

SOUTH AFRICA / JUDGMENT

Thamodran Gouden t/a Trev's Auto v Crawdord Properties CC (AR421/2023) [2024] ZAKZPHC 105 (20 September 2024) [2024] ZAKZPHC 105

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Henriques, R Singh

CASE / FILE NUMBER

AR421/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

CASE NO: AR421/2023

In the matter between:

THAMODRAN
GOUNDEN T/A TREV'S
AUTO
APPELLANT
and
CRAWDORD
PROPERTIES CC
RESPONDENT
ORDER

On

appeal from: the Magistrates'

Court for the District of eThekwin North, held at Verulam
(Magistrate O Hoskins sitting as court of first

instance):

1.
The application for the adjournment of the appeal is refused with costs;
2.
The application for condonation is dismissed with costs;
3.
The appeal noted by the appellant on 19 October 2023 in the Magistrate's Court for the district of eThekweni North, held at Verulam, under case number 4812/2023, is deemed to have lapsed;
4.
The appellant is directed to pay the respondent's costs in the appeal on an attorney and client scale, such costs to include the costs of the opposition to the application for condonation and the application for the adjournment heard on 16 August 2024.

JUDGMENT

Henriques J (R Singh AJ concurring):

Introduction

- [1] This appeal relates to an appeal against the entire ex tempore judgment delivered on 30 June 2023 by Magistrate O Hoskins. The grounds of appeal are set out in the notice of appeal dated 19 October 2023.
- [2] On 7 August 2024, the appellant delivered an application for condonation seeking to condone the late noting of its appeal, the late prosecution of its appeal, and the late filing of its heads of argument.
- [3] On 15 August 2024, a day prior to the appeal hearing, the appellant served an application for an adjournment of the appeal to enable it to place all the bundles which were supposed to be part of the appeal record before the court. This application for an adjournment was not filed in court and was brought to the court's attention at the hearing of the appeal by Ms Mathiba, who appeared for the appellant at the appeal hearing. Both applications are opposed by the respondent. Mr Eades, who appeared for the respondent, indicated that the condonation application would be dispositive of the matter.
- [4] When the appeal was called on 16 August 2024, we first heard argument on the application for condonation and the application for an adjournment. Given that the application for an adjournment was not filed in court and for reasons that will become apparent hereinafter, this court dealt with the application for condonation. I may add that, to some extent, the basis for the adjournment overlapped with those of the application for condonation.

- [5] It warrants mentioning at this stage that in the court a quo, the appellant was represented by Mr Andile Thusi, who was instructed by SH & Associates, specifically Ms Harrilal. At the hearing of the appeal, Ms Mathiba appeared, duly instructed by Ms Harrilal of SH & Associates.

Chronology leading up to the appeal hearing

- [6] It is necessary for this court to set out the chronology leading up to 16 August 2024, which formed the background against which the relief had to be considered to determine whether or not condonation ought to be granted.
- [7] The trial in the court a quo proceeded over two days, on 22 May 2023 and 1 June 2023. On 30 June 2023, the presiding magistrate delivered an ex tempore judgment at approximately midday. It is evident from the transcript of the proceedings that the reason for the delay in the handing down of the judgment was due to the fact that the appellant's advocate, Mr Thusi, emailed his heads of argument to the magistrate

at 17h40 the night before. The magistrate only learnt of the heads in the morning when he attended court and was only able to consider them then.

- [8] The delay in the time for the delivery of the judgment was for the presiding magistrate to consider the heads of argument prior to the judgment being handed down. Subsequent to the delivery of the ex tempore judgment and on 6 July 2023, the appellant's attorneys requested reasons. On 7 July 2023, the magistrate responded in terms of rule 51(8) of the Magistrates' Court rules ('MC rule'), in which he indicated that he had nothing further to add and abided by his ex tempore judgement handed down in open court on 30 June 2023.
- [9] Despite this response and the handing down of the ex tempore judgment, on 10 and 11 July 2023, the appellant's attorneys requested a written judgment from the magistrate as well as from the clerk of court. On 14 July 2023, the appellant was directed to obtain a transcript from the clerk of court. On 17 July 2023, Gauteng

Transcribers were requested to transcribe the record. On 18 July 2023 and 10 August 2023, the appellant's attorneys of record wrote to Gauteng Transcribers, following up on the request for the transcript.

