IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO.: 22/2020
CCA/0158/2019

In the matter between:

CHRISTOFFEL SMITH **APPELLANT**

AND

TSEPONG PROPRIETARY LIMITED **RESPONDENT**

CORAM: P.T. DAMASEB, AJA
M.H. CHINHENGO AJA
N.T MTSHIYA AJA

HEARD: 19 APRIL 2021
DELIVERED: 14 MAY 2021

SUMMARY

This is an appeal against an "ex tempore order" of the High Court that was delivered on the 24th February 2020, without any reasons being furnished. The appeal noted out of the prescribed 6 weeks from date of judgement. The Legal Representative of Appellant misunderstanding the meaning of the word 'judgement' in Rule 4(1) of the Court of Appeal Rules, waited for written reasons to be released before noting the appeal. Presiding judge in court a qou passed away before releasing the written reasons. Appellant's attorney advised by the respondents' attorney in July 2020 of need to file an application for condonation, but only filed the application for condonation 8 months later. Failure by attorney to file application for condonation as soon as they became aware of non-compliance with the rule, allegedly due to misinterpretation of Rule 15(3) of Court of Appeal Rules. An application for condonation is not a mere formality; the trigger for it is non-compliance with the Rules of Court. An attorney instructed to note an appeal is duty bound to acquaint himself with the Rules of the Court in which the appeal is to be prosecuted. It should not simply be assumed that, where non-compliance was due entirely to the neglect of the appellants' attorney, that condonation will be granted.

JUDGMENT

P.T. DAMASEB, AJA

Introduction

[1] This appeal started life as an urgent application in the High Court in which the appellant ('Dr Smith') sought an order to place the respondent ('Tsepong') under judicial management in terms

of s 156 of the Companies Act 2011 ('the Companies Act'). That application was fiercely opposed on every conceivable procedural ground and on the merits by a director of Tsepong.

[2] Section 156(1) of the Companies Act permits 'any shareholder, director or creditor' to apply to court for an order to place a company under judicial management in terms of s 125 of that Act.

[3] Dr Smith deposed to the founding affidavit in support of the application alleging that he was a director of Tsepong and duly authorized *qua* director to do so. Dr Smith is the managing director of Netcare Hospital Group (Pty) Ltd ('Netcare') which holds 40% shares in Tsepong. In terms of the shareholders agreement between the shareholders of Tsepong, Netcare is responsible for the management of Tsepong. Tsepong shareholders are as follows: Netcare: 40%; Excel Health Services (Pty) Ltd: 20%; Afri'nnal Health (Pty) Ltd: 20%; D10 Investment (Pty) Ltd :10% and Women Investment Company: 10%.

[4] Tsepong has six directors representing the various shareholders as follows: Netcare 2 directors and the remaining minority shareholders one director each.

[5] The application to place Tsepong under judicial management was brought by Dr Smith claiming to be a director of Tsepong. It is

significant that although in terms of s 156(1) Netcare, as shareholder, could have brought such an application, it did not.

[6] The overarching reason for the application to bring Tsepong under judicial management is stated in Dr Smith's affidavit to be that the board has become dysfunctional and that the shareholders are deadlocked and unable to do something about it. Voting at board meetings is along partisan lines and this has led to an impasse.

[7] Mr Smith's directorship of Tsepong was challenged by another director of Tsepong, Dr Norbert Moji who, purporting to act on behalf of Tsepong or in his capacity as a director of the company, deposed to the affidavit in opposition to Dr Smith's application. The challenge to Dr Smith's authority was premised on the fact that Dr Mr Smith's name does not appear on the register of directors of Tsepong as required by the Companies Act.

[8] For his part, Dr Smith also took the *in limine* objection that Dr Moji did not have the authority to act on behalf of Tsepong as there was no valid resolution taken by Tsepong to authorise the opposition to the application for judicial management. In the alternative, Dr Moji had asserted authority to act in terms of s 59 of the Companies Act which mandates the board of directors to manage the affairs of the company. Dr Smith took the view that the section does not authorize an individual director to oppose

proceedings on behalf of the company. (But that does not address Dr Moji's alternative stance that he is doing so in his individual capacity as a director). The significance of that will become apparent when I discuss the rights of directors under s 156(1) of the Companies Act.

