REGAL v AFRICAN SUPERSLATE (PTY) LTD 1962 (3) SA 18 (A)

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Citation	1962 (3) SA 18 (A)
Court	Appellate Division
Judge	Steyn CJ, Beyers JA, Ogilvie Thompson JA, Botha JA and Van Winsen JA
Heard	March 27, 1962
Judgment	March 31, 1962
Annotations	Link to Case Annotations

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Flynote : Sleutelwoorde

Appeal - Record - Late filing of - Application for condonation - Failure entirely due to neglect of applicant's attorney - Not to be attributed to applicant - No abandonment of B intention to appeal - Application granted - Costs - Applicant to pay costs of opposition - Attorney not to recover attorney and client fees and disbursements - Nuisance - Abatement of - Nuisance caused by defendant's predecessor in title - Small quantities of slate dumped in river bed still washing down C onto plaintiff's property - Suggestion for construction of a dam - Trial Court finding such not reasonable and refusing mandatory interdict - Absolution from the instance granted - Correctness thereof arguable on appeal - Reasonableness to be weighed in light of undoubted invasion of plaintiff's rights.

Headnote : Kopnota

D In an application for condonation of the late filing of the record in an appeal from a judgment of absolution from the instance which had been given in an action in which applicant had sued respondent for the abatement of a nuisance, it appeared that applicant and his attorney had decided that, before proceeding with the appeal, an opinion should be sought from senior counsel. Owing to pressure of work applicant's attorney had not been able to prepare instructions to counsel and, after E nearly two months had elapsed, he had given instructions for the typing of the record. Owing to the length of the record it was then found that this could not be prepared in time and respondent's attorneys had been approached for an extension of time, to which respondent had refused to agree. The nuisance had been caused by respondent's predecessor in title which had deposited masses of slate waste into the bed of a river running through applicant's farm, with the result that a large quantity of slate had been washed downstream onto applicant's farm, and a small F quantity was continuing to be washed down. Applicant had sought an interdict requiring the respondent to abate the nuisance, suggesting the construction of a dam for arresting the slate. The trial Court had found, however, after balancing the costs thereof against the small degree of damage still being done, that this was not a reasonable step to take, and had refused to grant a mandatory interdict, on the ground that applicant had been unable to suggest any reasonably practicable way G of arresting the further movement of slat downstream, and that abatement of the nuisance was either impossible or impractical.
Held, that the neglect of his attorney should not in the circumstances be attributed to the applicant, thus debarring him from further relief.
Held, further, that there had been no abandoning of an intention to appeal.
Held, further, on the merits, that, in considering the reasonableness of the suggestion for the construction of a dam, consideration would probably have to be given to the fact that there had been an undoubted H invasion of the rights of the applicant and that he would normally be entitled to a remedy.

Held, accordingly, that in the circumstances it was not possible to say that the applicant had no prospect of success on appeal at all, or that the appeal was not at least arguable, and that the application should be granted.
Held, further, as the opposition to the application was in the circumstances reasonable, that applicant had to pay the costs of opposition, and that, as the failure to file the record timeously was entirely due to the neglect of the applicant's attorney, that the latter should not attempt to recover from the applicant, as between attorney and client, fees or disbursements in connection with the application.

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Case Information

Application for condonation of the late filing of the record in an appeal from a decision in the Transvaal Provincial Division in *Regal v African Superslate (Pty.) Ltd.*, 1961 (4) SA 727. The facts appear therein and from the judgment of BOTHA, J.A.

A *J. F. Coaker*, for the applicant: On the facts as found by him, the Judge *a quo* erred in refusing to grant a mandatory interdict along the lines of the order made in *Prinsloo v Luipaardsvlei Estates & Gold Mining Co., Ltd.*, 1933 W.L.D. at p 29 and *Stollmeyer v Petroleum Development Co.*, 1918 A.C. at pp. 498 - 500; see also *Proprietors of Margate Pier v Town Council of Margate*, 20 L.T.R. (N.S.) 564; A - G. B v. *Tod Heatley*, 1897 (1) Ch. at p. 310; *Rivas v Premier Diamond Mining Co., Ltd.*, 1929 W.L.D. at p. 18. Sufficient cause exists, and existed, when the petition was signed, for condonation in terms of Rule 12, of applicant's failure to lodge the record within the time allowed; see *Rose and Another v Alpha Secretaries, Ltd.*, 1947 (4) SA at pp. C 518 - 9; *Auby & Pastellides v Glen Anil Investments (Pty.) Ltd.,* 1960 (4) SA at pp. 869 - 70. Applicant was not neglectful in noting and prosecuting the appeal.

