THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 410/10

EDWARD MOGOROSI Appellant

and

THE STATE Respondent

Neutral citation: ***Mogorosi v The State*** **(410/10) [2010] ZASCA 147 (29 November 2010)**

BENCH: **PONNAN, CACHALIA and LEACH JJA**

HEARD: **12 NOVEMBER 2010**

DELIVERED: **29 NOVEMBER 2010**

SUMMARY: **Condonation for failure to timeously note appeal – court below considering all of the relevant facts – limited grounds on which appeal court can interfere.**

ORDER

On appeal from: North West High Court (Mafikeng) (Gumbo AJ, Hendricks J concurring sitting as court of appeal).

The appeal is dismissed.

JUDGMENT

PONNAN JA (CACHALIA and LEACH JJA concurring):

[1] During August 2001 the appellant, Edward Mogorosi, was convicted of on a charge of rape and sentenced to imprisonment for a term of 15 years by the Regional Court, Lehurutshe.

[2] On 13 March 2009 the appellant approached the North West High Court (Mafikeng) by way of an appeal to set aside both the conviction and sentence on the basis that the record of his trial and the audio tapes on which the proceedings were recorded could not be located. Affidavits deposed to by the prosecutor in the case and the presiding magistrate made it plain that they: no longer had any notes in their possession; had no independent recollection of the matter; and, were not in a position to reconstruct the trial record.

[3] In terms of Rule 67(1) of the Magistrates' Courts Rules the appellant ought to have lodged his notice of appeal within 14 days of having been sentenced. As the lodging of his appeal was late by some seven years the appellant filed an application for condonation with the high court. Given that the appellant was seeking an indulgence he had to show good cause for condonation to be granted. In *S v Mantsha* 2009 (1) SACR 414 (SCA) para 5 Jafta JA stated that ‘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'.

[4] In support of his application for condonation the appellant filed an affidavit in which he stated:

'I have enquired on a number of occasions and later I made an application to the Regional Court to be provided with a copy of a transcript of my record to prosecute an appeal (I attach as annexure A, a copy of my letter dated 31 May 2007) and I was told that my case does not exist (I attach as annexure B, a copy of a [letter] dated 11 October 2007 from Ms Bonolo Mmileng). I wrote to the Department of Justice including the ministry to intervene in assisting me with my records. I requested the Legal Aid Board to assist me in this regard. I could not receive a positive response from all those institutions.

. . .

I would further humbly submit to the Honourable Court, that I have never instituted an application for leave to appeal before Mr Djaje [the presiding magistrate] or any other magistrate because my records are lost. If my records were not lost I would have accordingly prosecuted my appeal.'

The appellant studiously refrained from disclosing precisely when he caused the numerous enquiries to be made, or more importantly, when he first applied to the regional court for a transcript of his criminal proceedings. Neither Annexure A nor Annexure B was annexed to his affidavit. It bears noting that he was legally represented when he deposed to that affidavit.

[5] The appellant's application was heard by the Mafikeng High Court on 23 October 2009. On 29 October 2009 it was dismissed by Gumbo AJ (Hendricks J concurring) on the basis that the explanation given for the delay was inadequate and unsatisfactory. The matter was accordingly struck from the roll.

[6] Regard being had to the fact that the appellant's application for condonation was dismissed in the court below, the appellant has an automatic right of appeal to this court against such dismissal without the need to seek leave from that court (*S v Gopal* 1993 (2) SACR 584 (A); *S v Leon* 1996 (1) SACR 671 (A)).

[7] In considering the application before it the court below had a wide discretion, which, of course, had to be exercised judicially on a consideration of all of the facts. In essence, in exercising that discretion a court must strive for fairness to both sides. This court has a restricted power of interference with the decision of a trial court in relation to condonation. As it was put by the Constitutional Court:

'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".' (*Mabaso v Law Society, Northern Province & another* 2005 (2) SA 117 (CC) para 20.)

[8] A court considering an application for condonation must take into account a range of considerations. Relevant considerations 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. (See *S v Di Blasi* 1996 (1) SACR 1 (A) at 3g.)

[9] Nothing was said by the appellant in his affidavit about the merits of his conviction or his prospects of success in overturning his conviction on appeal. He simply did not take the court into his confidence. The submission before us was that since the record has been lost and cannot be reconstructed, the appellant, without more, has good prospects of success. Reliance for this proposition was placed on *S v Chabedi* 2005 (1) SACR 415 (SCA) para 5 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'.

But as *Mantsha* clarified (para 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.'

[10] Even allowing for the fact that the appellant acted in person at some stages in the prosecution of his appeal that can hardly compensate for the fundamental lacunae in his application. For as Heher JA pointed out in *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) 'condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and its effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility'. That did not happen in this case. The appellant's affidavit, notwithstanding that he was legally represented when it was drafted, failed to heed Heher JA's admonition. In my view it is opaque and singularly unhelpful in explaining the long delay.

[11] The court below considered all of the facts. It concluded that the delay of seven years in prosecuting the appeal was inordinately long and inexcusable and thus could not be condoned. I can find no fault in the approach adopted by court below or the conclusion reached by it. No case has been made out for this court to substitute its discretion for that of the court below. There is thus no warrant for us to do so. It follows that the appeal must fail and it is accordingly dismissed.

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V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	N L Skibi
	Instructed by: The Director of Public Prosecutions Grahamstown The Director of Public Prosecutions Bloemfontein
For Respondent:	G S Maema
	Instructed by: Legal Aid Board King William's Town Legal Aid Board Bloemfontein