[9] On the merits, Dr Moji alleged that a case had not been made out for judicial management and disputed all the grounds advanced by Dr Smith in justification of placing Tsepong under judicial management. In particular, he alleged that judicial management was being used as a ruse by Dr Smith and Netcare to hide the looting of Tsepong by Netcare and to thwart the attempt by other directors to institute a forensic audit of Tsepong which will uncover the mismanagement by Netcare of Tsepong's affairs.

[10] It is necessary that I deal upfront with the issue of Dr Moji's competence to have opposed the main application because that has become a live issue again in the appeal since Dr Moji has filed a notice to oppose the appeal and asked this court to strike off the appeal on the ground that Dr Smith failed to provide a satisfactory explanation for pursuing the appeal out of time. That issue has to be determined first before we can consider the merits. If Dr Moji is not authorized, the appeal must be considered unopposed and the opposing affidavit may not be considered.

Dr Moji's authority

[11] Both in the main application and in this appeal, Dr Moji alleges that he is duly authorized in terms of a resolution of Tsepong to oppose the litigation being pursued by Dr Smith. In the alternative, he states, he does so as a director of Tsepong in terms of s '59 and other provisions of the Companies Act'.

[12] In the view that I take of the reliance on s 59 of the Companies Act read with s 156, I do not find it necessary to decide if the disputed resolution relied on by Dr Moji is valid.

[13] It is a fundamental tenet of Company Law that a company acts through its directors as a collective.[1] The articles of association of a company (or shareholders agreement as in the case of Tsepong) ordinarily stipulate that the business of the company must be managed by the directors and empower the directors to exercise all the powers of the company other than those required by the companies legislation or the company's articles of association to be exercised by the company in general meeting or by an individual director.

[1] See s 59 of the Companies Act.

[14] Thus, unless a particular power is specifically delegated to an individual director, the powers of a company are exercised by the directors collectively, including the conduct of litigation.[2]

[15] In s 156 of the Companies Act, the legislator has departed from the general rule and empowered an individual director to act independently of the collective in litigating against the company.

[16] That is an important indication that in such proceedings, other directors who are dissatisfied with the director who acts independently, are not without recourse. In my view when it comes to judicial management, s 156(1) of the Companies Act read with s 59(1)[3] must be given a *purposive* interpretation to achieve its true objects.

[17] The facts of this case demonstrate that a contrary interpretation would be absurd and create inequity as between

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[2] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD at 168 at 217; *Wolpert v Uitzigt Properties (Pty) Ltd* 1961 (2) SA 257 (W) at 267-8; *Rosebank Television and Appliance Co (Pty) Ltd v Orbit Sales Corp* (Pty) Ltd 1969 (1) SA 300 (T) at 303.

[3] Which states: *'The business and affairs if a company shall be managed by, or under the direction or supervision of the board of the company, which shall have all the powers necessary for managing, directing and supervising the management of the business and affairs of the company, subject to modification, exceptions or limitations in accordance with the articles of incorporation.'*

directors who otherwise are required to act as a collective but for the exception expressly created in s 156(1).

[18] Purposive interpretation enjoys statutory imprimatur in Lesotho. Section 15 of the Interpretation Act 19 of 1977 states:

> 'Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.'

[19] Dr Smith's version, both in the main application and condonation application, is that Tsepong's board is hopelessly deadlocked and the shareholders are unable to do anything about it. The board of directors is, according to him, unable to take any decisions to advance the interests of Tsepong. That is the reason he as an individual director seeks judicial management and makes very grave allegations against other co-directors about their management of the affairs of Tsepong.

[20] Although it expressly states who may bring such an application, s 156 of the Companies Act is silent on who may oppose an application for judicial management. On Dr Smith's theory, only the board of Tsepong may do so. The net effect of that is that a single director can effectively determine the fate of

the company while other directors and shareholders are powerless to do anything about it. If the other directors are unhappy about such litigation or the allegations being levelled against them, those allegations will remain untested because, if Dr Smith is correct, they would have no standing in the proceedings.

