SALOOJEE AND ANOTHER, NNO v MINISTER OF COMMUNITY DEVELOPMENT 1965 (2) SA 135 (A)

Citation	1965 (2) SA 135 (A)
Court	Appellate Division
Judge	Steyn CJ, Ogilvie Thompson JA, Holmes JA, Wessels JA and Van Winsen AJA
Heard	September 21, 1964
Judgment	November 6, 1964
Annotations	Link to Case Annotations

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Flynote : Sleutelwoorde

Appeal - Appellate Division - Condonation of non-observance of Rules of Court - By no means a mere formality - Factors to be H regarded - Refusal of.

Headnote : Kopnota

Condonation of the non-observance of the Rules of the Appellate Division is by no means a mere formality. It is for the applicant to satisfy that Division that there is sufficient cause for excusing him from compliance, and the fact that the respondent has no objection, although not irrelevant, is by no means an overriding consideration.
An appellant should, whenever he realises that he has not complied with a Rule of Court, apply for condonation without delay.

STEYN CJ
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 the Appellate Division. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity.
The Court refused condonation in the absence of an acceptable A explanation not only of the delay in noting an appeal and in lodging the record timeously, but also of the delay in seeking condonation, where there were no strong prospects of success on appeal.

Case Information

Application for condonation. The facts appear from the judgment of STEYN, C.J.

B *I. Mahomed*, for the applicants.

J. J. Trengove, S.C. (with him *A. J. Heyns)*, for the respondent.

Cur. adv. vult.

C *Postea* (November 6th).

Judgment

STEYN, C.J.: This is an application for the condonation under Rule 13 of the Rules of this Court of the late noting of an appeal and the late filing of the record. The applicants are the executors testamentary in the estate of the late Suliman Moosa Saloojee, who

died on 27th D February, 1960. Before that date, on 23rd July, 1957, he had instituted an action against the Minister of the Interior for an order setting aside as null and void Proc. 153 of 1956, by which certain areas within the municipal areas of Johannesburg and Roodepoort Maraisburg, and on the farm Rietfontein in the district of Johannesburg, were declared group areas in terms of the Group Areas Act, 41 of 1950. By order of E Court the applicants have been substituted as plaintiffs in the action.

The validity of the Proclamation was attacked on a number of grounds. It was initially alleged that the Group Areas Board had failed to give proper consideration to the availability of alternative accommodation F for members of the groups affected, that the Board had decided in advance which group areas it was going to recommend and had failed to give proper consideration to the representations made by interested parties; that, in the alternative, the Minister concerned had likewise taken decisions in advance; and that he and the Governor-General-in-Council, in issuing the Proclamation, had failed to G apply their minds to the relevant issues and to exercise an honest discretion, more particularly in that they failed to give any or any honest consideration to the availability of alternative accommodation. As a result of the judgment of this Court in *Minister of the Interior v Lockhat and Others*, 1961 (2) SA 587 (AD) at p. 599, the latter allegation, in so far as it mentioned more particularly the failure to H give any or any honest consideration to the availability of alternative accommodation was abandoned in February, 1962. It was then averred that, in support of the more general allegation, the plaintiffs would rely upon a fixed policy in pursuance of which the Proclamation had been issued. The fixed policy is described as one of

> 'making life economically and socially intolerable and insupportable for the Asian inhabitants of the country and in particular for the Indian inhabitants, and/or of compelling them to emigrate from the country'.

According to the amended declaration, the Minister and the

STEYN CJ

Governor-General-in-Council did not honestly deem it expedient for the purposes of the Group Areas Act to issue the Proclamation, but did so with the improper and ulterior motive of giving effect to the fixed policy. The amended declaration indicated, further, that the plaintiffs A would rely not only on the nature and effect of the Proclamation mentioned, but also on other Proclamations declaring group areas in a list of 47 other towns and cities, in three Provinces of the Republic, and also on official pronouncements, including those of members of the Executive Council and of members and supporters of the Government.

