THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 432/07

In the matter between:

KHOLISILE MANTSHA **APPELLANT**

v

THE STATE **RESPONDENT**

Neutral citation: *Mantsha v The State* (432/2007) [2008] ZASCA 121 (26 September 2008)

Coram: Heher JA, Jafta JA et Maya JA

Heard: 15 September 2008

Delivered: 26 September 2008

Summary: Appeal against refusal of condonation for failing to lodge an appeal timeously – requirements therefor and grounds on which the appeal court will interfere.

ORDER

On appeal from: Cape High Court (Thring J and Irish AJ sitting as the appeal court)

(1) The appeal is dismissed.

JUDGMENT

JAFTA JA (HEHER JA and MAYA JA concurring)

[1] In June 1998 the appellant was convicted of various offences in the regional court and on 7 August he was sentenced to an effective 15 years' imprisonment. Immediately after sentencing he indicated to the presiding magistrate that he wished to lodge an appeal. He was advised to approach the Legal Aid Board for legal assistance. On 29 August 1998 an attorney – Mr Lloyd Fortuin – was appointed to represent him. But Fortuin took no steps towards the prosecution of the appeal.

[2] On 10 September 2002 the appellant – acting in person – sent a notice of appeal to the clerk of the court. As the lodging of his appeal was late by more than four years, the appellant also filed an 'application for condonation'. Meanwhile the record of his trial and the tapes on which the proceedings were recorded had been lost in the regional court at an unknown date. The presiding magistrate's notes also could not be traced.

As a result the record could not be reconstructed.

[3] The appellant's application for condonation was heard by the Cape High Court in 2005. Thring J (Irish AJ concurring) dismissed it on the basis that the explanation given for the delay was unsatisfactory and inadequate. The matter was struck off the roll. The present appeal is against that order and as it was not necessary the appellant did not seek leave of the court below[1].

[4] Although the appellant was represented by an attorney at the hearing of the condonation application in the court below, the document setting out the explanation for the delay was drafted by the appellant himself. His attorney was content to argue the matter on the basis of papers drawn by the appellant without supplementing or amending them.

[5] In terms of Rule 67 (1) of the Magistrate's Court rules as it then read, the appellant ought to have lodged his notice of appeal within 14 days from the date on which he was sentenced[2]. As the appellant was seeking an indulgence, he was required to show good cause for condonation to be granted. Good (or sufficient) cause has two requirements. The first is that the applicant must furnish a satisfactory and acceptable explanation for the delay. Secondly, he or she must show that he or she has reasonable prospects of success on the merits of the appeal.

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[1] *S v Gopal* 1993 (2) SACR 584 (SA); *S v Leon* 1996 (1) SACR 671 (A) and *S v Mohlathe* 2000 (2) SACR 530 (SCA).

[2] Rule 67 (1) then provided: 'A convicted person desiring to appeal under section 103 (1) of the Act shall within 14 days after the date of conviction, sentence or order in question, lodge with the clerk of the court a notice of appeal in writing in which he shall set out clearly and specifically the grounds, whether of fact or law or both fact and law, on which the appeal is based.'

[6] In this matter the appellant's application did not deal with prospects of success on the merits of his conviction and sentence. As regards the delay he furnished the following explanation:

'On the 10 August 1998 I applied for Legal Aid in Athlone Justice Centre. On the 29 August 1998 Mr Lloyd Fortuin was appointed as my legal representative. He consulted with me as soon as he was appointed to inform me about his duty. He told me that he was appointed to represent me on the appeal itself, he is also investigating the chances of appealing the case. Mr Fortuin came to me on the 17 January 2002 that he will be closing the file of my appeal temporally because the legal aid failed to honour its agreement of paying for his services on this matter. He wishes that I will persue the legal aid personally to honour its promises. He also told me that yes he wishes to do the appeal after developing a relationship between us, as we have been corresponding for more than 3 years. But my duty was to persue legal aid.
He also told me about the recommendations. He was to make to the Legal Aid Board. He never mentioned to me that he was only appointed only to investigate the chances of the appeal. I was led to believe I had a lawyer for my appeal. I came to understand that when the clerk of the court in Wynberg court wrote me a letter telling me that I have to note an appeal and condonation. The clerk of the court Miss S Francke told me that Mr Fortuin was only appointed to investigate that letter came to me on the 9 October 2002.
Eversince 1998 I have been writing to numerous government departments seeking legal advice in order to persue my appeal but all of them kept referring me to one office, the Athlone Justice Centre for assistance. That office to me is of no assistance. On the 2 July 2002 Ms Desai who is the senior executive at Justice Centre wrote me a letter and said I do not qualify for legal aid as I have served more than six months of my sentence and that is according to the guide policy of 2002 Legal Aid paragraph 3.1.2.8. I fail to understand that because I applied 3 days after my sentence and it is a failure within their office not to speed up my process.'

[7] The above explanation was not contained in a sworn statement or affidavit. It was set out in a document titled 'notice of condonation'. The

court below was willing to overlook the procedural imperfection and made allowance for the fact that the document was drawn by the appellant himself. Guided by considerations such as the length of the delay, the explanation therefor and the prospects of success on the merits, the court a quo found that the delay was inordinately long and that non-compliance with Rule 67 (1) was gross.