- [10] On 11 August 2023, Gauteng Transcribers provided a quotation for the transcript and requested payment. On 8 September 2023, only a portion of the quoted amount was paid to Gauteng Transcribers to obtain the transcript. On 11 September 2023, the attorneys, from their own pocket, paid the balance owing in terms of the quotation. The transcript was received from Gauteng Transcribers on 20 September 2023 and a notice of appeal was filed on 19 October 2023.
- [11] On 27 November 2023, the appellant filed a judgment bundle with the registrar of the KwaZulu-Natal Division of the High Court, Pietermaritzburg relating to the appeal. On the same day, the registrar issued directives relating to the filing of heads of argument. It is

common cause that the appellant's heads of argument were due on 5 February 2024 and were delivered to the appellant's attorneys by counsel on 6 February 2024. Despite this, the heads of argument were only filed on 12 February 2024 and on the same day, the appellant's attorneys filed bundles A and B with the registrar.

- [12] In the interim and on 19 February 2024, the respondent delivered its heads of argument. Therein, it took issue with the late noting of the appeal as well as the late prosecution of the appeal. It also raised concerns about the state of the record filed. Thus, as early as 19 February 2024, the appellant's attorneys were alerted to the fact that the appeal had been prosecuted late and further that the notice of appeal had lapsed.
- [13] Correspondence was exchanged between the parties after the filing of the respondent's heads of argument. On 14 February 2024, the appellant's attorneys wrote to the respondent's attorneys indicating that the only bundles that have been filed were those filed as per counsel's advice, as the only documents the appeal court had to read were those referenced in the heads of argument.
- [14] This was followed up with a further email exchange on 5 and 8 March 2024, in which it was drawn to the attention of the appellant's attorneys that it was their duty to ensure that the court file was in order. The response was that '[w]e have only filed bundles in (as below) required for the Court to read in terms of the appellant's heads of argument as per our Counsel's advices'. Subsequently, on 19 March 2024, the appellant's attorneys filed bundles D and I with the registrar.
- [15] On 25 July 2024, the appellant's attorneys were advised that the bundles were not filed in the court file. Similarly, on 1 August 2024, email correspondence was addressed to the presiding judge's registrar, indicating that the court file was not in order, and that a full record had not been filed in court. The appellant's attorneys requested an opportunity to peruse the court file and rectify the oversight. Access was allowed to the court file and when attempts were made by the appellant's attorneys to file the outstanding bundles, such request was refused. On 8 August 2024, the appellant's attorneys of record attended court and attempted to file the outstanding bundles which constituted the full record. This, similarly, was refused.
- [16] The appellant's attorneys deposed to an affidavit on 7 August 2024. Ms Harrilal sought the condonation and reinstatement of the appeal and indicated that the notice of appeal and the record were not lodged timeously. There is no explanation in the affidavit relating to the actual merits of the matter and the appellant's prospects of success in relation to the appeal.
- [17] She indicated that on 19 October 2023, she lodged a notice of appeal and record at the Verulam Magistrates' Court. She had calculated the dies for the lodging of the notice to appeal from the date of receipt of the transcript of the written judgment by Gauteng Transcribers, being 20 September 2023. She indicated that she was aware that there was an ex tempore judgment delivered on 30 June 2023 and subsequent to this, on 6 July 2023, she requested reasons for the judgment, which she filed at the Verulam Magistrates' Court.

[18] On 7 July 2023, she received an email from the clerk of the civil court, enclosing the MC rule 51(8) notice from the magistrate, indicating that he would abide his judgment and that a judgment was delivered in open court on 30 June 2023. She submitted that at this stage, they had not received a written judgment. A follow-up email was sent on 10 July 2023 to the magistrate requesting

a written judgment, and on 11 July 2023, a request was filed with the Verulam Magistrates' Court for the written judgment. A response was received on 14 July 2023, directing the appellant's attorney to obtain a transcript.

[19] It was on 17 July 2023 that she emailed Gauteng Transcribers requesting the transcript. She completed and emailed the form which had been sent by Gauteng Transcribers. From 18 July 2023 to 10 August 2023, she exchanged email correspondence with Gauteng Transcribers relating to the recordings. A quotation was only received from Gauteng Transcribers on 11 August 2023, and payment was requested. A further delay took place from 11 August 2023 up to and including 8 September 2023, as only a proportion of the amount quoted was paid. The shortfall of R453 was covered by her offices and subsequently paid three days later on 11 September 2023.