[21] Section 156(1) gives a court wide discretion to place a company under judicial management. It is important therefore that all the relevant facts are presented for the court to take an informed decision. It is the directors of the company who are steeped in its affairs and who can provide crucial information and facts to the court to exercise its discretion judiciously.

[22] Directors, both as a collective and individually, owe a fiduciary duty to the company. That fiduciary duty must, in my view, be read into s 156 of the Companies Act in so far as it is silent on who may oppose an application for judicial management brought by another director. If that were not so, one director may effectively singlehandedly move to place a company under judicial management taking advantage of the fact the board is deadlocked and that the shareholders are unable to resolve the internal differences in the company.

[23] I am satisfied, therefore, that Dr Moji, as a director of Tsepong, is authorised, as he claimed in the main proceedings

and in the appeal, to oppose the proceedings being pursued by Dr Smith.

The condonation application

[24] When the pleadings closed in the main application, the matter was argued before late Lady-Justice Lisebo Chaka-Makhooane who handed down an "ex tempore order" on 24th February 2020 and dismissed the application with costs, without furnishing reasons for the order. Regrettably, the presiding judge died on 14th July 2020 without handing down written reasons for the order she made.

[25] Although a Notice of Appeal was filed on 20 July 2020, the condonation application was only filed on the 19th March 2021, about 8 months after the Notice of Appeal was filed of record.

Condonation application

[26] The first order of business before this court is the condonation application brought by Dr Smith seeking relief in the following terms:

> *'1. That the late filling of the Notice of Appeal on behalf of the Appellant be condoned*
> *2. Costs in the event of opposition; and*
> *3. That such further and/or alternative relief be granted as may be deemed appropriate.'*

[27] The condonation application is opposed by Dr Robert Moji. The basis for the opposition is that a case had not been made out for the granting of the condonation.

The proper approach in a condonation application

[28] A party seeking condonation must furnish a satisfactory explanation for the non-compliance, explain the failure to act timeously and show the default was not wilful.[4] The court enjoys a very wide discretion. It is a matter of fairness to both sides.[5] The condonation application must be *bona fide,* and the applicant must make a full and frank disclosure of all the relevant facts that led to the non-compliance. Every period of the delay must be explained and the application for condonation must be brought as soon as the non-compliance has become apparent, including setting out the prospects of success.

[29] The factors that the court will place in the scale whether or not to grant condonation will include:

> *"The degree of delay in approaching the court for condonation, the adequacy of the reasons advanced for such delay, the prospects of Applicant's success on appeal, and the Respondent's interest in the finality of the judgment."*[6]

[4] *Sello v Sello and Others* (C of A (CIV) NO. 55/2011) [2012] LSCA 18 (27 April 2012).
[5] *Gumede v Road Accident Fund* 2007 (6) SA 304 (CPD) at 307 D.
[6] *Koaho v Solicitor General* 1980 – 1984 LAC 35 at 36-37.

[30] Although, generally, the court will consider the prospects of success in adjudicating an application for condonation it may dismiss the application if the breach of the rules is flagrant and gross. Where there was an inordinate delay that is not satisfactorily explained, the applicant's prospects of success are immaterial.[7]

[31] In *Moosa and Others v Lesotho Revenue Authority,*[8] citing with approval dicta from South Africa, this court stated:

> *'[18] [W]hen there has been non-compliance, the applicant should, without delay apply for condonation and should give cogent reasons for non-observance with the Rules initially...*
> *[19] 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, the prospect of success is important, but not decisive...'*

[32] In *Tshivhase Royal Council and Another v Tshivhase and Another*[9]Nestadt JA commented that:

> '[I]n 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; this applies even where the blame lies solely with the attorney.'

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[7] *Chetty v Law Society Transvaal* 1985 (2) SA 756 (A) at 765; *NUM v Council for Mineral Technology* (1999) 3 BLLR 209 (LAC) at 211 G-H; *National Education Health and Allied Workers Union on behalf of Mofokeng and others v Charlotte Theron Children's Home* (2004) 25 *ILJ* 2195 (LAC) at para 23

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[8] (C of A) (CIV) 2/2014 [2015] LSCA 36 (06 November 2015).

