THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 250/2017

In the matter between:

DR DI MTSHALI NO **FIRST APPELLANT**

THE NATIONAL DIRECTORATE OF ANIMAL HEALTH OF THE DEPARTMENT OF AGRICULTURE AND ENVIRONMENTAL AFFAIRS OF THE REPUBLIC OF SOUTH AFRICA **SECOND APPELLANT**

THE MINISTER OF AGRICULTURE AND ENVIRONMENTAL AFFAIRS OF THE REPUBLIC OF SOUTH AFRICA **THIRD APPELLANT**

and

BUFFALO CONSERVATION 97 (PTY) LTD **RESPONDENT**

Neutral citation: *Mtshali & others v Buffalo Conservation 97 (Pty) Ltd* (250/2017) [2017] ZASCA 127 (29 September 2017)

Coram: Cachalia, Bosielo JJA, Plasket, Lamont and Rogers AJJA

Heard: 31 August 2017

Delivered: 29 September 2017

Summary: Application for condonation and re-instatement of lapsed appeal – adequacy of explanation for delay – delay extreme and explanation unacceptable – application dismissed with costs.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Baqwa J sitting as court of first instance):

The application for condonation and for the reinstatement of the appeal is dismissed with costs.

JUDGMENT

Plasket AJA (Cachalia, Bosielo JJA, Lamont and Rogers AJJA concurring)

[1] The Buffalo (*Syncerus caffer*) is, in Southern Africa, an iconic animal. It is a large, aggressive bovine, possessed of fearsome horns, and a temper to match. As part of the Big Five,[1] it is an animal of considerable importance for the tourism and hunting industries, as well as, more generally, for ecological bio-diversity. Unfortunately, buffalo are carriers of two endemic bovine diseases, Foot and Mouth Disease (FMD) and Corridor Disease (CD), and are susceptible to other bovine diseases introduced to the African continent, such as Bovine Tuberculosis (BTB) and *Brucella Abortis* (BA) or Bovine Brucellosis. Because of the risk of these diseases being passed onto cattle, with catastrophic consequences for the cattle industry and the economy generally, the movement of buffalo is tightly controlled.

[2] This appeal, from a judgment of Baqwa J in the Gauteng Division of the High Court, Pretoria, concerns whether the appellants are liable in delict to the respondent for failures to conduct tests, principally for CD, on disease-free buffalo bred by the

[1] The Big Five comprise the lion, leopard, elephant, rhinoceros and buffalo. They were regarded by hunters as the five most difficult animals to hunt, and hence the most prized. They are now regarded just as highly from the point of view of game-viewing enthusiasts and hence are of considerable value in the tourism industry.

respondent, and to issue permits to authorise the translocation of these buffalo. The merits and quantum having been separated, Baqwa J found at the conclusion of the trial before him that the respondent – the plaintiff in the court below – had indeed established the factual basis for, and the necessary elements of, delictual liability. This appeal is with his leave.

[3] The first appellant, Dr Dumisani Mtshali, was at the time of the events giving rise to this appeal, employed by the State as the Director of Veterinary Services for the Northern Region of KwaZulu-Natal. The second appellant is the National Directorate of Animal Health in the Department of Agriculture and Environmental Affairs in the national sphere of government. This directorate, according to the respondent, is responsible for testing animals for animal diseases and for granting authority to move buffalo from one place to another. The third appellant is the Minister of Agriculture and Environmental Affairs in the national sphere of government. He is cited as the head of the Department of Agriculture and Environmental Affairs.

[4] The department over which the minister presides, and its officials, administer and enforce the Animal Diseases Act 35 of 1984 and the regulations made by the minister in terms of that Act. They are enjoined, the respondent avers, to control the spread of animal diseases, test animals for diseases at the request of persons who wish to move buffalo from one place to another, to authorise the issuing of permits for the movement of buffalo, and to approve and register land where buffalo may lawfully be kept. They are required, the respondent says, to perform these functions ‘in a proper and efficient manner and without being negligent’.

[5] The respondent is Buffalo Conservation 97 (Pty) Ltd, a company that conducted a buffalo breeding program, first at Phinda and later at Magudu in KwaZulu-Natal. It bred disease-free buffalo from buffalo infected with CD. Its complaint, in a nutshell, is that for a number of years it was precluded from moving its disease-free buffalo from Magudu because the relevant State veterinary officials refused to conduct the

necessary tests on them so that a permit to authorise their translocation could be issued.