F. C. Kirk-Cohen, for the respondent: Applicant must show sufficient cause, not sufficient cause for the delay but any cause sufficient to justify the Court in granting relief from the operation of the Rules; see *Cairns' Executors v Gaarn*, 1912 AD at p. 186. Applicant must set D out a sufficient explanation of his failure to comply with the Rules and the general circumstances of the case must be considered for the granting of relief; see *Kapotes v Grobbelaar*, 1927 AD at p. 390. When a party has obtained a judgment in his favour and the time allowed by E law for appealing has elapsed, he is in a very strong position and he should not be disturbed except under very special circumstances; see *Cairns'* case, *supra* at p. 193; *Goeser v Standard Bank*, 1934 AD at p. 78. Where the failure to comply with the Rules is due to the negligence of an attorney alone, the granting of condonation depends upon the facts of each case; see *Rose and Another v Alpha Secretaries, Ltd, supra*. F Though the negligence of an attorney *per se* does not excuse applicant, it may well be held against him; see *van der Merwe v Wellington Licensing Board*, 1931 AD at p. 2; *du Plessis v Tager*, 1953 (2) SA at pp. 279 - 280; *Auby and Pastellides v Glen Anil Investments*, 1960 (4) SA at p. 870. The Court must be careful not to encourage G negligence or carelessness on the part of litigants or their attorneys; see *Reed v Freer*, 1920 CPD 250. The present case is a case where on the grounds of carelessness of the attorney alone, no relief will be granted to applicant. The position of the present applicant is different from that of the petitioners in *Rose's* case, *supra* at pp 516, 519. Unreasonable delay in obtaining advice on the prospect of an appeal H succeeding and considering such advice is not 'sufficient cause'. Where the delay is caused by seeking senior counsel's opinion and a delay ensues after obtaining such an opinion, the Court will not grant condonation; see *Reeders v Jacobsz*, 1942 AD at pp. 396 - 7. At best for applicant, the present is a case where he could not, or would not, make up his mind and on these grounds condonation will be refused, it is submitted; see *Reeder's* case, *supra; R v Mkize*, 1940 AD 211. Applicant is presumed to know the rule in question

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and there is no allegation that he does not, in fact, know of it. The reasoning in *C.I.R v Burger*, 1956 (4) SA at p. 449, is equally applicable here and condonation will therefore

be refused. There is no allegation of a misunderstanding between applicant and his legal A advisers nor is there any allegation that the delay was due to the attorney's negligence alone. A misunderstanding is not a sufficient answer; see *Burger's* case, *supra* at p. 449.

As to the merits, the decision of the Judge *a quo* on the facts cannot be attacked. The only order sought was along the lines set out in *Prinsloo* B *v. Luipaardsvlei Estates & Gold Mining Co.*, 1933 W.L.D. at p. 22. In that case, as in *Stollmeyer v Petroleum Development Co.*, 1918 A.C. 498 and *Rivas v Premier Diamond Mining Co., Ltd.*, 1929 W.L.D. at p. 18, no point was made of impossibility. No Court will grant an order that is impossible of performance or that it does not know how it can be carried C out. There is no prospect of success on the merits. Alternatively, the prospect of success of the project is merely one aspect to be considered by this Court. As to costs, respondent is entitled to the wasted costs occasioned by the application. Respondent's opposition is reasonable and applicant should be ordered to pay those costs. As to the matters incorporated in applicant's replying affidavit which were not D incorporated in his application, a matter which should have been incorporated in the petition cannot be introduced in the reply. Similarly, issues and evidence material and/or vital to the relief sought, must be incorporated in the petition and not in the reply; see *Joseph and Jeans v Spitz and Others*. 1931 W.L.D. at p. 48; *Seymour* v. E Seymour, 1937 W.L.D. at p. 9; *Victor v Victor,* 1938 W.L.D. at p. 16; *de Villiers v de Villiers*, 1943 T.P.D. at p. 63; *Coffee, Tea & Chocolate Co., Ltd v Cape Trading Co.*, 1930 CP.D. at p. 82; *Mauerberger v Mauerberger*, 1948 (3) SA at p. 732; *Riddle v Riddle*, 1956 (2) SA at pp. 747 - 8; *Lebenya v District Commandant of Police*, 1950 (1) SA at pp. 867 - 77; *Bayat and Others v Hansa and Another*, F 1955 (3) SA at p. 553; *In re Leydsdorp and Pietersburg Estate, Ltd.*, 1903 T.S. at pp. 258, 259; *Crowley v Crowley and Gester*, 1919 T.P.D. at p. 428.

Coaker in reply.

Cur. adv. vult.

G *Postea* (March 31st).