[20] Her offices then received the transcript on 20 September 2023, which was then forwarded to counsel with a request for the notice of appeal and condonation application to be drafted. Counsel on brief at the time, Mr Thusi, advised her that a condonation application was not necessary, as they had only received the written judgment of the magistrate on 20 September 2023. On 19 October 2023, approximately a month later, a notice of appeal was served at the Verulam Magistrates' Court. On this day, she was accompanied by counsel and met with the chief magistrate to explain why a condonation application was not needed. The chief magistrate allowed them to file the notice of appeal and pay the security.

[21] She submitted that the appeal was not prosecuted within 60 days of noting it and it lapsed on 19 December

2023. Although they received the directive from the registrar relating to filing of the appellant's heads of argument before 5 February 2024, her offices only received counsel's heads of argument on 6 February 2024, whereafter they were served but only filed in court on 12 February

2024. She considers that the heads of argument are only three days late. It was only when new counsel was brought on board that she was advised that a substantive application for condonation was required to reinstate the appeal and to explain the reasons for the late prosecution of the appeal.

Analysis

- [22] Although a court, in the exercise of its discretion, may find that an appeal has not lapsed, an appellant must demonstrate good cause in order for this to occur. In any application for condonation, such litigant must deal with the following, as quoted in *United Plant Hire (Pty) Ltd v Hills and others*,^[1] namely: the degree of non-compliance with the rules of court and provide an explanation therefore, its prospects of success on appeal, the importance of the matter, the respondent's interest in the finality of the judgment, the convenience of the court, and the avoidance of delay. When dealing with the delay, a litigant must provide an explanation for each period of the delay.
- [23] During argument, Mr Eades referenced *Nawa and others v Marakala and another*,^[2] where the court had to issue a declarator that the appeal had lapsed as a consequence of an applicant's failure to prosecute same. The court took the view that a single judge of the high court had jurisdiction to entertain such an application where the prospects of success of an appeal were not required to be traversed. Such issue does not arise in this matter, as the matter served before the appeal court presided over by two judges. As stated, *Nawa* involved a declaratory order that the appeal had lapsed as the necessary steps were not taken. This matter is similar in that the appellant has not taken the steps necessary to have the matter properly before the appeal court.
- [24] In relation to the fact that the appeal was noted out of time, the following is evident from the chronology and the record filed. On 6 July 2023, four court days after the *ex tempore* judgment was handed down on 30 June 2023, the appellant requested reasons from the magistrate in terms MC rule 51(1). Rule 51(1) allows a party to request a judgment in writing. This was not necessary as a transcript of the proceedings ought to have been requested as an *ex tempore* judgment had been delivered in court. The appellant had knowledge of this. On 7 July 2023, the magistrate had issued a notice in terms of MC rule 51(8) that such notice was not accompanied by a transcript of the written reasons. The magistrate, as well as the clerk of court, indicated that an *ex tempore* judgment had been handed down and the appellant was required to obtain a transcript of the *ex tempore* judgment.
- [25] The transcript was eventually obtained by the appellant on 20 September 2023 and the appeal noted on 19 October
2023. At the time when the appeal was noted, MC rule 51(3) read as follows
- ‘(3) An appeal may be noted within 20 days after the date of a judgment appealed against or within 20 days after the registrar or clerk of the court has supplied a copy of the judgment in writing to the party applying therefor, whichever period shall be the longer.’^[3]

Consequently, the notice of appeal had to be delivered within 20 days after the judgment was delivered or 20 days after the registrar or clerk of court has supplied a copy of the judgment in writing. Having regard to the rule, the 20-day period commenced running on 30 June 2023, the date the judgment was delivered or on a generous interpretation, from the date of the rule 51(8) notice, being 7 July 2023, and consequently the appeal ought to have been noted on 4 August 2023 and not 19 October 2023. Consequently, the noting of the appeal is 32 days late.

[26] If one calculates the dies from the date of the receipt of the transcript of the judgment, the appeal was noted on the 20th day. However, problems arise with that interpretation of the rule in that the appellant was provided with a quotation for the transcript

on 11 August 2023, and only paid for the transcription on 11 September 2023, some 21 court days after the quote had been provided.

The appellant has not indicated or explained the long delay in the noting of the appeal, save that having regard to the application, it appears to lay the blame at the magistrate's door.