B By a petition dated 14th May, 1962, the respondent sought an order declining to entertain the action on the ground that the original plaintiff unduly delayed the institution of the action and that the applicants unduly delayed the prosecution of the action to the respondent's prejudice; as also on the further ground that,

> 'in changing the basis of portion of their case by only now attacking the validity of the Proclamation on the ground of the so-called fixed C policy, an unreasonable length of time has elapsed since the publication of the Proclamation, and the State has been seriously prejudiced in consequence'.

The applicants thereupon applied for the cancellation of the respondent's petition. Their counsel contended that an action could not be stayed on the grounds advanced. HILL, J., held

> 'that although the proceedings were initiated by summons and not by way D of petition the true nature thereof is a review and that the defendant may rely on delay and prejudice as grounds for the stay of the proceedings'.

The application accordingly failed. (*Kalil and Another, NN.O v Minister of the Interior*, 1962 (4) SA 755 (T)).

Thereafter the petition was heard by CLAASSEN, J.* , who held that there E had been no undue delay in the institution of the action, and that both parties had contributed to the delay in prosecuting it. He did not find any such delay which could be a basis for refusing to hear the action. As to the new ground of attack upon the validity of the

Proclamation, the learned Judge was of the view that whatever occurred at the relevant F meeting of the Governor-General-in-Council is secret, confidential and privileged from disclosure, and that the Judge in charge of the proceedings would not therefore permit the giving of direct or circumstantial evidence of what occurred at the meeting. In the result he declined to entertain or permit evidence to be led in respect of the alleged fixed policy. To that extent the application succeeded. Although, according to the order of Court which was issued, the G application was allowed, the Court did in fact not decline to entertain the action, as prayed. In that respect the order is incorrect. The learned Judge did not, however, deal with the contention as to delay and prejudice in regard to this new ground. The judgment was delivered on 30th July, 1963. On the next day the applicants noted an appeal against H this judgment to the Provincial Division.

On 16th August, 1963, the applicants' attorneys wrote to the State Attorney, referring to a telephonic discussion and suggesting a direct appeal to this Court by consent. By a letter dated 24th August, the State Attorney replied that the Department concerned had no objection to such a course. The form of consent was forwarded to him on 5th

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STEYN CJ

October, and was returned to the applicants' attorneys on 8th October, duly completed.

On 11th October a notice of appeal, together with a written consent, was A handed in at the office of the Registrar of this Court, during his absence. On his return to the office on 14th October the Registrar informed the Bloemfontein attorneys of the applicants 'that the noting of the appeal was definitely out of time'. This was conveyed to their attorneys in Pretoria on 16th October, and on 18th October they were advised that the Registrar had refused to accept the notice of appeal.

B As to the filing of the record, the State Attorney was requested on 2nd October, 1963, to consent to the late filing thereof on the ground that the record is voluminous. He granted his consent on 4th October. The record was only completed and available for filing on 28th C January, 1964. Shortly thereafter an attempt was made to lodge the record with the Registrar, but he declined to accept it at that stage.

The petition for condonation of the late filing of the notice of appeal and of the record was received by the Registrar on 17th April, 1964, i.e. more than eight months after the date of the judgment in the Court below.

D In their petition, which was signed on 7th April, 1964, the applicants mention some of the facts to which I have referred, but they hardly make any attempt to explain the inordinate delay in approaching this Court. They state that the respondent has no objection to the grant of the relief prayed, and apparently regarded the application as a mere E formality. It is necessary once again to emphasise, as was done in *Meintjies v H. D. Combrinck (Edms.) Bpk.*, 1961 (1) SA 262 (AD) at p. 264, that condonation of the non-observance of the Rules of this Court is by no means a mere formality. It is for the applicant to satisfy this Court that there is sufficient cause for excusing him from compliance, and the fact that the respondent has no objection, although not irrelevant, is by no means an overriding consideration. In any F event, the statement that the respondent has no objection, is incorrect. The application has been vigorously contested. When the applicants signed the petition, they may have laboured under a wrong impression, but on the same day, after they had signed, their attorneys received a letter from the State Attorney in which he placed certain G facts on record and concluded by saying:

> 'Should the information referred to above be substantially correct, I must record that the respondent would not be prepared to consent to any application for condonation.'