[9] *Tshivhase Royal Council and Another v Tshivhase and Another* [1992] ZASCA 185; 1992 (4) SA 852 (AD) at 859E-F,

[32] Therefore, if the cause of delay in complying with the rules is the conduct of the applicants' attorney, it does not follow that condonation will be granted. A legal practitioner instructed to note an appeal has a duty to acquaint himself with the Rules of the Court and the relevant judgements having a bearing on those rules.[10]

[33] As Plewman JA observed in *Darries*[11]:

> '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 the appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realizes 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 appellants' attorney that condonation will be granted. In applications of this sort the applicants' 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.' (own emphasis added)

[34] In *Saloojee and Another NNO v Minister of Community Development*[12], Steyn CJ put it thus:

> '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

[10] *Moaki v Reckitt and Colman (FRICA) Ltd and another* 1968 (3) SA 98 (A) at 101
[11] *Darries v Sheriff Magistrate's Court, Wynberg and Another* [1998] ZASCA 18;1998(3) SA 34 (SCA) at 40H-41E.
[12] *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A),

> 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 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 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 relationship, no matter what the circumstances of the failure are.'

[35] It is against that backdrop that I now proceed to consider the affidavits filed by the parties in the condonation application.

The affidavits in the condonation application

The appellant

[36] Aggrieved by the High Court's order dismissing his application, Dr Smith decided to appeal to this court. In terms of rule 4(1) of the Court of Appeal Rules, the appeal should have been noted within six weeks of the High Court's order. The six weeks lapsed on 07 April 2020.

[37] The appeal was however only noted on the 20th July 2020, without an application for condonation for the late filling of the appeal. It is common cause that the condonation application was only filed some 8 months later after its absence was made

reference to by Dr Moji's counsel of record in the heads of argument filed for the hearing of the appeal.

[38] The question now is whether: (a) Dr Smith provided a satisfactory explanation for the late filing of the notice of appeal and (b) he brought a condonation application as soon as he became aware of the non-observance of the rules? In the summary that follows it will be apparent that he took great trouble to explain why the notice of appeal was filed late but he does not at all in the founding affidavit explain why the condonation application took 8 months to be made. On the authorities I have referred to, he should have.

[39] In his condonation application Dr Smith maintains that he laboured under doubt as to when a Notice of Appeal was to be filed. The doubt was a result of uncertainty as to the interpretation of the word "judgment" in rule 4(1) of the Court of Appeal rules, which his legal advisers interpreted to include the written reasons for the order. In other words, he was advised initially that the notice to appeal had to be filed 6 weeks after written reasons were handed down.

[40] According to Dr Smith, considering the provisions of Rule 4 (4) and 4(5) of the Rules of this court it was not possible to file a Notice of Appeal without the written reasons, as the rules require specificity as to which parts of the judgment or order are being

appealed against and prohibits a party from relying or arguing on grounds not set forth in the grounds of appeal.[13]

[41] Dr Smith further explains that efforts to obtain the written reasons were hindered by Covid-19 related measures, the National lockdowns in both South Africa (27 March 2020) and Lesotho (29 March 2020-21 April 2020), the border closure between South Africa and Lesotho and the fact that the courts in Lesotho were closed from 29th March 2020-11th May 2020.

[42] According to the deponent, after the order was handed down on the 25th February 2020, his South-African-based attorneys, Werksmans, sent an email to their correspondents, Kleingeld Attorneys, expressing the intention to appeal, and seeking advise

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[13] Rule 4 stipulates that:

> *'The notice of appeal shall-*
> *(4)(a) state whether the whole or part of the judgment or order is appealed against. If a part only of the judgement or order is being appealed against, the notice of appeal shall state which part; and-*
> *(b) set forth concisely and clearly the grounds of objection to the judgment or order and such grounds shall set forth in separate numbered paragraphs the findings of fact and conclusions of law to which the appellant objects and shall also state the particular respects in which the variation of the judgment or order is sought.''*
>
> (5) The appellant shall not argue or rely on grounds not set forth in the notice of appeal unless the Court grants him leave to do so. The court, in· deciding the appeal, may do so on any grounds whether or not set forth in the notice of appeal and whether or not relied upon by any party.'

on how to obtain the written reasons and the timelines for noting an appeal. Mr. Kleingeld responded with a commitment to revert as soon as possible on the availability of the reasons and the relevant timelines.

