



SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 14 December 2021

STATUS Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

The Chairperson of the North West Gambling Board & 1 Other v Sun International (SA) Ltd (1214/2019) [2021] ZASCA 176 (14 December 2021)

Today the Supreme Court of Appeal (SCA) gave reasons for the order which it made on 5 November 2021. On that day, the Court dismissed the appellants' applications for condonation for the late filing of the record of appeal and the application for the late filing of the heads of argument. The main matter was struck off the roll with costs.

The merits of the appeal concerned a dispute between the appellants, the Chairperson of the North West Gambling Board and the North West Gambling Board and the respondent, Sun International (SA) Limited over whether Free Play, which was a credit given by the respondent to its most valuable customers, ought to be included or excluded from the calculation of gross gaming revenue. The appeal was against the order of the North West Division of the High Court, which had found that the Free Play credit should be excluded from the calculation of gross gaming revenue.

The Court had first to decide on two applications for condonation brought by the appellants. They related, firstly, to their failure to file the record of appeal timeously, and secondly, to the late filing of the heads of argument, practice note and certificate in terms of Rule 10 of the SCA's Rules (the Rules), six months after they were due. It

was common cause that the appeal had lapsed upon the failure of the appellants to file the record on the extended date of 14 April 2020. The appellants thus sought condonation in respect of both breaches of the Rules, as well as the reinstatement of the appeal.

In terms of Rule 8(1) of the Rules, an appellant is required to lodge with the Registrar six copies of the record of the proceedings in the court below within three months of the lodging of the notice of appeal. Rule 8(3) provides that if the record is not lodged within the period prescribed by Rule 8(1), or an extended period in terms of Rule 8(2), the appeal shall lapse.

Rule 10 provides that heads of argument must be filed within six weeks from the lodging of the record; if the appellant fails to lodge heads of argument within the prescribed period or within the extended period, the appeal shall lapse.

The appellants served their notice of appeal on 13 November 2019. The appeal record was thus required to be lodged by 13 March 2020. The appellants' attorney stated that, although they had arranged for the documents to be couriered to Bloemfontein on 11 March 2020, they were only received on 13 March 2020. The attorneys were unable to bind and deliver the record to the court timeously. The Registrar granted an extension until 14 April 2020 for the record to be filed, failing which the appeal would lapse.

The appellants' attorney then referred to the Covid-19 lockdown, which was announced on 23 March 2020 and commenced on 26 March 2020, which made it impossible to travel over provincial boundaries, in order to file the record. This explanation was unconvincing, as Ms Makhetha was based in Bloemfontein and did not have to travel over any provincial boundaries and the office of the Registrar was open throughout this period.

Level 4 lockdown was announced on 3 May 2020. On the following day, the record was filed, but there was no application for condonation. The application for condonation for the late filing of the record was filed on 21 May 2020. No further

communication was addressed to the respondent or the Registrar, who informed the appellants' attorney in September 2020 that the appeal had lapsed.

On 21 December 2020 – some seven months after the application for condonation was filed - the heads of argument and the further application for condonation were filed. The appellants' attorneys claimed that they had held the matter in abeyance as there were similar matters in other courts (all of which had found against the appellants), including a matter in the Western Cape High Court. They were waiting for the leave to appeal application to be decided upon in the Western Cape matter, which they believed, if granted, should be heard together with the present matter. The appellants' attorneys did not inform the Registrar or the respondent of its unilateral decision to hold the matter in abeyance. It did not ask for an extension based upon this reasoning that there should be a consolidation of the matters in this Court.

The court discussed the various factors that come into play in order to obtain condonation. These include 'the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice' (per Ponnau JA in *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] ZASCA 5; [2013] 2 All SA 251 (SCA) para 11.

The appellants' dilatory conduct was exacerbated by its failure to apply for condonation as soon as reasonably possible. It waited until 21 December 2020 to file such an application.

The appellants blatantly failed to comply with the Rules of Court in virtually every instance. They were late in seeking leave to appeal from the High Court, in seeking a postponement of the application for leave to appeal, in filing its heads of argument and a replying affidavit in the application for condonation before the High Court, in filing the record of appeal in the SCA, and six months late in filing its heads of argument and application for condonation in this Court. Their explanations for each of these delays were wholly unsatisfactory. The appellants displayed a blatant disregard for the Rules and the administration of justice.

The Court held that, even assuming that the appellants had good prospects of success on appeal, the non-observance of the Rules, on virtually every occasion had been so flagrant that the applications for condonation should not be granted and the appeal was struck off the roll with costs.