[6] Interesting as the issues are that arise from the appeal, it is not necessary for us to engage with them. At the hearing of the appeal, we decided to hear argument on two preliminary issues before considering the merits, if necessary. They were first, whether the appeal was perempted and secondly whether to grant condonation for the late filing of the record and allow the re-instatement of the appeal, which had lapsed.

[7] Having heard counsel on these issues, we made an order dismissing the application for condonation and for the re-instatement of the appeal, with costs. We undertook to furnish our reasons later. These are those reasons.

Condonation and re-instatement: the facts

[8] The material facts giving rise to the application for condonation and re-instatement are largely common cause. I shall set out a chronology of events before I consider the explanations for the delays in pursuing the appeal.

[9] The court below's judgment was handed down on 10 December 2014. Thereafter, an application for leave to appeal was filed. It was slightly out of time and an application for condonation accompanied it. On 1 June 2015, Baqwa J granted condonation as well as leave to appeal to this court. The notice of appeal was filed on 30 June 2015, 13 days out of time. It consequently also had to be accompanied by a condonation application.

[10] The record had to be filed by 20 October 2015. On 13 October 2015, the appellants' attorney requested an extension of time from the respondent's attorney. It was agreed between them that the record would be filed by 20 November 2015. On 17 November 2015, the appellants' attorney sought and received a further extension of time: it was agreed that the record would be filed by 4 December 2015.

[11] The record was not filed by 4 December 2015. On 8 December 2015, the registrar of this court notified the parties that the appeal had lapsed.

[12] The respondent's attorney stated in his answering affidavit that he had advised his client of the lapsing of the appeal. He also warned that an application for condonation could be expected within the following few weeks.

[13] No application was forthcoming. In the face of the appellants' attorney's silence, the respondent's attorney proceeded to have his bills of costs drafted and taxed. He also employed expert witnesses with a view to amending the particulars of claim in order to increase the quantum of the claim.

[14] In due course, the respondent's bills of costs were taxed, the taxing master's *allocaturs* being issued on 12 September 2016. They were presented to the appellants' attorney, together with a demand for payment, on 15 September 2016. On 14 October 2016, a second demand was made, whereupon the appellants' attorney paid the bills of costs in two payments – a payment of R694 487.89 to the respondent's attorney and a payment of R36 833.62 to the respondent's attorney's Pretoria correspondent.

[15] On 5 December 2016, an expert summary was filed and served by the respondent's attorney. A notice of intention to amend the particulars of claim was filed and served on 6 December 2016. The respondent's attorney applied for a trial date on 13 December 2016. By this stage, not a word had been heard from the appellants' attorney since 2 December 2015, more than a year before.

[16] On 15 December 2016, the appellants' attorney broke his silence. On that day the record and an application for condonation were served on the respondent's attorney's Bloemfontein correspondent. The appellants' Bloemfontein correspondent also tried to serve the record and the application of the registrar of this court. The registrar refused to accept service because one page of the record was illegible and

various photographs were not in colour. The application for condonation was dated 23 November 2015, about three weeks prior to the date of its service on the respondent's Bloemfontein correspondent.

[17] The respondent's attorney set about drafting an answering affidavit to the application for condonation. He deposed to this affidavit on 8 February 2017. He sent it to Bloemfontein for filing and service. On 13 February 2017 he was informed by his Bloemfontein correspondent that the registrar of this court had refused to accept the affidavit because the record and the application for condonation had still not been filed.

[18] The record and the application for condonation were eventually filed on 17 March 2017.

The explanation for the delay

[19] The appellants' attorney has attempted to explain the long delay in the proper filing of the record. It commences in October 2015.

[20] It was not possible for the record to be filed by 20 October 2015 because it was discovered that one of the days of the proceedings in the trial (6 October 2014) had not been transcribed. It was for this reason that an extension of time was sought and granted until 20 November 2015. The transcript of the proceedings was received by the appellants' attorney on 14 October 2015 and forwarded by him to iAfrica Transcriptions (iAfrica), the firm that was preparing the record.

[21] The appellants' attorney was able to present counsel with a draft index for settling on 16 November 2015. Counsel commented on the draft index the following day but said that it was necessary to obtain a discovery affidavit that had been put to one of the witnesses in the trial. This necessitated the second extension – to 4 December 2015 – as neither the appellants' attorney nor his counsel had a copy of the affidavit.

[22] On 2 December 2015, two days before the record was to be filed, the appellants' attorney wrote to the respondent's attorney to ask if the latter had a copy of the discovery affidavit. The respondent's attorney wrote back on 4 December 2015 to ask why a discovery affidavit had to be included in the record. He received no response and heard nothing more from the appellants' attorney for over a year.

