REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: A5019/09

In the matter between:

THE ROAD ACCIDENT FUND Applicant

and

RAMALEBANA MOSES Respondent

J U D G M E N T

KATHREE-SETILOANE, AJ:

[1] This is an application for reinstatement of a lapsed appeal. The applicant (the Road Accident Fund) was the unsuccessful defendant in an action for damages, brought by the respondent against it, for injuries sustained by the respondent's minor child who was a victim of a motor vehicle

collision, which occurred on 10 November 2003. The Court *a quo* (Coetzee AJ) granted judgment for the respondent, on 25 March 2009, in the amount of R3 356 564, 00 plus interest thereon at the rate of 15, 5% per annum from date of judgment to date of payment.

[2] The applicant brought an application for leave to appeal and, on 22 May 2009, Coetzee AJ granted leave to appeal to the Full Bench of this Division. The applicant delivered its notice of appeal on 22 June 2009, but failed to make written application to the Registrar for a date for the hearing of the appeal within 60 days of delivery of the notice of appeal, and the appeal lapsed on 15 September 2009. The applicant then brought the application for reinstatement of the lapsed appeal a full month after this date.

[3] Rule 49(6)(a) of the Uniform Rules of Court ("*the Rules*") provides that within 60 days after delivery of a notice of appeal, the appellant must make written application to the Registrar for a date for the hearing of that appeal, and if no such application is made, the appeal will be deemed to have lapsed. Rule 49(6) (b) of the Rules, in turn, provides that the court to which the appeal is made may, on application and upon good cause shown, reinstate a lapsed appeal. This is the relief which is sought by the applicant in this application.

[4] In *United Plant Hire v Hills* 1976 (1) SA 717 (A), the Appellate Division, in considering the factors that a court will look at in an application for reinstatement of a lapsed appeal, stated (at 720F-G) that:

> "*It is well settled that, in considering the application for condonation, the court has discretion, to be exercised judicially upon a consideration of all the facts; and that in essence it is a question of fairness to both sides. In this inquiry, relevant considerations may include the degree of non-compliance with the rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent's interests in the finality of the judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.*
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> *These factors are not individually decisive but are inter-related and must be weighed one against the other; Thus a slight delay and a good explanation may be held to compensate for prospects of success which are not strong.*"

[5] The applicant's explanation for the lapsed appeal is set out in an affidavit deposed to by its attorney, Ms Nompumelelo Portia Banda ("*Ms Banda*") of the firm Mabunda Incorporated. Ms Banda explains that in anticipation of the application for leave to appeal being successful she applied for a trial record, on 23 April 2009, and was furnished with a quotation from LOM (Pty) Ltd ("*LOM*"). In mid-May she was furnished with a partial record of the trial, the last two days having been omitted. She then requested a complete record from LOM. LOM subsequently advised her that they had found records that might relate to the last two days of the trial, and requested her to visit their office in order to review the proceedings, which she did.

[6] On her visit to the LOM office, she was informed that the person dealing with the transcripts was not in. She then returned to the LOM offices on 22 May 2009, the day that the application for leave to appeal was heard, but was advised that the person dealing with the transcript was again not in.

She then made repeated calls to LOM requesting the missing portions of the record, and visited their offices for the last time on 22 June 2009, but to no avail.

[7] While waiting for the appeal record, however, she did not apply for a date for the hearing of the appeal as she was under the mistaken and *bona fide* belief that it was impermissible for her to apply for an appeal date until she was in a position to file two copies of the complete record, and that the appeal would not lapse until the full record was available. She was apparently also unaware of Rules 49(7)(a)(i) and (ii) of the Rules in terms of which the Registrar may accept an application for a date for the hearing of the appeal, where copies of the record are not ready at that stage provided that:

> 7.1 the application is accompanied by a written agreement between the parties that the copies of the record may be handed in late; or
>
> 7.2 failing such agreement, the appellant delivers an application together with an affidavit in which the reasons for his or her omission to hand in the copies of the record in time are set out, and in which is indicated that an application for condonation of the omission will be made at the hearing of the appeal.

[8] The appeal had in the meantime lapsed on 15 September 2009, but Ms Banda only became aware of this on 2 October 2009 when advised by the

respondent's attorney in a letter of the same date. She concedes that she is at fault, and asks this Court not to punish the applicant for her ignorance of the Rules as the applicant intended, at all times, to prosecute the appeal.

