

**IN THE COURT OF APPEAL OF LESOTHO**

In the matter between:

**MOTLATSI ADOLPH MOSAASE**

**APPELLANT**

and

**REX**

Held in Maseru

**CORAM:**

Steyn, P  
Grosskopf, JA  
Melunsky, JA

**SUMMARY**

*Appeal against a decision refusing to grant condonation of the late filing of a notice of appeal in a criminal matter – Court **a quo** confining itself to a consideration of the sufficiency of the explanation given by the appellant and failing to give any consideration to the prospects of success. – Such an approach unacceptable – Court should have weighed the degree of insufficiency of the reason for delay against the prospects of success – the Court should exercise greater tolerance in criminal matters, particularly where the liberty of the individual is at stake. - Approach should not be compartmentalized but comprehensive – Appeal upheld and condonation granted. – Court ordered hearing of the appeal as a matter of urgency.*

## JUDGMENT

### STEYN, P

At the hearing of this urgent appeal I gave an *ex tempore* judgment which has now been transcribed and which reads as follows:

This is an appeal against an order of the High Court dismissing an application to condone the late filing of a notice of appeal against a sentence imposed in the Magistrate's Court.

The appellant had been convicted after pleading guilty on 3 counts of fraud involving a total amount of M3,200. He was sentenced to 2 years' imprisonment on each count, the sentences to run concurrently. He appealed out of time to the High Court against the severity of the sentences only. His appeal to this Court is directed only against the refusal of the court *a quo* to grant condonation for the late filing of the appeal.

The appellant was sentenced on the 14<sup>th</sup> of June. The appeal to the High Court was noted on the 25<sup>th</sup> of August. The appeal – including the condonation application was heard on the 19<sup>th</sup> of

September and judgment refusing to condone the delay was delivered on the 30<sup>th</sup> of September. In its judgment the court held that the reasons for the delay were unsatisfactory and the court could not grant him the indulgence sought. These reasons are recorded as follows in an affidavit by the appellant:

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After my conviction it was my wish to appeal against the sentence, but I was unable to obtain legal assistance in the matter. It was only recently that my parents obtained the services of an attorney to assist me. At first my attorney set out to make representations on my behalf on the automatic review of my case by this Honourable Court, but the said representations did not reach this court until the court declared the proceedings to be in accordance with substantial justice. That process also added to the delay in filing this appeal.

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I respectfully say that the delay in filing this appeal was not deliberate as explained above already. I further say that my appeal has prospects of success in that the court *a quo* did not take into account my personal circumstances and overemphasized the deterrence aspect as against my circumstances.”

The court *a quo* in its judgment confined itself exclusively to a consideration of the sufficiency of the explanation for the delay of some 2 months and 11 days from the time of conviction to the date of the noting of the appeal. At no stage does the court refer to any other consideration – and most importantly makes no reference to the

prospects of success in the appeal.

Particularly in view of the fact that this is a criminal matter the court should have weighed the degree of insufficiency of the reasons for the delay against the prospects of success in the appeal against the sentences imposed. Some possibilities in this respect are the following: (i) reduction or a setting aside of the sentence and possibly imposing only a partially operative custodial sentence, or (ii) suspending all or part of the period of imprisonment on conditions; (iii) either with or without a substantial fine, either compensatory or otherwise. The contentions to be considered are legion and should at least have exercised the court's mind before closing the door to relief on the appellant.

There is clear authority that such an approach is to be commended and more particularly that the court should exercise greater tolerance in criminal matters when the explanations fall short of the desired standards, and there are reasonable prospects of success. This must not be construed and condoning inadequately presented applications but is directed at ensuring just outcomes.

See in this regard:

**Rex v Anderson 1949 (4) SA 629 (C) at pp.632 – 633; R v Kruger and others 1954(3) 816.**

See also generally **S v Ackerman 1965 (4) SA 740 (0)** the headnote of which in so far as it is relevant reads as follows:

“Section 103 (3) of Act 32 of 1944 gives the Court a wide discretion but the Court must be satisfied that, in exercising it, justice is being done. In an application under the section by an applicant to condone his failure to note an appeal timeously in terms of Rule 63 (1) of the Act, all the facts which the applicant puts forward directly in regard to his failure, and the merits of the case, as well as the consequences, such as prejudice to other interested parties, must be considered. It is essential in such an application that the applicant in any event gives reasons, no matter how flimsy, which will explain his failure.”

The Court of Appeal in South Africa has also laid down the general rule as follows in *Melane v Santam Insurance Co. Ltd.* 1962 (4) SA (A) at 532:

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent’s interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in

the affidavits. I think that all the foregoing clearly emerge from decisions of this Court, and therefore I need not add to the evergrowing burden of annotations by citing the cases.”

It is our view:

1. That the court *a quo* did not consider the matter comprehensively and compartmentalised a consideration of the sufficiency of the reasons for a delay instead of viewing the matter comprehensively including considering the question of the prospects of success.
2. It had no or insufficient regard to the implications of a refusal of the application, particularly the fact that the liberty of the subject was in issue.
3. That in the circumstances of the case and weighing up the explanation of the delay together with the prospects of success and the fact that this is a criminal matter, condonation should be granted.

For these reasons we order as follows:

1. **The appeal is upheld and the order refusing condonation for the late noting of an appeal is set aside.**
2. **Condonation of such late noting is granted.**
3. **The appeal is referred to the High Court for hearing.**

4. **The Registrar is ordered to afford the appeal the highest priority and is directed to have it enrolled as a matter of urgency.**

J.H. STEYN  
PRESIDENT OF THE COURT OF APPEAL

I agree :

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F.H. GROSSKOPF  
JUDGE OF APPEAL

I agree :

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L. MELUNSKY  
JUDGE OF APPEAL

DELIVERED ON THIS THE 20<sup>TH</sup> DAY OF OCTOBER 2005

For Appellant : Mr. E.H. Phoofolo

For Respondent : Mr. Mr. M. Tlali