Answering and replying affidavits have since been filed, and the relevant facts are to be gleaned from these affidavits.

H What calls for some acceptable explanation, is not only the delay in noting an appeal and in lodging the record timeously, but also the delay in seeking condonation. As indicated, *inter alia*, in *Commissioner for Inland Revenue v Burger*, 1956 (4) SA 446 (AD) at p. 449, and in *Meintjies' case, supra* at p. 264, an appellant should, whenever

he realises that he has not complied with a Rule of Court, apply for condonation without delay. A perusal of the Rules of this Court should have disclosed to the applicants' attorneys that, when they obtained consent to an appeal direct to this Court on 8th October, the time for

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STEYN CJ

noting an appeal had already expired. By 18th October, 1963, they knew that the notice of appeal tendered had been rejected by the Registrar as being out of time. From then onwards it must have been quite clear to them that an application for condonation was necessary. There is no A apparent reason why the petition, which comprises only some eight pages, could not have been lodged shortly thereafter.

The applicants state that, the Registrar having refused to accept the notice of appeal.

> 'it then became necessary to make application to this Honourable Court and this your petitioners decided to do once they were able to determine whether they could afford the substantial expense of the making of copies of the record'.

B Their attorneys confirm that it was decided that the necessary application should be drawn once the copies of the record had been made, so that they could be lodged together. As to the expense involved, it is quite clear that, already on 8th October, at the latest, i.e. ten days before the applicants say they realised an application was necessary, C their attorneys had arranged for the making of copies of the record. According to Mr. Crighton, one of their Johannesburg attorneys, it is true that they were not able to furnish the funds connected with the appeal in one sum, but they confidently assured his firm that funds would be provided, which in fact was done. Furthermore the reason given D to the State Attorney when his consent to a late filing of the record was sought, was not any lack of funds but that the record was voluminous. In these circumstances any suggestion that the delay, after 8th October, in making the application, was due to financial consideration, cannot carry any conviction, and, if anything, discloses a lack of candour.

E Notwithstanding the allegation that the petition was to be lodged together with the record, that was in fact not done. The last paragraph of the petition reads as follows:

> 'in view of the attitude of the respondent your petitioners have been advised not to burden this petition with a copy of the judgment or other portions of the record of the proceedings in the Transvaal Provincial Division but the necessary documents will be available to this F Honourable Court at the hearing of this application should this Honourable Court require to peruse such documents'.

The record was so made available. It comprises 120 pages. I would not describe it as voluminous. The record of the pleadings in the action was also produced. Its production hardly served any purpose. That these G records could be produced at the hearing of the application, must have been obvious all along. These records, moreover, were completed on 28th January, 1964. That did not accelerate the drawing of the petition, which was only signed on 7th April, more than two months later. In the result there is little reason to suppose that there is any exculpatory H connection whatsoever between the delay in the preparation of the record and the delay in bringing the application.

Neither is there any acceptable explanation of the first-mentioned delay. The record would have been necessary also for the appeal noted in the Provincial Division. Except for a somewhat vague reference to the financial position of the applicants, without any particulars, there is nothing to show why the necessary arrangements could not have been made until more than two months after the noting of that appeal. It is true that the respondent consented to the late filing of the record

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STEYN CJ

in this Court and that the consent was not limited to any specified date. But that, of course, cannot be taken to mean that it was a consent to a delay of unlimited duration. There is some evidence that initially A the attorneys on both sides might have been under the impression that the prescribed period would run as from the date of the

consent to an appeal direct to this Court, i.e. as from 8th October, 1963. On that basis, the parties might at that stage have thought that copies of the record should be filed at the latest three months thereafter, i.e. on 8th January, 1964. On 22nd January, 1964, the State Attorney wrote to B the applicants' attorneys in Pretoria pointing out that the record had not been completed and requesting that the matter be given immediate attention as the record should by that time have been filed. To this letter there was no reply, but copies of the record were served on him on 28th January. There is no explanation at all as to why the record of C the motion proceedings before CLAASSEN, J., i.e. the record with the exclusion of the pleadings in the action, could not have been prepared expeditiously.