[27] A further problem facing the appellant relates to the fact that the appeal itself has lapsed. Even if this court were to be generous to the appellant and to consider that the appeal had been noted timeously, this does not assist the appellant, as the appeal has lapsed. In terms of rule 50(1) of the Uniform Rules of Court, an appeal must be prosecuted within 60 days of the noting of such appeal and unless it is prosecuted within such time frame, it shall 'be deemed to have lapsed'.

[28] Uniform rule 50(4)(a) requires the appellant to apply to the registrar for a date for the hearing of the appeal within 40 days of noting the appeal. Together with the delivery of the application for a hearing date, an appellant is required in terms of Uniform rule 50(7) to lodge two copies of the full record, including the pleadings, evidence, necessary documents and a certificate by an attorney certifying that the record is correct. On receipt of such application from the appellant, in terms of Uniform Rule 50(4)(c), the appeal is deemed to have been duly prosecuted.

[29] If one strictly applies these rules to the present matter, the appellant was required to file the record with the registrar by 14 December 2023, and to prosecute its appeal on or before 17 January 2024. In its attempt to prosecute its appeal, the appellant had only delivered a judgment bundle on 27 November 2023, some 27 days after noting its appeal. The rest of the record was filed as follows: two bundles containing the pleadings and notices, bundles A and B, respectively, on 12 February 2024, some 38 days late; and the plaintiff's trial bundle and a portion of the transcribed record, marked bundles D and I, respectively, on 19 March

2024, some 74 days late.

- [30] What still has not been delivered to complete the record, are the following bundles utilised in the court a quo, namely the discovery bundles, bundle C; the defendant's trial bundle, bundle E; the written closing arguments, bundle F; the respondent's affidavit, bundle G; and the main portion of the transcribed record, bundle H. Consequently, we agree with the submission of Mr Eades that the appellant's appeal cannot be said to have been prosecuted and has lapsed.
- [31] A further complication in the matter is that the respondent, in its heads of argument delivered on 19 February 2024, pertinently raised the issue of the incomplete record with the appellant and also brought to its attention that its appeal had lapsed. Despite delivery and service of the heads of argument on 19 February 2024 and the email correspondence exchanged in the course of February and March 2024, the appellant delayed until 7 August 2024 to institute its application for condonation.
- [32] It is useful at this juncture to recall the remarks of Heher JA in *Uitenhage Transitional Local Council v South African Revenue Service*[4] where he held the following:
- ‘One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.’
- [33] Joubert JA said the following in *Blumenthal and another v Thomson NO and another*: [5]
- ‘This Court has often said that in cases of flagrant breaches of the rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal are; this applies even where the blame lies solely with the attorney (*Tshivhase Royal Council and Another v Tshivhase and Another*; *Tshivhase and Another v Tshivhase and Another* [1992] ZASCA 185; 1992 (4) SA 852 (A) at 859E-F).’
- [34] At the hearing of the matter, I raised with Ms Mathiba the issue of the lack of a proper explanation, as the affidavit does not deal with each and every aspect of the delay and non-compliance with the rules. She submitted that most of the problems were caused as a consequence of the bad advice given by the former counsel in the matter. When I raised concerns about the fact that the blame cannot be laid at the door of counsel only but the attorney also had to bear some responsibility, the response I received was that it was the attorney's first appeal.

[35] In my view, no acceptable explanation has been forthcoming by the appellant's attorneys for the delay. There is no explanation as to why the attorneys did not immediately obtain the transcript of the ex tempore judgment and instead delayed through addressing correspondence back and forth requesting reasons for the judgment. Counsel had been briefed to attend court on 30 June 2023 when the judgment was delivered. There is no proper explanation as to what transpired

between July and August 2023, when correspondence was exchanged requesting the judgment from Gauteng Transcribers.

[36] Any diligent attorney would have known that the transcript had to be requested and would have post-haste attended at the clerk of court to obtain the necessary form, alternatively to liaise with Gauteng Transcribers to obtain the quotation urgently. No explanation is proffered by the attorneys. There is also no explanation, save for the fact that counsel delayed in the filing of the notice of appeal, for the delay from 20 September up to and including 19 October 2023.

[37] In addition, there is no excuse for an attorney not familiarising themselves with the rules of court and taking whatever steps are necessary to ensure that a record is transcribed but also to look at the rules themselves and see what needs to be done in order for a record to be complete. It is all set out in the rules. It is a simple task of familiarising oneself with the rules of court and not solely relying on counsel.