[9] Mr Ancer, appearing on behalf of the respondent, contended that the explanation given by the applicant is both weak and bereft of sufficient detail as it fails to provide an explanation for what occurred between 22 June 2009, the last time that Ms Banda contacted LOM, and 2 October 2009, the date on which she received a letter from the respondent's attorney advising her that they were awaiting payment as the appeal had lapsed.

[10] There is much force in Mr Ancer's contention that in the absence of a reasonable explanation for what occurred during this three and a half month period, the only inference to be drawn is that the applicant's attorney did nothing to further the finalisation of the appeal, and was thereafter grossly negligent. Insofar as Ms Banda claims that she is solely at blame and that the applicant should not be penalised for her ignorance of the Rules, our courts have held that whilst an applicant should not be prejudiced by his or her attorney's incompetence, there is a limit beyond which a litigant cannot escape the results of his or her attorney's lack of diligence or insufficiency of explanation tendered. (*Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141C-E). In *Saloojee (supra)* Steyn CJ pointed out that:

> "*To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations ad misericordian should not*

> *be allowed to become an invitation to laxity. In fact this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of the failure to comply with the Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.*"

[11] Similarly, culpable inactivity or ignorance of the rules by an attorney has been held, by our courts, to be insufficient ground for either the grant of condonation or reinstatement (*P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799B-H; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131I-J; *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281G-282A; *Blumenthal and Another v Thomson NO and Another* 1994 (2) SA 118 (A) at 121C-122C; *Aymac CC v Widgerow* 2009 (6) SA 433 (WLD) at para [39]).

[12] Now although Ms Banda candidly confessed her ignorance in relation to the prosecution of an appeal, she was, nonetheless, under a duty as the applicant's attorney to acquaint herself with the relevant Rules of this Court (*Moaki v Reckitt and Colman (Africa) Ltd and Another* 1968 (3) SA 98 (A) at 101G-H; *Kgobane and Another v Minister of Justice and Another* 1969 (3) SA 365 (A) at 369 *in fin* to 370A; *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 685A. It is also well settled that whenever an applicant realises that he or she has not complied with a Rule, he or she should apply for condonation without delay (*Rennie v Kamby (Pty) Ltd* 1989 (2) SA 124 (A) at 129F-G; *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281D-

E. This notwithstanding, Ms Banda waited for almost a full month before applying for reinstatement of the lapsed appeal, and for this delay there is no explanation.

[13] Our courts have also consistently held that the interest of the other party in the finality of the matter is a further reason why condonation or reinstatement in the face of flagrant and gross breaches of the Rules should not be granted. Holmes J in *Federated Employers Fire and General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A) thus observed (at 363A):

> "*The late filing of a notice of appeal particularly affects the respondent's interest in the finality of his judgment - the time for noting an appeal having elapsed, he is prima facie entitled to adjust his affairs on the footing that his judgment is safe; see Cairns' Executors v Gaarn , 1912 AD 181 at p. 193, in which SOLOMON, J.A., said:*
>
> > *'After all the object of the Rule is to put an end to litigation and to let parties know where they stand.'*"

[14] The attorney is the representative who the litigant chooses for himself or herself. This is particularly so in the case of the applicant, which is a public entity seized with vast amounts of public funds that need to be protected and dispensed of properly. It thus goes through a careful selection process when choosing a panel of attorneys, to which it gives its work exclusively. In the circumstances, there is little reason for the applicant to be absolved from the consequences of such a relationship, when that attorney acts in flagrant breach of the Rules. Our courts have often said that in cases of flagrant breaches of the Rules, particularly where there is no acceptable explanation

for such non-compliance, 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 (*Blumenthal and Another v Thomson NO and Another* 1994 (2) SA 118 (A) at 121I-J; *Tshivhase Royal Council and Another v Tshivhase and Another; Tshivhase and Another v Tshivhase and Another* 1992 (4) SA 852 (A) at 859E-F.

[15] It is important to point out, in this regard, that the applicant's failure is not confined only to its non-compliance with Rule 49(6) (a) of the Rules, but extends, *inter alia*, to a failure to:

15.1 furnish a proper record as required in terms of Rule 49(7)(a) of the Rules as the record furnished does not contain any exhibits in the case and, in particular, none of the medico-legal reports of the expert witnesses;

15.2 comply with Rules 59(8) (a) and (b) of the Rules as the record was not bound but furnished in loose pages;

15.3 comply with Rule 49(5)(15) of the Rules as it has failed to furnish its heads of argument which were due, not later than 15 days before the hearing of the appeal, on 23 April 2010; and

15.4 comply with the requirements of Chapter 7, paragraph 7, of this Court's Practice Manual, which provides that simultaneously with the filing of heads of argument, counsel shall file a practice note.