As to the delay in drawing and lodging the petition after the record had become available, the only excuses offered are that Mr. Lewis, the D Pretoria attorney dealing with the matter, was unable to attend to it during February, 1964, as a result of extreme pressure of work after his return to office from annual leave at the end of January, and certain misunderstandings which arose because the applicants' Pretoria and Johannesburg firms of attorneys did not keep one another properly informed. I need hardly say that in the circumstances of this case these E are not excuses which could serve as a sufficient explanation for the delay. In any event, even after February, the Pretoria attorney only forwarded a draft petition to the Johannesburg attorneys on 12th March. If the petition in its present form is any reflection of the work he has done, it would not be irrelevant to know why he took so long over it. It F was received by the Johannesburg attorneys on 14th March. Mr. Crighton states:

> 'At this stage I was unaware that there was any urgency in regard to the filing of the petition since I had received no information that the State Attorney was at that stage making any enquiries regarding the same, or that he had expressed any concern over the delay.'

I accept that he was then unaware of the State Attorney's letter to the G Pretoria attorneys on 17th March, enquiring whether steps had been taken to place the matter on the roll of this Court, but I am at a loss to understand how he could, after so much procrastination, have failed to realise that the matter had already been urgent for quite a long time, or that urgency did not depend upon concern on the part of the State Attorney. I can only infer that, in the absence of reminders from H the State Attorney, he regarded the launching of the petition as a matter to be dealt with at his convenient leisure.

In the result, I find it impossible to hold that the delay in preparing the record and in bringing this application has been explained in a manner which is even remotely satisfactory.

This Court has on a number of occasions demonstrated its reluctance to penalise a litigant on account of the conduct of his attorney. A striking example thereof is to be found in *R v Chetty*, 1943 AD 321. In that case there was an even longer delay than here, and the

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excuses offered by the attorney concerned were clearly unsatisfactory, but the Court nevertheless granted condonation. FEETHAM, J.A., remarked (at p. 323):

> 'So far, however, as appeared from the papers before us, the applicant himself was not responsible for the delays which have occurred, save in so far as he continued to allow his case to remain in the hands of an A attorney who had shown himself unworthy of his confidence, and, in view of the serious nature of the conviction recorded against the applicant, and of the fact that he was given leave to appeal by the Transvaal Provincial Division, the application for condonation is now granted.'

In *Regal v African Superslate (Pty.) Ltd.*, 1962 (3) SA 18 (AD) at p. 23, also, this Court came to the conclusion that the delay was due B entirely to the neglect of the applicant's attorney, and held that the attorney's neglect should not, in the circumstances of the case, debar the applicant, who was himself in no way to blame, from relief. 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 C 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 D 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 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 E such a relationship, no matter what the circumstances of the failure are. (Cf. *Hepworths Ltd v Thornloe and Clarkson Ltd.*, 1922 T.P.D. 336; *Kingsborough Town Council v Thirlwell and Another*, 1957 (4) SA 533 (N)). A litigant, moreover, who knows, as the applicants did, that the F prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney (cf. *Regal v African Superslate (Pty.) Ltd., supra* at p. 23 *i.f.)* and expect to be exonerated of all G blame; and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none H of it is to be imputed to himself. That has not been done in this case. In these circumstances I would find it difficult to justify condonation unless there are strong prospects of success (*Melane v Santam Insurance Co. Ltd.*, 1962 (4) SA 531 (AD) at p. 532).

I turn then to the applicants' prospects of success. In regard to the ruling by the Court below that evidence to prove what took place at a meeting of the Governor-General-in-Council would not be admissible,

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1965 (2) SA p142

STEYN CJ

the submission is that the evidence as to the alleged fixed policy will not be direct evidence as to any discussion or decision at any such meeting, but evidence of other facts from which the fixed policy is to be inferred. Other facts detailed are the effects of the Proclamation in A issue and of other Proclamations applicable to the towns and cities mentioned in the list to which I have referred, the manner in which the granting of permits and the making of determinations in relation to the areas affected have been carried out, and pronouncements by members and B supporters of the Government. It may well be that this Court would hold that such evidence would not be inadmissible.

