Reportable 20/98

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NUMBER: 25/96

In the matter between:

OMAR DARRIES APPELLANT

and

THE SHERIFF OF THE MAGISTRATES' COURT, WYNBERG 1st RESPONDENT

GLEN RICHARD KANNEMEYER 2nd RESPONDENT

CORAM: **HEFER, EKSTEEN, OLIVIER, PLEWMAN JJA and MELUNSKY AJA**

DATE OF HEARING: **17 MARCH 1998**

REASONS: **25 MARCH 1998**

REASONS FOR ORDER

PLEWMAN JA

The petitioner's applications for condonation of the late filing of the notice of appeal, of the late filing of a power of attorney and of the late furnishing of security were dismissed with costs on 17 March 1998. In so ordering the Court also ordered that such costs include the respondents' costs on appeal and of such costs the costs of the applications for condonation were to be paid by appellant's attorneys, Papier Charles and Associates, *de bonis propriis*. It was intimated that the Court's reasons would be furnished later. These reasons now follow.

A brief reference to the facts of the case must be made. Appellant is a cabinet maker. He conducted his business from hired premises. In 1991 he fell into arrear with his rent. He also fell into debt. Judgments were granted against him in the Wynberg Magistrates' Court in respect of his debt and for his ejectment from the leased premises - a factory.

The respondents are the Sheriff and Deputy Sheriff respectively

for the area. In August 1991 the clerk of the court, pursuant to the judgments, issued (a) a warrant of execution authorising the seizure of sufficient property of appellant to satisfy the judgment debt of some R16 449,20 and (b) a warrant of ejectment. The warrant of ejectment authorised and requested the sheriff to put the plaintiff in the ejectment proceedings into possession of the premises described in the warrant as Factory No 3, Protea Road, Phillipi. It was common cause that the warrants were validly and properly issued. On 15 and 16 August 1991 the second respondent (to whom I will refer simply as "the sheriff") proceeded to execute both warrants. He found the factory unattended and locked. It was one of several factories in a complex. The complex was sited in what is described as a compound. It was surrounded by a security fence and access was obtained via a gate in the security fence. The sheriff, since he found no one in charge of the factory, had to break the door lock to gain access to the factory. He laid under attachment under the warrant of execution and removed

from the premises to his own warehouse for storage pending the sale thereof a large number of articles of equipment and machinery in order to satisfy the judgment debt. What remained of appellant's belongings he deposited outside the factory and some ten or fifteen meters from the main door but within the compound. The litigation related to goods other than those placed under attachment in execution. Certain of these (so it was alleged) were removed by "... persons whose identities (were) to the (appellant) unknown".

The claim, in essence, was founded upon an allegation that the sheriff "...by permitting the aforesaid other unknown persons to remove some of the said goods acted unlawfully and wilfully alternatively negligently in the execution of his duties as deputy sheriff". At the close of the evidence of both parties Motala AJ ordered absolution from the instance and awarded respondents their costs. On 12 December 1995 leave to appeal to this Court was granted.

Appellant was at all times represented by Mr Charles of the firm referred to above. He failed to prosecute the appeal in accordance with the procedure prescribed by the rules of this Court. This resulted in appellant filing three (separate) petitions seeking orders condoning the failure to comply with the rules I now discuss.

The first rule with which the Court is concerned is Rule 5(1) - which obliged appellant to lodge a notice of appeal, within 20 days of the order granting leave to appeal, in which it was stated whether the whole or part only of the judgment was appealed against and, if part only, then what part. This period, extended because of public holidays, elapsed (at the latest) on 11 January 1996. The notice of appeal was actually lodged on 22 January 1996 - some 11 days late. The petition for condonation was filed on 30 January 1996.

The next is Rule 5(3)(b). This obliged the attorney representing the appellant to lodge with the registrar a power of attorney, authorising him to prosecute the appeal, within 20 days of the lodging

the notice of appeal. This 20 day period elapsed (at the latest) on 9 February 1996. The date upon which the power of attorney was actually lodged with this Court does not appear from the petition but it was only signed in Cape Town on 27 February 1996. The petition was filed on 6 March 1996.