[16] On 9 April 2010, the respondent's attorney sent a letter to the appellant's attorney advising of the inadequate and improper record to which the applicant did not reply. It is a serious criticism of the applicant's attorney that even after being advised by the respondent's attorney of the inadequate and improper record, her neglect of the observance of the Rules was persisted in, and she did nothing to remedy the situation. Likewise, on 10 May 2010, the secretary to my brother Lamont J enquired from the applicant's attorney whether the applicant's heads of argument were available. It was only at this stage that the applicant's attorneys decided to brief counsel in order to prepare the heads of argument, albeit that they were already hopelessly out of time.

[17] It now emerges, from the affidavit of Mr Bloem, an attorney at Mabunda Incorporated, that he only became aware of the reinstatement application on or about 3 May 2010, and after Ms Banda had left the employ of Mabunda Incorporated. Apparently Ms Banda had left the employ of Mabunda Incorporated on 30 April 2010, and had left the file for his attention with an undated note requesting him to "*deal*" with the matter. What is, however, conveniently not explained in Mr Bloem's affidavit is why, and if Ms Banda

only left the employ of Mabunda Incorporated on 30 April 2010, the heads of argument were not filed on 23 April 2010, as required in terms of the Rule.

[18] Despite Mr Bloem having briefed counsel on 10 May 2010, the heads of argument were only handed up to this Court, on 17 May 2010, at the hearing of the application for reinstatement of the lapsed appeal.

[19] The applicant's problems do not, however, end here, as will become apparent from an assessment of the applicant's prospects of success in the appeal. Here, again, the application is defective. Our courts have often stated that where application is made for reinstatement of a lapsed appeal, it is advisable, more particularly, as in this case, where the explanation for the lapsed appeal is palpably wanting, that the applicant should set out briefly and succinctly such essential information as may enable the court to assess the applicant's prospects of success (*Meintjies v H D Combrinck (Edms) Bpk* 1961 (1) SA 262 (A) at 265C; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131D-G). The sole averment made in this respect, which is to be found in the applicant's affidavit supporting its application for reinstatement, is that the "*applicant has an excellent prospect of success on appeal*".

[20] In *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131G-J, which concerned an application for condonation of the late filing of a record on appeal, Hoexter JA observed (at 131G-J) as follows:

> "*In applications of this sort the prospects of success are in general an important, although not decisive, consideration. It has been pointed out (Finbrow Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein, and Others 1985 (4) SA 773 (A) at 789C) that the Court is bound to make an assessment of the petitioner's prospects of success as 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. It seems to me that in the instant case the cumulative effect of the factors which I have summarised in paras [1]-[5] above is by itself sufficient to render the application unworthy of consideration; and that this is a case in which the court should refuse the application irrespective of the prospects of success.*"

[21] Now although, in view of the cumulative effect of the applicant's flagrant and gross breaches of the Rules, it would be unnecessary to make an assessment of the applicant's prospects of success on appeal I, nevertheless, do so in order to illustrate that the appeal served no other purpose than to frustrate the legitimate claim of the plaintiff to compensation for wrongful injury, to his minor child, caused by the driver of the insured vehicle.

[22] The applicant's primary ground of appeal is that Coetzee AJ erred in concluding that the minor child sustained a head injury from the collision as: Ms Adan, the plaintiff's neuropsychologist, was not an expert to make such a diagnosis; she drew conclusions that were not within her field of expertise; in diagnosing the head injury she depended on the medico-legal report of the neurosurgeon who did not give evidence, and whose report was not admitted into evidence; and there was no evidence by a neurosurgeon to confirm her diagnosis of a head injury.