[43] Mr Kleingeld confirms that he read and understood the meaning of rule 4(1) to be that the six months commence from the date of judgment containing the reasons for the order made, and that he did not consider the word ‘judgment’ to have the same meaning as order.

[44] Dr Smith accepts that it was on 16th July 2020 that Mr. Kleingeld was informed by the attorneys representing Dr Moji that the time period commenced on the date the “ex tempore order” was handed down and thus they would be required to file an application for condonation for late filing of the appeal.

[45] Confronted with the statement by Dr Moji’s attorneys, Mr Kleingeld sought counsel from other Lesotho-based legal practitioners and when confronted with conflicting views, he advised Werksmans on the18th July 2020 who in turn advised the Appellant that the six weeks commenced from the date of the order. Dr Smith then instructed his attorney to attend to noting the appeal and that was done on the 20th July 2020.

[46] Dr Smith states that he relied on the advice of his attorney and did not question the attorney's interpretation of the Rules of the Court, and thus pleads not to be punished for his attorneys (mis)understanding of the Rules.

[47] The application for condonation was filed only on the 19th March 2021, some 8 months after being made aware of the need to file the application. There is no explanation why that is so.

The respondent

[48] Dr Moji purporting to act on behalf of Tsepong opposed the application for condonation and, in his answering affidavit, alleges that the position of the law in Lesotho is that an appeal is noted against the order of the court and not the reasons. He states that nothing prevented Dr Smith from noting the appeal on time and reserving his right to file further grounds of appeal once the reasons were provided.

[49] The appellant's attorneys, when advised by Dr Moji's attorney of the need to file a condonation application, responded via email contending that a condonation application 'in terms of [rule section 15 (3) of the Court of Appeal Rules] requires and appellant who is out of time 'to file such not less than 7 days before the date of hearing.'

[50] Dr Moji asserts that Dr Smith’s legal team was fully aware of the breach of rule 4 (1), and when they so became aware took the posture that a condonation application could wait until ‘not less than’ seven days before the hearing. This attitude, Dr Moji contends, demonstrates that Dr Smith’s attorneys proceeded from the premise that a condonation application is a mere formality which is ‘there for the taking’.

[51] According to Dr Moji, Dr Smith filed the condonation application after he was served with the respondent's heads of argument in the appeal, wherein Dr Moji’s counsel referred to the fact that no condonation application had yet been filed.

[52] Dr Moji maintains that the Dr Smith ought to have applied for condonation the moment he became aware that he was in breach of the rules notwithstanding the provisions of rule 15 (3).

[53] The respondent contents that the appellant deliberately did not disclose that notwithstanding his spirited efforts to blame the lockdown in his own country, he ironically was able to file an urgent application for rescission in August 2020 and that he fully participated in such litigation until its finality notwithstanding national lockdown and state of emergency in his country as he claims. His use of the national lockdown is opportunistic in the circumstances.

Discussion

[54] The focus of Dr Smith's explanation for the delay is the period leading up to the noting of the appeal on 20 July 2020. He makes no effort to explain the reason for not seeking condonation for the late noting of the appeal. In fact, it is clear from the respondent's papers that he had become aware, if his lawyer was not already so aware as he should have been, that a condonation application was required - and as soon as the non-compliance became apparent.

[55] For an inexplicable reason, considering the clear statement of the law in the cases that condonation must be sought immediately the breach is apparent, Dr Smith's lawyer adopted the attitude that because of rule 15(3), condonation will only be applied for 'not less than 7 days before the hearing'. In fact, the application was made only after the respondent made reference to its absence in the respondent's heads of argument.