The third rule with which the Court is concerned is Rule 6(2). This must be read with Rule 5(4). Rule 5(4) obliged the appellant after the appeal had been noted, to lodge with the registrar six copies of the record of the proceedings in the court appealed from within three months of the date of the order granting leave to appeal (a period which could be extended by an agreement in writing with the other parties). The registrar's date stamp on the record is 6 May 1996. I will accept this as the date of the lodging of the record. It appears from the court file (though there is no mention of the fact in the affidavits filed in support of the petitions) that the explanation for what would otherwise have been late filing is to be found in an

agreement between the parties to extend the period. Rule 6(2) obliges an appellant before lodging the record with the registrar to enter into good and sufficient security for the respondents' costs of appeal. This means that security had to be provided (at the latest) by 6 June 1996. Security (in an unusual form which has, however, not been questioned by respondents) was in fact lodged on 27 August 1996. The petition for condonation of this delay was filed on 3 October 1996.

The petitions are in a standard or like form. In each case the supporting affidavit is attested to by appellant's attorney, R Charles. This firm's letterhead shows that the firm has two partners and two professional assistants.

Although there appears to have been no reaction to the first two petitions by respondents the third provoked opposition and led to the filing of an opposing affidavit by respondents' attorney to which is annexed correspondence which passed between the attorneys' firms. In the affidavit in support of the third petition (attested to on 9

October 1996) appellant's attorney incorporated by reference his affidavit in support of the first petition. This led the respondents' attorney to deal with the facts stated in all three petitions. In no case did the appellant himself depose to a supporting affidavit. Nor did Mr Charles file (or tender) a replying affidavit in any of the cases.

The number of petitions for condonation of failure to comply with the rules of this Court, particularly in recent times, is a matter for grave concern. The reported decisions show that the circumstances which have led to the need for applications for condonation of breaches of the rules have varied widely. But the factors which weigh with the Court are factors which have been consistently applied and frequently restated. See *Federated Employers Fire and General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A) at 362 F-H; *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720 E-G.

I will content myself with referring, for present purposes, only

to factors which the circumstances of this case suggest should be repeated. Condonation of the non-observance of the Rules of this Court is not a mere formality (see *Meintjies v H D Combrinck (Edms) Bpk* 1961 (1) SA 262 (A) 263H-264B; *Saloojee and Another NN.O. v Minister of Community Development* 1965 (2) SA 135 (A) 138 E-F. In all cases some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a rule of court apply for condonation as soon as possible. See *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449 F-H; *Meintjies's* case, *supra*, at 264 B; *Saloojee's* case, *supra*, at 138 H. Nor should it simply be assumed that where non- compliance was due entirely to the neglect of the appellant's attorney that condonation will be granted. See *Saloojee's* case, *supra*, at 141 B-G. In applications of this sort the appellants' prospects of success are in general an

important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the court to assess the appellant's prospects of success. See *Meintjies's* case, *supra,* at 265 C-E; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131 E-F; *Moraliswani v Mamili* 1989 (4) SA 1 (A) at 10 E. But appellant's prospect of success is but one of the factors relevant to the exercise of the court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be. See *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281 J - 282 A; *Moraliswani v Mamili, supra,* at 10 F; *Rennie v Kamby Farms (Pty) Ltd, supra,* at 131 H; *Blumenthal and Another v Thomson NO and Another* 1994 (2) SA 118 (A) at 121 I -

122 B.

I turn to the petitions. Appellant's attorney does not in the three affidavits attested to by him assert that he was unacquainted with the rules. In relation to the petition for condonation of the late filing of the notice of appeal (surely the most fundamental and elementary requirement relating to the prosecution of an appeal) he says as follows:

> "I discussed (the appeal) with the advocate who had, to that date dealt with the matter Advocate S.S. Majiedt, and assumed that he would prepare the Notice of Appeal for timeous lodging." (My underlining.)

He goes on to recount that he "misunderstood Advocate Majiedt as he was not able to attend to the matter as he was giving up practise". This "misunderstanding" he says was compounded by "the fact that his (that is the attorney's) office was closed for the Christmas and New Year holidays and only re-opened on 12 January". The explanation tendered is as bald as the above extracts suggest. There