[23] The explanation, so far, creates the impression that the record, but for the missing discovery affidavit, was more or less ready for filing. Indeed, the appellants' attorney stated:

'In the meantime, in consultation with counsel I finalised the remainder of the appeal record for preparation by iAfrica by 4 December 2015. Ms Carol Smal, who is employed by iAfrica and who was preparing the appeal record, informed me on 2 December 2015 that the only document outstanding in the appeal record at that date was the discovery affidavit.'

He stated too that by 2 December 2015 he 'still anticipated . . . that it might be possible to deliver the record on or before 4 December 2015'.

[24] The appellants' attorney was advised by counsel on 4 December 2015 that if the affidavit could not be found, it could be omitted from the record. Despite having stated that he believed the record could be filed in time, for a reason that remains unexplained, the appellants' attorney then stated that he 'now understood . . . that the record would not be ready for filing by 4 December 2015'. Despite this, he never requested the respondent's attorney for a further extension of time. At some time after 4 December 2015 – he does not say when – he fell ill and was not at work until 17 December 2015, an absence of less than two weeks.

[25] By then, the registrar of this court had informed the parties that the appeal had lapsed, and that an application for condonation and for the re-instatement of the appeal would have to be filed with the record. The appellants' attorney instructed counsel to draft the application but was told that this could only be done when the record was ready.

[26] On 8 December 2015 – ironically, the day the registrar informed the parties that the appeal had lapsed – Ms Smal informed the appellants' attorney that she did not have the judgment of 1 June 2015 granting leave to appeal. On 17 December 2015, he requested a transcription of the judgment. (It is 29 lines long.) On 14 January 2016, iAfrica provided him with a transcript but this turned out to be the transcript of 6 October 2014, not of 1 June 2015. The judgment of 1 June 2015 was only transcribed by 10 February 2016 but it required the judge's signature. That took some time but, on 16 May 2016, iAfrica informed the appellants' attorney that the record was now ready.

[27] On 25 May 2016, the appellants' attorney informed counsel of this and requested him to draft the application for condonation and re-instatement. Counsel said that he could only attend to this towards the end of June 2016. Then, when counsel tried to arrange a consultation in late June 2016, the appellants' attorney was not available. Then, counsel was out of the country until mid-July 2016. The result was that it was only on 15 July 2016 that a candidate attorney consulted with counsel to provide facts relevant to the application. (Why a candidate attorney was not made available in late June 2016 was not explained.)

[28] A draft of the application was e-mailed to the appellants' attorney on 18 July 2016. There was one issue on which counsel required instructions. The appellants' attorney, it would appear, was not able to provide the information: he stated that he was 'not available to consider the application' because of his involvement in the Commission into Higher Education (the Commission). This, he said, took up a great deal of his time. As a result, he only attended to the application and responded to counsel's query on 18 October 2016. (By then, the respondent's bills of costs had been taxed and paid.) It would appear that the application was drafted and settled by about 26 October 2016. It was then decided, on the advice of senior counsel, that a further affidavit should be obtained from a person within the department to explain what efforts the clients had made to progress matters.

[29] The appellants' attorney's affidavit was deposed to on 14 November 2016, that of Mr H J B Beukes, a senior legal administration officer in the Department of Agriculture, Forestry and Fisheries, was deposed to two days earlier and the notice of motion was signed on 23 November 2016.

[30] The record and the application were served on the respondent's Bloemfontein correspondents on 14 December 2016. An attempt was made to file them with the registrar but that did not happen until 17 March 2017.

[31] In his affidavit, Mr Beukes outlined the steps that he had taken to keep himself informed of the progress made – or lack thereof – in the preparation of the record and the drafting of the application. He outlined his attempts to contact the appellants' attorney and the lack of proper responses from him. On three occasions, in August, September and October 2016, he copied e-mails he sent to the appellants' attorney to the head of the State Attorney's office in Pretoria.

[32] In his replying affidavit, the appellants' attorney sought to explain the further delay in filing the record from November 2016 when the condonation papers were prepared to 17 March 2017 when the record was finally filed.

[33] He stated that on 14 December 2016, the registrar of this court refused to accept the record because one page was illegible and the photographs in the record were not in colour. He forwarded this information to Digital Audio Transcription Recordings which iAfrica had become. He received no response despite sending follow-up e-mails during January 2017, the last of which was dated 31 January 2017. Why the appellants' attorney thought that Digital Audio would still have the record and be in possession of colour photographs is not explained. One gets the impression that as soon as the registrar of this court raised problems with the record, the appellants' attorney deflected the enquiry to Digital Audio to get the matter off his desk for a while. He took no steps himself to locate a legible copy of the page or colour photographs.