[56] To justify the timing of the condonation application, Mr Stais SC for Dr Smith in oral argument placed great store by Court of Appeal Rule 15 (3). It is doubtful whether subrule (3) refers to the actual hearing of the appeal and not the hearing date determined for the hearing of the condonation application. This must be considered against the backdrop of what I say in para [64] below.

[57] Rule 15 seems to me to regulate the procedure for the adjudication of condonation applications. The rule in its entirety reads:

> *"15. (1) If an appellant breaches provisions of these Rules, his appeal may be struck off the roll.*
>
> *(2) The Court shall have a discretion to condone any breach on the application of the appellant.*
>
> *(3) Such application shall be by notice of motion delivered to the respondent and to the Registrar not less than seven days before the date of hearing.*
>
> *(4) Where the respondent consents to condonation, the application may be considered by a single Judge.*
>
> *(5) The Court, if it condones the breach, may order that the appellant shall comply with the Rules breached within a specified time or may make any order which it deems just including any order as to costs.*
>
> *(6) The provisions of this Rule shall apply mutatis mutandis to the appellant in a cross-appeal.'*

[58] If what is intended is the hearing of the appeal, it begs the question when the respondent in the condonation application will oppose and file answering papers, the reply filed and the court will give the directions contemplated in sub-rule (5). Although I have the doubts that I have expressed, I will assume for present purposes, that the parties' interpretation of the rule is correct and that the 'hearing' referred to in rule 15(3) is the hearing of the actual appeal.

[59] It bears mention that the sub-rule makes clear that the application for condonation must be filed ‘not less than’ seven days before the date of hearing. Seven days is the minimum period within which such an application must be brought. It does not suggest that where it is possible to do so more than seven days before the hearing a party should not do so.

[60] We have no explanation on the record why the condonation application could not be brought earlier than it actually was. That is contrary to the clear statement in the cases to which I have referred, both in this jurisdiction and that where Dr Smith’s attorneys practice.

[61] Condonation is not a right but an indulgence which the court grants on good cause shown. It is elementary that condonation must be sought as soon as the non-compliance becomes apparent. It is an abuse of the process of the court to wait for eight months and to apply for condonation seven days before the hearing of an appeal when it was reasonably possible to do so much earlier. Worst still, where there is no satisfactory explanation for why the applicant for condonation waited for as long as it did before seeking condonation.

[62] Not only is condonation an indulgence, but it is not a unilateral process. It implicates the rights of the other party involved in the appeal. Such a party is entitled to both finality and

to oppose the condonation. Where, as here, the respondent puts the applicant on notice as to the non-compliance and the need for seeking condonation at once, it imposes an onerous responsibility on the applicant when seeking condonation to show why it could not be done earlier than the seven days.

[63] It must be understood by all those who make it their business to practice before this court that it is not only the convenience of the parties but also that of the court and the interest of the administration of justice that is at stake in a condonation application.

[64] To demonstrate, this court's roll makes provision for the hearing of interlocutory motions as contemplated in rule 18 of the Court of Appeal rules before the roll call of the set down appeals. In other words, the court's preference is to dispose of interlocutory motions before the matter is heard on the merits. In that way, the court's time is not wasted by entertaining interlocutory skirmishes when the focus must be on the merits of a matter.

[65] The 'glaring, flagrant and inexplicable' failure to seek condonation when the breach became apparent, renders the issue of prospects of success unworthy of consideration regardless of the merits of the appeal. The condonation

application therefore falls to be dismissed, not simply struck off the roll.

The Order

[66] In the result:

(a) The application for condonation is dismissed, with costs.

(b) The appeal is consequently, struck off the roll, with costs.

PT DAMASEB

ACTING JUSTICE OF APPEAL

I agree

MH CHINHENGO

ACTING JUSTICE OF APPEAL

I agree

N MTSHIYA

ACTING JUSTICE OF APPEAL

FOR THE APPELLANT: MR P STAIS SC instructed by
HARLEY & MORRIS

FOR THE RESPONDENT: MR LETSIKA
MEI & MEI ATTORNEYS