Judgment

BOTHA, J.A.: On the 23rd December, 1954, the applicant purchased the farm Tweefontein No. 648 in the district of Rustenburg, and became the H registered owner thereof on the 14th June, 1955. On the 2nd April, 1957, the respondent acquired an adjoining piece of land being portion of the farm Bankdrift. The Elands River runs through both these properties. Along the banks of this river there is a slate formation and slate has been quarried on Bankdrift for some 16 years. Respondent's predecessor in title was also a private company, Superslate (Pty.) Ltd., and during its slat quarrying operations on Bankdrift, its manager, one Hooler, caused immense masses of slate waste to be dumped into the river bed at three different points. In February, 1955,

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there was a flood of the magnitude that can reasonably be expected to occur in that area once in every ten years. This flood carried many thousands of cubic yards of slate waste downstream on to Tweefontein. This, the trial Court found, could plainly have been foreseen. The trial A Court accordingly concluded that the deposit in the river bed of waste slate, the forward movement of which on to applicants' property was clearly foreseeable, constituted a nuisance. An action by the applicant against the previous company, which owned Bankdrift and which was responsible for the dumping of the slate waste in the river bed, for an B abatement of the nuisance, was rendered abortive by that company going into liquidation.

In an action instituted by the applicant in the Transvaal Provincial Division against the respondent, the present owner of Bankdrift, for an abatement of the nuisance, the trial Court found, *inter alia*, that:

> '1. The present defendant company never dumped additional waste in or near the river bed where it would be washed downstream by any C foreseeable future flood;

2. A flood such as the one experienced in 1955 will not remove further material from the dumps but will move the material already in the river bed further downstream. The evidence was - and I accept it - that the dumps had a damming effect in 1955 which caused the water to rise higher than it would otherwise have done. I do not agree with the engineer Mr. Alexander that the damming effect was negligible. The same D flood will not rise to the same height. As much as could be carried away by that flood has gone from the dumps, and it will require an appreciably greater flood to undercut the dumps any further;

3. The maximum flood that can be envisaged will carry away a further 30,000 cubic yards from the dumps. That is not much compared to what is already in the river bed, and a flood of such magnitude occurs only at long intervals. These may be in the region of 20 to 50 years. By a process of erosion more slate will however gradually be brought down E from the dumps into the river bed. Compared to the great damage already done, this will however not be a serious menace within measurable time. The danger emanating from the remainder of the dumps is therefore so small that an interdict is not justified in regard to this specific source of danger.

4. The material in the river will be carried progressively downstream, but exceedingly slowly. During the last three or four years it has moved forward by about 16 feet. It will be thinned out continually and the F rate of progress will be slowed down even further as more and more of the material is permanently trapped. This forward movement of slate (which involves the bringing down of more slate from Bankdrift to Tweefontein) will indeed further impair the amenities of the river, but not spectacularly so.

5. There is insufficient evidence to prove that the potentialities of Tweefontein as a farming proposition will be appreciatively affected. It is the river as an amenity which is in danger, and if defendant were liable and a practical method of abating the nuisance could be found, G the threat would be sufficient to justify an interdict.

6. No practicable way of arresting the slate was suggested.'

The trial Court found that the nuisance which undoubtedly existed, was not caused by the respondent, but by its predecessor in title, and that as the applicant was unable to suggest any reasonably practicable way of H arresting the further movement of slate waste downstream, ordered absolution from the instance with costs.

The trial Court pointed out that the removal of the slate waste from the river bed was a practical impossibility In any event most of the waste was already there when the applicant became the registered owner of Tweefontein (albeit not when he purchased it) and the dumping was done by the respondent's predecessor in title. An interdict against further dumping of waste could not be asked for, because

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the respondent had not dumped waste in places where it could be reached by the water. A suggestion made during the trial that a dam might be constructed to arrest the further progress of slate waste was, according A to the learned trial Judge, tentative and not persisted in. At any rate no order was sought for the construction of such a dam which, by reason of its probable cost, would in any event not have been a reasonable step to expect in the circumstances. In the end, says the learned Judge, nothing more was asked for than an order along the lines of the order made in the case of *Prinsloo v Luipaardsvlei Estates & Gold Mining Co.* B *Ltd.*, 1933 W.L.D. 6 at p. 29. Such an order was however also refused on the ground that abatement of the nuisance was either impossible or impractical.

Judgement in the action was given by the trial Court on the 22nd September. An appeal against this judgment was noted on the 9th October, C 1961, that is, within the period prescribed by the Rules, and the appeal record should, according to the Rules, have been lodged with the Registrar of this Court not later than 22nd December, 1961. This the applicant has failed to do, and now applies to this Court for an order condoning his failure in this respect, and for an order re-instating the appeal so noted.