[8] The court below assessed the explanation given by the appellant in the context of his right to appeal entrenched in s 35 of the Constitution. Applying the principle of fairness to both the appellant and the State, the court below concluded that in the absence of a satisfactory explanation, condonation ought to be refused. The court reasoned thus:

'The longer the delay, generally speaking, the more reluctant will a court of appeal be to condone it and the more persuasive will the explanation for the delay have to be before condonation can be granted. In this case the explanation is, in my view, far from satisfactory or persuasive. In fact, in my opinion it is totally inadequate.'

[9] This court has a restricted power of interference with the decision of a court a quo in relation to a condonation application. It must be persuaded that that court did not exercise a judicial discretion.[3] In *Mabaso v Law Society, Northern Provinces and Another*[4], the Constitutional Court succinctly outlined the test in the following terms:

'The Rules of [the Supreme Court of Appeal] provide that it may condone the failure to comply with its Rules, and condonation will ordinarily be granted when sufficient cause is shown. It is trite law that a court considering whether or not to grant condonation exercises a discretion. The discretion must, of course, be exercised judicially on a consideration of all the facts and "in essence it is a matter of fairness to

[3] In the sense discussed in *S v Leon* 1996 (1) SACR 671 (A) at 673b-h; see also *S v Basson* 2007 (3) SA 582 (CC) at paras 110-111.
[4] 2005 (2) SA 117 (CC) para 20.

both sides". It is clear that the SCA may decide an application for condonation without considering the merits of the case, though it does so only where there is a gross and flagrant failure to comply with its Rules. Ordinarily the approach of an Appellate Court to the exercise of such a discretion is that it will not set aside the decision of the lower court "merely because the Court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles".'

[10] The court a quo was well aware that allowance had to be made for the appellant's own involvement in the pursuit of his appeal. But it also recognised, very properly, that such involvement could not supplement fundamental *lacunae* in the substance of the application.

[11] In considering an application for condonation a court must take into account a number of considerations. These include the extent of non-compliance and the explanation given for it; the prospects of success on the merits; the importance of the case; the respondent's interest in the finality of the judgment; the convenience of the court and the avoidance of unnecessary delay in the administration of justice.[5]

[12] Before us, although the appellant's attorney conceded that the explanation given for the delay was inadequate, he argued that the court below was wrong in finding that 'nothing happened' from the moment the appellant was sentenced until 10 September 2002 when a notice of appeal was lodged. He submitted that Mr Fortuin was instructed to prosecute the appeal but failed to do so. The error pointed out by the attorney does not affect the inadequacy of the explanation given for the

[5] *Federated Employers Fire and General Insurance Co Ltd v McKenzie* 1969 (3) SA 360 (A); *S v Adonis* 1982 (4) SA 901 (A) and *S v Di Blasi* 1996 (1) SACR 1 (A).

delay. Even if the step taken by the appellant in instructing Mr Fortuin is discounted from the period of four years, there remains a period of three and half years for which there was no explanation furnished. Where non-compliance with the rules is time-related, the explanation must cover the entire period. In *Uitenhage Transitional Local Council v SA Revenue Service*[6], Heher JA repeated the admonition previously issued to practitioners who bring applications such as the present. He said:

'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.'[7]

[13] Moreover the attorney who represented the appellant in the court below did not heed the above admonition.[8] She did not apply her mind to the propriety of the form followed by the appellant in drafting the papers. Nor does she appear to have considered whether the notice filed set out an acceptable explanation for the delay. Not only did Fortuin not make an affidavit corroborating the appellant and explaining his own conduct, but no explanation was offered by the appellant for the failure to obtain such an affidavit. From the heads of argument she filed on the appellant's behalf in this court, it seems that she does not appreciate the basic requirements for a successful application for condonation. Her heads of argument also omitted to deal with the test for interference by this court

[6] 2004 (1) SA 292 (SCA).
[7] Id para [6].
[8] Not the attorney who appeared before us in the appeal.

in orders refusing condonation. I mention these matters not as criticism of the appellant, but rather to emphasise that the seriously inadequate case originally made by the appellant gained nothing by what was done on his behalf by his legal representatives prior to the hearing in this court.

[14] Regarding prospects of success on appeal, the appellant's attorney submitted before us that, since the record has been lost and cannot be reconstructed, the appellant has good prospects of success. Reliance for this proposition was placed on *S v Chabedi*[9] where this court said:

'On appeal, the record of the proceedings in the trial Court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal it will, as a rule, lead to the conviction and sentence being set aside.'

[15] The above statement must be read in context. There can be no doubt that the setting aside of a conviction and sentence, in a case where the record is lost, is not based on a finding made after consideration of the merits. That such a result will follow, if condonation is granted, cannot lay the foundation for the submission that the appeal has prospects of success on its merits. It follows that the appellant's reliance on *Chabedi* was misplaced. It was necessary, in the circumstances, that the appellant took the court a quo into his confidence concerning the evidence led in the case. That the record was missing did not detract from this duty; that would simply have rendered it more difficult for the state to rebut his say-so. But he made no effort in this regard.

[16] It follows from what I have said that the approach of the court a

[9] 2005 (1) SACR 415 (SCA) para 5.

quo cannot be faulted. In the result the appeal is dismissed.

C N JAFTA
JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	C B Brand Instructed by Justice Centre, Cape Town Legal Aid Board, Bloemfontein
FOR RESPONDENT:	M Allie Instructed by The Director of Public Prosecution, CAPE TOWN The Director of Public Prosecution BLOEMFONTEIN