[38] However, the delay in prosecuting this appeal is just one factor to consider. Among the considerations is the appellant's prospects of success on appeal. In *Valor IT v Premier, North West Province and others*[6] the following is stated:

'One of the factors that must be considered whenever condonation is sought is the applicant's prospects of success on the merits. It must be borne in mind that the grant or refusal of condonation is not a mechanical process but one that involves the balancing of often competing factors. So, for instance, very weak prospects of success may not offset a full, complete and satisfactory explanation for a delay; while strong prospects of success may excuse an inadequate explanation for the delay (to a point).'

[39] As already indicated, the appellant has not dealt with its prospects of success on appeal in its affidavits, apart from a bald allegation that it has prospects of success. Despite this, and on the available record, I have considered this aspect and am not convinced that the appellant has any prospects of success on appeal.

[40] Turning now to the request for an adjournment. It is trite that an adjournment is not simply for the asking. Having regard to the

principles set out in *Myburgh Transport v Botha t/a SA Truck Bodies*,^[7] I am not satisfied that the appellant has made out a case entitling it to an adjournment. The application for an adjournment has not been timeously made nor has the true reason for the appellant's unpreparedness been explained. In addition, the respondent has an interest in the finality of the matter and the prejudice cannot be cured by a costs order.

[41] There is simply no basis to come to the assistance of the appellant, as no case has been made out on the papers for condonation to be granted.

Costs

[42] Turning now to the aspect of costs, at the time of argument, this court, given the conduct of the legal representatives, contemplated issuing a rule nisi calling upon the appellant's attorneys of record and former counsel to show cause why they ought not to bear the costs occasioned as a consequence of the appeal having lapsed. These were based on the conduct of the attorneys and the former counsel of the appellant. Among the considerations which informed this view was that it would be unfair to mulct the appellant with additional costs emanating from the lack of diligence of its legal representatives.

[43] Mr Eades, however, discouraged the court from doing so as this would delay the matter and emphasised the respondent's interest in the finality of the matter. In addition he indicated that the issue of costs can be resolved between the attorneys. Similarly, Ms Mathiba also requested the court to refrain from making such an order against the appellants' attorneys and reiterated it was her first appeal. It is most unfortunate that the appellant has to face an adverse costs order.

[44] Whilst I cannot issue such an order initially contemplated without further delaying the proceedings, I trust that the appellant's attorneys and former counsel will not repeat their errors and consider not rendering fees emanating from the appeal. To do so in circumstances where they have not been diligent in prosecuting the appeal would be most unfair to the appellant. Attorneys are also encouraged to familiarise themselves with the relevant rules of court and not solely rely on counsel. One also assumes that counsel are familiar with the rules of court. To the extent they are not or uncertain, counsel are encouraged to seek the advice of senior colleagues.

[45] As the award of costs is a matter of discretion, I have been persuaded that costs ought to follow the result and that they ought to be on a punitive scale.

Order

[46] In the result the following order will issue:

HENRIQUES J

R SINGH AJ

Case Information

Date of Argument: 16 August 2024 Date of Judgment: For the Appellant: Ms Mathiba Instructed by: SH & Associates Suite 19 Storage Unlimited 0 Highdale Road, Glen Anil Durban North Tel: 081 487 3532 Email: law@shandassociates.co.za For Respondent: Mr Eades Instructed by: Larson Falconer Hassan Parsee 93 Richefond Circle Ridgeside Office Park Umhlanga Rocks Tel: 031 534 1600 Email: Tamara.Botha@lfhp.co.za

- [1] United Plant Hire (Pty) Ltd v Hills and others 1976 (1) SA 717 (A) at 720E-G.
- [2] Nawa and others v Marakala and another 2008
- (5) SA 275 (BH).
- [3] MC rule 51(3) was amended by GN R4476, GG 50272, 8 March 2024, with effect from 12 April 2024.
- [4] Uitenhage Transitional Local Council v South African Revenue Service 2004
- (1) SA 292 (SCA) para 6.
- [5] Blumenthal and another v Thomson NO and another [1993] ZASCA 190; 1994
- (2) SA 118 (A) at 121I.
- [6] Valor IT v Premier, North West Province and others
- [2020] ZASCA 62; 2021 (1) SA 42 (SCA) para 38.
- [7] Myburgh Transport v Botha t/a SA Truck Bodies 1991
- (3) SA 310 (Nm).

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