[34] Then, he said, he was unable to take the matter any further because he attended a workshop of the Commission and was busy preparing for its next hearings. It was, as a result, only in mid-February 2017, that he took any further action. This time he received a response from Ms Smal who informed him that his earlier e-mails, addressed primarily to a Ms Keiller, had not been forwarded to her.

[35] Ms Smal no longer had a copy of the record but she asked him to forward the illegible page to her, as well as any colour photographs that he had or an affidavit stating that the appellant had no colour photographs. The illegible page and the affidavit were only forwarded to Ms Smal on 3 March 2017. The appellants' attorney was only able to attend to these tasks then because he was attending the Commission.

[36] The record was completed and re-bound on 9 March 2017. It was served and filed on 17 March 2017.

Condonation: the legal principles

[37] The approach of this court to condonation in circumstances such as the present is well-known. In *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others*[2] Ponnan JA held that factors relevant to the discretion to grant or refuse condonation 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'.

[38] In *Darries v Sheriff, Magistrate's Court, Wynberg & another*[3] these general considerations were fleshed out by Plewman JA when he stated:

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[2] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others* [2013] ZASCA 5; [2013] 2 All SA 251 (SCA) para 11.

[3] *Darries v Sheriff, Magistrate's Court, Wynberg & another* 1998 (3) SA 34 (SCA) at 40H-41E. (References omitted.)

'Condonation of the non-observance of the Rules of this Court is not a mere formality. 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. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. In applications of this sort the applicant's 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. 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.'

[39] Reference was made in the passage I have cited above to it being an erroneous assumption that if the cause of the delay in complying with the rules is the conduct of the appellant's attorney, condonation will be granted. That assumption was dispelled in no uncertain terms in *Saloojee & another NNO v Minister of Community Development*.[4] In that matter the notice of appeal, the record and the condonation application were filed some eight months late. After considering the explanation given for the delay and concluding that it was not even 'remotely satisfactory'[5] Steyn CJ proceeded to hold:[6]

'I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* 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

[4] *Saloojee & another NNO v Minister of Community Development* 1965 (2) SA 135 (A).
[5] At 140H.
[6] At 141B-E.

whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a 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.'

[40] While the various factors that have been listed in the cases should be weighed against each other, there are instances in which condonation ought not to be granted even if, for instance, there are reasonable prospects of success on the merits. This was alluded to in the passage that I cited from the *Darries* matter. In *Tshivhase Royal Council & another v Tshivhase & another; Tshivhase & another v Tshivhase & another*[7] Nestadt JA said that this court 'has often said that in cases of flagrant breaches of the Rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal are' and that this applies 'even where the blame lies solely with the attorney'.[8]

[41] In the present case we did not hear argument on the merits. Counsel were asked to make their submissions on the assumption that an appeal would have reasonable prospects of success. The appellants' counsel went further, submitting that his clients' prospects of success on the merits – the peremption point aside – were strong. An assumption to this effect does not change the outcome on the particular facts of this case.

Is the explanation adequate?

[42] The explanation given by the appellants' attorney is far from adequate. This was conceded by Mr Redding who, together with Mr Wesley, appeared for the appellants.

[43] The explanation, such as it was, leaves a substantial amount of time spanning the entire period of the delay, unaccounted for. It appears from the absence of an

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[7] *Tshivhase Royal Council & another v Tshivhase & another; Tshivhase & another v Tshivhase & another* 1992 (4) SA 852 (A) at 859E-F.

[8] See by way of example, *P E Bosman Transport Works Committee & others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799D-E. See too *Blumenthal & another v Thomson NO & another* 1994 (2) SA 118 (A) at 121I-122B.

explanation for most of this time that the appellants' attorney did not consider time to be of the essence, when it clearly was.

[44] For instance, it took him from 17 December 2015 to 16 May 2016 to obtain the signed judgment, 29 lines long, granting leave to appeal. Even if certain events were beyond his control, he appears to have displayed no sense of urgency whatsoever. Secondly, the record was ready (or so he believed) by 16 May 2016 but it took until 23 November 2016 to complete the condonation papers. Once again, he allowed time to pass without any concern for the lengthening delay. He could have furnished instructions to counsel in writing if there was difficulty in arranging a mutually convenient consultation. Better still, he could have prepared a first draft of the condonation application himself, which counsel could have settled. After all, drafting documents of this nature is comfortably within the competence of an attorney. In addition, he had knowledge of the necessary facts and held the relevant correspondence in his file. Thirdly, even the condonation application was plagued by delay once it had been drafted: the two affidavits were signed on 12 and 14 November 2016, the notice of motion nine days after the latter date, on 23 November 2016, and the application was only served on the respondent on 14 December 2016. In other words, more than a month passed from when the papers were ready until their service. And of course, even that was plagued with problems as it was only on 17 March 2017 that the record and the application were filed with the registrar of this court.

