of Community Development

1965(2) SA 135(A) at 141. See also *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein, and Others* 1985(4) SA 773(A) at 787 G-H, where HOEXTER JA referred to the "oft-repeated judicial warning that there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered".

Finbro Furnishers

(Pty) Ltd v Registrar of Deeds, Bloemfontein, and Others

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An attorney instructed to note an appeal is in duty bound to acquaint himself with the rules of the court in which the appeal is to be prosecuted. See *Moaki v Reckitt and Colman (Africa) Ltd and Another* 1968(3) SA 98(A) at 101; *Mbutuma v Xhosa Development Corporation Limited* 1978(1) SA 681(A) at 685 A-B. Inasmuch as an applicant for condonation is seeking an indulgence from the court, he is required to give a full and satisfactory explanation for whatever delays have occurred. The explanation given in the present case was neither full nor satisfactory. I might add that although there was gross negligence on the part of the defendant's attorney, the defendant

himself was not entirely blameless. He knew, from the warnings given to him by his attorney, what the position was, but he appears to have shown scant regard to such warnings.

Moaki v Reckitt and Colman (Africa) Ltd and Another

Mbutuma v Xhosa Development Corporation Limited

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The respondent's interest in the finality of his judgment, is a factor which weighs with the court. The fact that the time for noting an appeal has elapsed, prima facie entitles him to adjust his affairs on that footing. See *Federated Employers Fire & General Insurance Co Ltd & Another v McKenzie*, supra at 363. As far as the prospects of success on appeal are concerned, the appeal in the present case would not appear to be without merit. However where the non-

Federated Employers Fire & General Insurance Co Ltd & Another v McKenzie

observance of the rules has been as flagrant and as

gross as in the present case the application should not be granted whatever the prospects of success might be. See *P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980(4) SA 794(A) at 799; *Rennie v Kamby Farms (Pty) Ltd*, supra at 131 I-J.

P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd

Rennie v Kamby Farms (Pty) Ltd

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For these reasons the applications for condonation were dismissed with costs and it was ordered that the costs were to include the respondent's costs of appeal.

G. FRIEDMAN AJA.

HEFER JA)Concurred NESTADT JA)

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Prepared on 11 October 2026 · Esheria