[23] A glaring and obvious omission by the applicant during the trial was that the applicant's counsel did not, in cross-examination, put to any witness of the respondent that the minor child had not sustained a head injury in the collision. This was, therefore, never an issue between the parties. The applicant's criticism of Ms Adan's ability and expertise to testify, as she did, was also left unchallenged in cross-examination, thus causing Coetzee AJ, at the end of the applicant's cross-examination of Ms Adan, to alert the applicant's counsel to her failure to challenge Ms Adan's evidence and to the consequences thereof as enunciated, by the Constitutional Court, in *President of the Republic of South Africa v South African Football Union and Others* 2000 (1) SA 1 (CC) at paras [61] to [64] as follows:

> "*The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct.*"

[24] A further difficulty impediment to the applicant's contention is that the evidence of Dr Harmse (the Industrial Psychologist), the sole witness to testify for the applicant, was that the minor child had sustained a head injury in the collision. In the circumstances, I am satisfied that the applicant has no prospects of success on appeal.

[25] Now quite apart from the fact that no reasonable explanation is proffered by the applicant for the lapsed appeal, and that it has no prospects of success on appeal, the matter is also not one of particular importance to the applicant. Whilst the appellant is a public entity seized with vast amounts of public funds that need to be protected and dispensed of properly, in the broader scheme, the amount of money awarded to the respondent, though substantial when viewed from the perspective of the needs of the respondent and his minor child, is not a substantial amount to the applicant. The minor child's very existence is at risk if she does not receive the compensation, which she is entitled to without delay. She should, therefore, not have to wait for the conclusion of an appeal that has no prospects of success. Her interest in the finality of the judgment, accordingly, far outweighs that of the applicant.

[26] The applicant is an organ of state established by section 2 of the Road Accident Fund Act 56 of 1996 ("*the Act*"). Its object is to pay compensation in accordance with the Act for loss or damage wrongfully caused by the wrongdoing of drivers of motor vehicles. The role of the applicant is to re-integrate victims of road accidents into society from a health and economic perspective, and to protect wrongdoers and their families from financial ruin. The applicant does this by paying the medical and related costs which are required to restore the accident victims to health, compensating the victims or their families for loss of income or support as a result of the accident, and indemnifying the wrongdoer from liability. In addition, it pays general damages to accident victims, which represent compensation for pain and suffering, loss of amenities of life, disability and disfigurement, as well as funeral costs to

families in circumstances where the victim of the accident sustains fatal injuries.

[27] Accordingly, where the loss or damage is proved, the claimant is entitled to be compensated without delay. However, despite failing to adduce expert evidence to counter the testimony of the respondent's experts, and to challenge core aspects of the respondent's case, the applicant has sought to appeal the judgment of Coetzee AJ on grounds that are frivolous and directed at frustrating the legitimate claim of the plaintiff. Not only does conduct of this nature lead to a waste of public funds, but it is also inconsistent with the applicant's constitutional obligations to act diligently, and in a manner that ensures that the rights of the respondent and his minor child to receive compensation are realised without delay (*Mlatsheni v Road Accident Fund* 2009 (2) SA 401 (ECD) at 405G-406J).

[28] The indifference of the applicant, to the rights of the respondent and his minor child, is exacerbated by the ineptness and incompetence of the attorney tasked with prosecuting the appeal. Although regrettable, this conduct should not be allowed to recur. In the circumstances, I order that a copy of this judgment be served upon the Chairperson of the Board of the applicant so that appropriate action can be taken against Ms Banda, and that the relevant officials of the applicant be instructed to assess the grounds for appealing judgments against the applicant more conscientiously and diligently so as to prevent the indifference, which has been displayed by the applicant and its

attorney toward the rights of the respondent and his minor child to receive compensation without delay.

[29] In the circumstances, the applicant's application for reinstatement of the lapsed appeal fails. In view of the conclusion that I have arrived at in respect to the reinstatement application, it is unnecessary to make a finding on the applicant's application for condonation of the late delivery of its heads of argument in the appeal.

[30] In the result the following order is made:

The application for reinstatement is dismissed with costs, which costs shall include the costs of the appeal.

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F KATHREE-SETILOANE
ACTING JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree:

_____

P BORUCHOWITZ
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree:

_____

C G LAMONT
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

COUNSEL FOR THE APPLICANT	MR F SAINT
APPLICANT'S ATTORNEYS	MABUNDA INCORPORATED
COUNSEL FOR THE RESPONDENT	MR B ANCER SC
RESPONDENT'S ATTORNEYS	NOKUFA NELUHENI ATTORNEYS
DATE OF HEARING	17 MAY 2010
DATE OF JUDGMENT	25 JUNE 2010