THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 695/2008

THE MINISTER OF TRADE AND INDUSTRY Appellant

and

N KLEIN N.O & H M HAMMAN N.O Respondents

Neutral citation: *Minister of Trade and Industry and Klein NO* (695/08) [2009] ZASCA 77 (1 June 2009)

Coram: FARLAM, CLOETE, PONNAN JJA, LEACH and BOSIELO AJJA

Heard: 19 May 2009

Delivered: 1 June 2009

Updated:

Summary: Appellant applying for condonation of late filing of record and heads of argument, and seeking order reinstating lapsed appeal – no acceptable explanation for delays – prospects of success on the merits remote – application dismissed.

ORDER

In an application for leave to appeal from the High Court, Pretoria (Prinsloo J sitting as court of first instance).

The application for condonation is refused with costs, including the costs occasioned by the appeal and the employment of two counsel

JUDGMENT

LEACH AJA (FARLAM, CLOETE, PONNAN JJA and BOSIELO AJA concurring):

[1] The applicant, the Minister of Trade and Industry, who wished to appeal to this Court against an order made against him in the Pretoria High Court, applied for an order condoning both his late filing of the record and his failure timeously to prosecute the appeal. He also sought an order reinstating his appeal on the roll. In seeking this relief, the applicant blamed difficulties experienced by the State Attorney in preparing the record which were exacerbated when the attorney dealing with the matter resigned without alerting the other members of the professional staff that the appeal required urgent attention.

[2] Having heard the parties, this court dismissed the application for condonation with costs and stated that its reasons for doing so would follow. These are those reasons.

[3] The appeal arises from an application brought by the liquidators of a company known as Corpcapital Limited ('the company') seeking an order compelling the applicant to direct the Registrar of Companies to release to them a copy of a written report made to him by two inspectors who had been appointed under s 258(2) of the Companies Act 61 of 1973 to probe certain possible irregularities in the conduct of the company's business and financial affairs. The inspectors were appointed in August 2003. They completed their report in May 2004 and it came into the possession of the applicant in July that year.

[4] The report was fairly lengthy. It consisted of a summary of 126 pages, a main report of 686 pages and annexures thereto of 288 pages. There was also a so-called 'record of proceedings' of 114 arch files. However, by January 2005 the report had still not been read by the applicant, as he himself stated in his opposing affidavit filed in response to the respondents' application. This led to the respondents seeking the relief they obtained in the court below.

[5] The applicant conceded that the company was entitled to receive a copy of the report in due course, but adopted the attitude that the application was premature as he was bound to consider the report (which he had not yet done) before releasing it and that he would only do so once he had been satisfied that the complaint had been fully investigated – even if it required him to refer the matter back to the inspectors for further investigation.

[6] The court *a quo* decided that the applicant had misconstrued his obligations under the Act. It concluded that the applicant did not have a discretion to withhold the report, that he had unreasonably delayed furnishing the report to the company, and that the application was therefore not premature. In the result it ordered the applicant forthwith to direct the Registrar of Companies to forward a copy of the report to the respondents.

[7] The judgment of the court *a quo* was delivered on 24 August 2006. On 1 July 2007 the applicant was granted leave to appeal. The applicant served his notice of appeal in this Court on 2 July 2007, whereupon the Registrar informed him that the appeal record was to be lodged by no later than 2 October 2007. It was not, and during November 2007 the Registrar wrote to the parties advising that the appeal had lapsed. Some 11 months later, in October 2008, the applicant lodged the record (13 months after the appeal had lapsed). He did so without simultaneously filing an application for condonation. That application was only forthcoming after a delay of a further two months.