D After the appeal was noted, a discussion took place between the applicant and his attorney on the 12th October, 1961, when it was decided that, before proceeding with the appeal, an opinion be sought from senior counsel. In his affidavit filed with the petition, applicant's attorney alleges that owing to pressure of work at the time, he was unable timeously to take the necessary steps for the preparation E of instructions to senior counsel for an opinion. It was not until the beginning of December, 1961, nearly two months later, when it was obvious that there would be no time to instruct senior

counsel for an opinion, that applicant's attorney decided, apparently without further reference to the applicant himself, to proceed with the appeal without F such an opinion, and on the 4th December, 1961, applicant's attorney instructed his Pretoria correspondents to request the stenographers to proceed with the typing of the record.

On the 12th December, 1961, or some time between the 4th and the 12th December, applicant's attorney realised that, because the record would G come to over 400 pages, and because difficulties were being encountered with the copying of a large number of photographs, plans and diagrams, which were handed in at the trial as exhibits, it had become doubtful whether a copy of the record would be completed by the 22nd December. It was accordingly arranged to approach the respondent's attorneys for an extension of time for the filing of the record. This was done on the H 13th December, but on the 18th December, applicant's attorneys were advised that respondent was not prepared to agree to such an extension. In consequence a petition to this Court for an order condoning the late filing of the record was prepared and signed on the 21st December, 1961.

The typing of the evidence was completed on the 3rd February, 1962, and we were informed from the Bar that the record will soon be ready for filing.

Condonation may be granted under Rule 13 if the applicant shows

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sufficient cause to justify this Court in granting the indulgence sought. (*Cairns' Executors v Gaarn*, 1912 AD 181; *Rose and Another v Alpha Secretaries Ltd.*, 1947 (4) SA 511 (AD) at pp. 517, 518). An exhaustive definition of what constitutes sufficient cause has never been attempted as any such attempt

> A 'would merely hamper the exercise of a discretion which the rules have purposely made very extensive and which it is highly desirable not to abridge'.

(*Cairns'* case at p. 186). In *Meintjies v H. D. Combrinck (Edms.) Bpk.*, 1961 (1) SA 262 (AD), the learned CHIEF JUSTICE at p. 264 pointed out that although the power to condone a failure to comply with a B procedural rule within a prescribed period will be exercised only upon sufficient and satisfactory grounds being shown, an application such as the present will receive favourable consideration because a Court is hesitant to allow a party to forfeit the enforcement of a right by reason of the non-compliance with such a Rule. (See also *Phillips v Direkteur vir Sensus*, 1959 (3) SA 370 (AD) at p. 374).

C It seems to me that the delay in the present case was due entirely to the neglect of applicant's attorney which neglect should not, in my view, in the circumstances of this case, debar the applicant, who himself was in no way to blame, from relief. (Cf. *Rose and Another v Alpha Secretaries Ltd., supra)*. The applicant's attorney should clearly D have realised that, in view of the fact that the trial itself had lasted four and a half days, and that a very large number of photographs, plans and diagrams were handed in as exhibits by both parties at the trial, the preparation of the appeal record would take considerably longer than the time he had allowed for it. On the other E hand, when the attorney finally realised that the record could not be prepared in time, he did everything he could, and with reasonable expedition, to remedy the results of his own neglect. His request to the respondent's attorneys for an extension of time was made soon after the realisation that the record could not be prepared in time and prior to the expiration of the prescribed period of three months, and the F petition to this Court was prepared and signed within three days of the respondent's refusal to agree to an extension of time, and before the three months had expired. The essence of the attorney's neglect seems to me therefore to have been a failure to realise, as he should in the circumstances have done, that the preparation of the appeal record would G take considerably longer than the time he had allowed for it, and that he allowed himself to be kept fully engaged on other duties until it was too late to ensure compliance with the Rules relating to the appeal to this Court. Under these circumstances it seems to me that I ought not to attribute the neglect of his attorney to the applicant and thus debar him from the relief sought.

H It was suggested during argument that the applicant himself was not entirely blameless, as he himself did nothing during the relevant period to ensure compliance with the Rules relating to the prosecution of his appeal. It is difficult to know what he should have done beyond directing a reminder or an enquiry to his attorney. He had left the matter in the hands of his attorney who had been his legal adviser for many years, and whom he had fully instructed about the appeal. It is said that a close business and professional relationship apparently

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existed between the applicant and his attorney. Although the applicant may have been, and probably was, anxious to know the result of counsel's opinion in regard to the appeal, and yet took no effective steps to A ascertain whether the opinion had been obtained or not, and what the advice was, he was nevertheless entitled to assume that his attorney would do everything that was necessary in connection with the prosecution of the appeal. It is unlikely that a reminder or an enquiry directed to his attorney would, in the circumstances, have ensured a timely completion of the record.