But that would not be the end of the matter. There would remain the question whether there would be any likelihood of prejudice to the respondent if the applicants were to be allowed to proceed on the new ground of attack introduced after such a long lapse of time since the C promulgation of the Proclamation and the institution of the action. (Cf., *inter alia, Hepworths Ltd., supra; Hassan & Co. Ltd v Potchefstroom Municipality*, 1928 T.P.D. 827; *Chesterfield House (Pty.) Ltd.*, v *Administrator of the Transvaal and Others*, 1951 (4) SA 421 (T) at p. 424). The evidence placed in prospect by the applicants covers D a vast field, over a period going back more than five years, and calls into question the pattern according to which thousands of permits have been issued, and a great many determinations have been made. On behalf of the respondent it is pointed out, *inter alia*, that policy matters would have been discussed between the then responsible Minister and E members of the Group Areas Board, and, if necessary, at Cabinet meetings, of which no minutes are kept, that the then Prime Minister (who would no doubt have been an authoritative exponent of his Government's policy) has since died, that there have been numerous changes in the Cabinet and in the composition of the Board, that in the F meantime memories have faded and that, by reason of the long delay, it would be extremely difficult to deal with all the allegations on which the applicants intend to rely. The submission, as I understand it, is that because of these considerations, although the alleged fixed policy will be denied, the

respondent will at this late stage be prejudiced in G the presentation of the State's case. I am not prepared to say that an examination of the respondent's position from this angle would not disclose any likelihood of prejudice. Having regard to the lapse of time and the multitude of decisions which may have to be investigated, there does appear to be at least a substantial possibility of some prejudice which might have been avoided had the plaintiff in the action relied on H these allegations at an earlier stage in the proceedings. The respondent is now, in effect, in an action instituted in 1957 placed in the position in which he would have been had an action based on those facts been instituted when the declaration was amended in 1962. To that extent he has, for all practical purposes, to face a new action, for which he may not be able to prepare himself as well as he might have done at an earlier stage. It seems clear that an action cannot be drawn out to such length by the tardy addition of further grounds, without some disadvantage to the other side. While, therefore, I would not hold that

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the applicants have no prospects of success on this issue, I cannot regard it otherwise than doubtful and uncertain.

A peculiar feature of this application is that the issue of likelihood of prejudice to the respondent by the late introduction of a new ground of attack called for a discretionary decision by the Judge *a quo* which A has not been given. It may be that if the applicants should on appeal succeed on the issue as to the admissibility of evidence of a fixed policy, the matter would be referred to the Court below to decide the first-mentioned issue. It is accordingly arguable, although the point has not been taken before us, that the prospects of success should be assessed only in regard to the evidential issue. I am of opinion, B however, that in such a situation the prospects of success before the Court *a quo* are not irrelevant. If, for instance, it should be clear that even if the matter were to be left to the discretionary decision of the Court below, an applicant cannot hope to succeed, an appeal to the Court would serve no purpose. In this case I cannot put the prospects C before the Court below, if the matter should be referred to that Court, higher than I have assessed them to be.

It is no doubt of importance to the applicants and many others that the action instituted by the late Suliman Saloojee should proceed. While the alleged fixed policy is not the only ground advanced in that action for D the invalidity of the Proclamation in question, it may be regarded as the main issue. But having regard to the uncertainty of the prospect that the issue of delay and prejudice raised in the respondent's petition in the Court below will be resolved in favour of the applicants, and the wholly unsatisfactory features of the delay in preparing the record and in bringing this application, and of the E explanation thereof to which I have referred, I am not disposed to grant the indulgence sought.

The application is refused with costs.

F OGILVIE THOMPSON, J.A., HOLMES, J.A., WESSELS, J.A., and VAN WINSEN, A.J.A., concurred.

Applicants' Attorneys: *A. Livingstone & Co.*, Johannesburg; *McIntosh, Cross & Farquharson*, Pretoria; *Goodrick & Franklin*, Bloemfontein. G Respondent's Attorneys: *State Attorney*, Pretoria; *Deputy State Attorney (O.F.S.)*, Bloemfontein.

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* See 1963 (4) SA 65 (T) - EDS.