[8] The applicant's explanation for these delays is flimsy, to say the least. It is alleged that the member of staff of the State Attorney originally handling the matter, Mr Mabetshu, had difficulty in locating the court file which the transcribers needed to prepare a record,

that Mabetshu resigned in November 2007 (by which time the appeal had already lapsed) and that despite a record still not having been prepared by then, Mabetshu failed to bring this state of affairs to the attention of anyone in the office of the State Attorney when he departed. In December 2007, Mr Le Roux took over the matters Mabetshu had been handling. In an affidavit filed in this court he alleged that he had been very busy at the time, but had telephonically contacted the transcribers in regard to the record in mid-December 2007. However that appears to be all Le Roux did for the next five months before May 2008 when he received a draft index from the transcribers. He still did nothing for another three months until the respondents' attorneys sent him their copy of the papers in order to facilitate the preparation of a record. These papers were made available to the transcribers and eventually led to a record being forthcoming on 10 October 2008.

[9] This is not an adequate explanation for the many inexcusable delays that took place. There is in fact no real explanation for why the appeal lapsed. I accept that the court file appears to have been mislaid, but there is no explanation why the State Attorney's own file was not sufficient for the purpose of preparing a record. Nor is there any explanation of why, while Mabetshu was still handling the matter, the offer of the respondents' attorney of 17 August 2007 to assist him in the reconstruction of the record was ignored – despite being repeated on 28 August 2007 and again on 14 September 2007.

[10] Not only is the Mabetshu's failure to take up the offer of assistance from the respondent's attorney unexplained, but Le Roux does not explain why he did not do so when he took over the file. Moreover, not only does Le Roux fail to provide any acceptable explanation for why he effectively did nothing in the matter from December 2007 to May 2008, he also does not explain why he did not immediately accept a similar offer made to him by the respondents' attorney on 5 June 2008 and why it took him almost a month to reply by merely thanking him for his 'feedback'. And Le Roux fails to explain why after yet a further month's delay, and only after further prompting from the respondents' attorney, he ultimately accepted the respondents' assistance. This was almost a year after such assistance had initially been offered. The delay in accepting it is as inexplicable as it is unexplained.

[11] In the light of this, appellant's counsel correctly conceded that the appellant had

failed to provide a reasonable explanation for the various delays. Not only was the concession correctly made, but the fact that the applicant gave no acceptable explanation for the delays is probably sufficient reason alone to refuse condonation – compare *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* [2009] ZACC 12 delivered on 7 May 2009.

[12] However, it was argued on behalf of the applicant that the prospects of success on appeal were good and more than made up for the deficiencies in the respondent's explanation. I accept that strong prospects of success may at times overcome an inadequate explanation for a delay in cases of this nature, but this does not appear to be the case in this matter – particularly as the applicant faces a substantial hurdle in the form of s 21A(1) of the Supreme Court Act 59 of 1959 which provides that this court may dismiss an appeal on the sole ground that 'the judgment or order sought will have no practical effect or result'.

[13] By the time the application was heard in the court below, the appellant had directed the Registrar of Companies to send a copy of the inspector's report to the company. Accordingly, the question whether he had been obliged to do so earlier became moot and no practical effect will be achieved by ventilating the issues argued in the court below once more.

[14] Counsel for the applicant however submitted that this court's interpretation of s 261(2) of the Companies Act and an authoritative decision on the applicant's obligations thereunder are important, particularly as the applicant may again be involved in the appointment of inspectors and the receipt of reports, and there is therefore a public interest to be served by this court hearing the matter which is not just of academic interest. This argument was not grounded on any factual allegations appearing in the papers, and the applicant has not shown that the appointment of investigators is a common occurrence despite the specific allegation in the respondents' answering affidavit in the condonation application (to which there was no reply) that 'the [applicant] has set out no facts to indicate that the {applicant] is persistently or presently required to deal with matters in terms of sections 258 to 261 of the Companies Act and that consequently there is a practical significance to the interoretation issues relating to section 261. . .' . Significantly,

the papers include a newspaper report containing a statement that the investigation in the present case was only the sixth such probe undertaken by the Department of Trade and Industry. Bearing in mind that the Companies Act has been on the statute books for the last 36 years, if that is anything to go by, reports by inspectors are unlikely to be a frequent event in the future.