It was also contended that there is no evidence at all that the B applicant had at all times intended to proceed with the appeal. On the contrary, so it was argued, it appears that after the 12th October, 1961, when in consequence of a discussion between applicant and his attorney, it was decided that before proceeding with the appeal an C opinion would be sought from senior counsel, the applicant had never himself decided to proceed with the appeal. I do not understand the decision taken on the 12th October as one abandoning an intention to appeal subject to what senior counsel may advise, but as one merely suspending the further steps in the prosecution of the appeal until counsel's opinion was obtained, and if that opinion was unfavourable, D that it might have resulted in an abandonment of the intention to appeal. This is confirmed by the subsequent events, including the launching of the petition for condonation. If there had been a definite abandonment of the intention to appeal, it is unlikely that applicant's attorney would, without reference to the applicant, have decided to E proceed with the appeal without the advice of counsel, and have incurred the costs in connection with the preparation of the record.

It was finally contended on behalf of the respondent that the applicant has, in any event, no prospect of success on appeal and that condonation should be refused on this specific ground (*de Villiers v de Villiers*, 1947 (1) SA 635 (AD) and *Meintjies v* F *H. D. Combrinck (Edms.) Bpk., supra* at p. 265).

Counsel for the applicant contended that the learned trial Judge's findings of fact were open to attack in several respects, but his main contention was that, even on the facts as found by him, the learned G Judge erred in refusing to grant a mandatory interdict along the lines of the order made in *Prinsloo v Luipaardsvlei Estates and Gold Mining Co. Ltd., supra* at p. 29. Counsel, while conceding that the applicant did not seek a specific order directing the construction of a dam in the river bed, contended that it was persisted in as a practical suggestion for the arrest of further movement of slate waste downstream on to H applicant's property. The suggestion served merely to show that the arrest of the further movement of slate downstream was neither impossible nor impractical, and that an order along the lines of the order made in *Prinsloo's* case was therefore not precluded on those grounds.

The learned Judge, however, expressed the view that the construction of a dam for arresting the slate was, in view of the probable cost thereof, not a reasonable step to expect. We do not know what the probable cost of such a dam would be, but counsel suggested that the

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figure mentioned at the trial does not in the circumstances make it an unreasonable or impractical step to take. In considering the reasonableness of the suggestion,

consideration will probably also have to be given to the fact that, according to the findings of the trial A Court, there has been an undoubted invasion of the rights of the plaintiff and that he would normally be entitled to a remedy.

In the light of these and the other circumstances of this somewhat unusual case, it seems to me impossible to say that the applicant has no prospect of success on appeal at all, or that the appeal is not at least arguable. (*Auby and Pastellides (Pty.) Ltd v Glen Anil Investments (Pty.) Ltd.*, 1960 SA 865 (A.D.) at p. 870).

B I should in conclusion mention that the applicant was allowed to file replying affidavits in this matter on the day of the hearing of the application. This was followed by a notice on behalf of the respondent that application would be made at the hearing to strike out certain passages from the applicant's replying affidavits.

C It is, however, unnecessary to deal with the motion to strike out, for the passages objected to in applicant's replying affidavits have no material bearing upon the essential considerations which are decisive of this application, and even if those passages were struck out, the conclusion on the application would still have been the same.

D Having regard to the fact that in our view the failure to file the appeal record in this case within the prescribed time was due entirely to the neglect of the applicant's Johannesburg attorney, we assume that the latter will not attempt to recover from the applicant, as between attorney and client, fees or disbursements in connection with this E application. As the opposition to the application was in the circumstances reasonable, applicant must pay the costs of opposition. We are not concerned in these proceedings with the applicant's right, if any, to recover these costs from his attorney.

Condonation of the late filing of the appeal record and the re-instatement of the appeal is accordingly ordered.

F Applicant is ordered to file the record within 30 days of the date of this judgment, and to pay the respondent's costs of opposition, excluding the costs of the notice to strike out.

STEYN, C.J., BEYERS, J.A., OGILVIE THOMPSON, J.A., and VAN WINSEN, J.A., concurred.

G Applicant's Attorneys: *Adams & Adams*, Pretoria; *Goodrick & Franklin*, Bloemfontein. Respondent's Attorneys: *MacIntosh, Cross & Farquharson*, Pretoria; *Fred S. Webber & Son*, Bloemfontein.