[45] When the registrar of this court refused to accept the record and application for condonation on 14 December 2016, it took over three months to provide a legible copy of one page of the record and an affidavit stating that the appellants had no colour photographs. No acceptable explanation was given for this delay. Indeed, no attempt was made to supplement the condonation papers to include this period of time. It was only when the respondent's attorney's Bloemfontein correspondent wished to file the answering affidavit that it came to light that the record had not been filed.

[46] When it is considered that, on his own version, the appellants' attorney believed that the record was more or less ready for filing on 4 December 2015, it beggars belief that it took more than 15 months before the record was filed. And all that needed to be done in that time was to obtain a short judgment, retype an illegible page and file a short formal affidavit.

[47] The closest that the appellants' attorney came to an explanation was that he was busy in the Commission and did not have time to devote to this case. That is not an acceptable explanation.[9] In *Kgobane & another v Minister of Justice & another*[10] Rumpff JA, when confronted with a similar explanation, said that '[w]hen an attorney tells this Court, in effect, that he is too busy to study the Rules of this Court and to supervise the prosecution of an appeal, his explanation is quite unacceptable'.

[48] The appellants' attorney also proffered no explanation for his extraordinary failure to communicate with the respondent's attorneys for over a year, despite the appeal having lapsed, despite bills of costs being taxed and presented for payment and despite the further steps the respondent's attorney took in respect of the quantum aspect of the case.

[49] Mr Beukes does not appear to have attempted, with any particular vigour, to hold the appellants' attorney to proper professional standards of work. It is true that he sent him numerous communications requesting progress reports but did little to ensure that the appellants were properly represented. As I have commented above, he copied e-mails to the head of the State Attorney's office in Pretoria on three occasions in an effort to obtain responses from the appellants' attorney. One would have thought that he would have arranged to meet the head of the office, at an early stage, with a view to resolving the problem of the appellants' attorney's over-commitment and his consequent lack of attention to this matter. I accept that the appellants had no choice but to be represented by the State Attorney. That does not mean that they had to accept shoddy

[9] *Saloojee's* case (fn 4) at 140D-E.
[10] *Kgobane & another v Minister of Justice & another* 1969 (3) SA 365 (A) at 369B.

service. They were entitled to be represented in a professional and responsible manner and ought to have demanded that the appeal be prosecuted in accordance with those standards. The head of the State Attorney's office was aware of the problem but appears to have done very little, if anything, to address it. The attempts of Mr Beukes, such as they were, to goad the appellants' attorney into action, and the latter's failure to respond positively, aggravate the egregiousness of his conduct. This is one of those unfortunate cases in which the attorney's conduct is so far beyond the pale that the clients will have to suffer the consequences.

[50] In my view, this is a particularly gross case: the delay was extreme and the explanation unacceptable. Each stage of the delay increased the need for urgent and decisive action at the next stage yet, from beginning to end, the appellants' attorney's endeavours were feckless and desultory. In these circumstances, the appellants' prospects of success, even if they were assumed to be strong, could not salvage the appellants' position. The cumulative effect of the mismanagement of the appeal, the inadequacy of the explanation and the respondent's interest – and the public interest – in the finality of the litigation mean that the application for condonation and re-instatement of the appeal cannot succeed. If it had been necessary to consider the prospects of success, the appellants face a formidable hurdle, unrelated to the merits of their defence to the underlying action, in the form of the argument that by inter alia allowing the appeal to lapse and months later paying the respondent's costs without reservation, the appellants have perempted their appeal.

Conclusion

[51] For the reasons stated above, we made an order at the hearing of the appeal that the application for condonation and for the re-instatement of the appeal is dismissed with costs.

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C Plasket

Acting Judge of Appeal

APPEARANCES:

For the Appellants:	A Redding SC with MA Wesley
Instructed by:	Office of the State Attorney, Pretoria
	Office of the State Attorney Bloemfontein
For the Respondent:	R Stockwell SC
Instructed by:	Harvey Nossel & Turnbull Attorneys, Johannesburg
	Lovius Block Attorneys, Bloemfontein