[15] But in any event, the Companies Act of 1973 under which the inspectors were appointed has been repealed and replaced by the Companies Act 71 of 2008. The latter Act is not yet in effect and can only be brought into operation after 9 April 2010 (see GN 421 of 9 April 2009). But the provisions of the current Act relating to the appointment of investigators and their reports have not been taken over into the new Act, and the section which the appellant wishes this court to interpret is thus not likely to be operative for more than a relatively restricted time in the future. Absent any information regarding any other investigations or the likelihood of further reports being called for or received in the near future, the applicant has failed to show that the necessity to interpret the current section will necessarily arise again. This unlikelihood militates against this court exercising its discretion to hear an academic dispute of this nature – compare *Netherburn Engineering CC t/a Netherburn Ceramics v Mundau NO and Others* [2009] ZACC 10 delivered on 1 April 2009.

[16] In addition, even if this court was to hear the appeal, there exists the very real prospect of its not deciding the legal issue the appellant wishes to have decided. Even if the appellant was not obliged to make the report immediately available to the respondents, as he contends, he concedes that he was obliged to do so within a reasonable time. And while the report may have been quite lengthy as I have pointed out, it was not so voluminous that it could not have been reasonably assimilated and acted upon within a few weeks. Consequently, if the appeal was to be ventilated there is a reasonable possibility (and I put it no higher than that) that the court would decline to interpret s 261 of the Companies Act and dismiss the appeal on the basis that even if the applicant's interpretation of the section were correct, there had been an unreasonable delay on the part of the applicant which entitled the respondents to the relief they were granted.

[17] Two further issues need to be mentioned briefly. First, the interpretation of the

Companies Act became a deadletter as far as the respondents were concerned when the report was made available. Even if the applicant had an interest in obtaining a more authoritative judgment on the issue there was no need for it to do so at the respondents' cost. The applicant did not tender to pay the respondents' costs. Instead he sought a costs order against them, and I see no reason why they should be at risk in regard to the costs of a matter in which they have no interest. Secondly, to allow the appeal to be heard will lead to further delays in the winding-up of the company, to the detriment of its creditors, and there is no reason for them to be prejudiced merely to allow the applicant to obtain a judgment which is academic in so far as they are concerned. These two factors alone make it somewhat surprising that leave to appeal was granted in the first instance.

[18] The applicant has therefore failed to show that the appeal will have any practical effect or result. In so far as the present parties are concerned, the matter is moot and of academic interest only. Not only has the applicant failed to show that the legal issue he seeks to have decided is likely to arise again, but he has failed to establish that it would even be determined if the appeal were to be heard. There is no reason for the respondents to be dragged into an appeal in respect of which they have no real interest in order to have an academic issue decided to their potential prejudice and cost.

[19] Consequently, even if the applicant had offered a reasonable and acceptable explanation for the inordinate delay, this court would probably have refused to hear the appeal under s 21A. That being so, in the absence of a credible explanation for the delays, the court concluded that condonation should not be granted.

[20] There was no reason for the applicant not to pay the respondents' costs, including their costs in preparing for the appeal if it had gone ahead. The parties were correctly agreed that the costs of two counsel should be allowed.

[21] For the above reasons, this court made the following order:

'The application for condonation is refused with costs, including the costs occasioned by the appeal and the employment of two counsel'.

_____

LE LEACH
ACTING JUDGE OF APPEAL

Appearances:

For appellant:	B R Tokota SC and Z Z Matebese
Instructed by:	State Attorney, Pretoria
	State Attorney, Bloemfontein
For respondents:	A E Bham SC and T Ntsonkota
Instructed by:	Deneys Reitz Inc, c/o Mothle Jooma Sabdia, Pretoria
	Webbers, Bloemfontein