

**IN THE COURT OF APPEAL OF LESOTHO
HELD AT MASERU**

**C OF A (CIV) 45/2021
CIV/APN/245/2011**

In the matter between:

MAKHELELISE KHATALA

APPELLANT

AND

**COMMISSIONER OF CORRECTIONAL
SERVICES**

1ST RESPONDENT

**MINISTER OF JUSTICE, HUMAN RIGHTS
AND REHABILITATION**

2ND RESPONDENT

MINISTER OF PUBLIC SERVICE

3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

CORAM:

P.T. DAMASEB AJA.

P. MUSONDA AJA.

M.H. CHINHENGO AJA.

HEARD:

20TH APRIL 2022

DELIVERED:

13TH MAY 2022

SUMMARY

Application for condonation- Eight (8) years delay in noting an appeal- the delay and frailty of the reasons for the delay unprecedentedly long and outlandish respectively- interrogation of the merits or prospects of success not desirable- Application dismissed and appeal struck from the roll with costs.

JUDGMENT

P. MUSONDA

Introduction

[1] This appeal commenced as an application by the appellant in the High Court (Makhelelise Khatala) seeking an order directing the Respondent to pay the appellant his unpaid salary arrears together with the mountain and risk allowance for nineteenth months from April 2008 to October 2010.

Background

[2] The appellant was employed as a correctional officer within the Department of Correctional Service. He was dismissed by letter of 20th March 2008 after being absent for five (5) months from the 2nd day of November.

[3] After dismissal, the appellant wrote a letter dated 31st March 2008, in which he pleaded with the Commissioner of Correctional Services to be reinstated as he was a married man and a breadwinner. He remorsefully pleaded that he was ready for any

punishment including the forfeiture of past or whole of the salary for the period that he was out of employment.

[4] The Commissioner reinstated the appellant on 28th October 2009. He was directed to report back at Thaba-Tseka Correctional Institution on the 4th of November 2009.

[5] After reinstatement, the appellant applied to the High Court to direct the Respondents to pay him salary arrears for the period he was out of employment.

Proceedings in the High Court:

[6] It was the appellant's case in the High Court that the dismissal was clouded in procedural impropriety, consequently his dismissal for nineteen (19) months was unlawful. After reinstatement he legitimately expected to be paid his salary, mountain allowance and risk allowance arrears.

[7] The Respondent's case on the contrary was that appellant was dismissed for being absent without leave and the dismissal was lawful; that he had no legitimate expectation to be paid after being reinstated and that in any event in his plea for mercy the appellant undertook to take alternative punishment aside of dismissal.

The Reasoning of the Judge in the Court a quo.

[8] The facts before the learned judge were common cause, the matter therefore fell to be decided on the law. The learned Judge

dealt with the law governing legitimate expectation. The decision of **Gauntlett JA**, set out the requirements of legitimate expectations as follows:

- i) The representation underlying the expectation must be clear, unambiguous and devoid of relevant qualification;
- ii) The expectation must be reasonable;
- iii) The representation must have been indeed by the decision-maker;
- iv) The representation must have be one which was competent and lawful for the decision maker to make without which the reliance cannot be legitimate.¹

[9] The Judge a quo reasoned that, there was no representation from the respondents which representation would otherwise entitle the appellant to claim that he had a legitimate expectation. The Judge was satisfied that the respondents did not make a representation to the appellant that he was to be paid arrears upon reinstatement.

[10] The court also relied on Smalberger JA's dictum in **Commissioner of Police and Another v Ntlo-Ts'oeu**², that referred to as an accurate definition of the word 'reinstate' or 'reinstatement', as 'carrying no retrospective connotation'.

¹ Adelaja Otubaiyo V Director of Immigration C of A (CIV) No. 35/05.

² 2005-2006 LAC 156.

[11] The High Court therefore concluded that, in absence of the undertaking by the respondents to pay appellant salary arrears and allowances, or to reinstate retrospectively, they were not claimable. In any event the appellant did not aver that he had tendered to perform his duties.

[12] On 17 October 2013, the Court a quo dismissed the application with costs.

[13] Dissatisfied with the dismissal, the appellant noted the appeal on 15th day of September 2021, which was eight (8) years later.

Condonation Application.

[14] The Court has to first deal with the application for condonation by Mr. Makhelelise Khatala. According to the appellant “the real question is whether this is a proper case to condone non-compliance with the Rules of the Court. Rule 4(1) provides that the appeal should be noted within six weeks after judgments but in this case appellant according to him, he noted the appeal six years after judgment”

Application for condonation

[15] The appellant gave the following explanation through his attorney Mr. Ndebele:

- a) In the Court a quo, he was represented by Adv. Malefane. According to him he faithfully executed his

mandate. He was informed the case was dismissed on the 17th October, 2013, almost a year after the hearing. When he requested for reasons from Adv. Malefane, he told him, he was still waiting for a written judgment. He got the judgment in early 2016.

- b) He spent two years without an income, he was indebted in sums way beyond his means. The situation persisted in 2016 and by this time his relationship with Adv. Malefane was frosty.
- c) When he got the judgment, he moved from one lawyer to another, with the little he had, he would only manage to pay consultation fees. All lawyers he consulted advised him that learned Judge was correct. Until late 2020, a friend of his advised him to consult Mr. Ndebele. Mr. Ndebele advised him that, he could appeal out of time after perusing the documents.

[16] The starting point of the applicant's legal argument by Mr Ndebele was the decision of this Court in **Zaineb Moosa and Others v Lesotho Revenue Authority**³, where it was held that:

The standard for considering an application for condonation is the interest of justice. However, the concept 'interests of justice', is so elastic that it is not capable of a precise definition. Fairness includes, the nature of the relief sought, the extent and cause of the

³ C of A (CIV) 2/2014 Para 15.

*delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay the importance of the issue to be raised in the intended appeal and the prospects of success, **Brewes v Gorfil Brothers Investments (Pty) Ltd (2000) (2) SA 837.***

[17] Mr. Ndebele further submitted that an application for condonation is not a mere formality. It is triggered by non-compliance with the Rules of the Court. Accordingly, when there has been non-compliance the applicant should, without delay apply for condonation and should give cogent reason for non-observance with the Rules initially, **Estate Woolf v Johns 1968 (4) SA at 497**, where non-observance of the Rules has been flagrant and gross, an application for condonation should not be granted whatever the prospect of success might be. The prospect of success is important, but not decisive. **Darries v Sheriff Magistrate Court Wynberg and Another (1998) 3 SCA 34 at 41.**

[18] Adv. Moshoeshoe in opposing the application submitted that in order for an appellant to succeed in an application for condonation he must satisfy two requirements as stated in the case of **Motake v Moqhoai and Others**⁴, as follows:

The principles applicable in an application for condonation of the late filing of an appeal are now well established in this

⁴ LAC (2009- 2010) 89 at page 921-933

jurisdiction. In essence the applicant must satisfy two requirements, namely (1) that there is sufficient explanation for the delay in question, sometimes expressed as 'sufficient cause' and (2) that there are prospects of success on appeal.

[19] Advocate Moshoeshoe added that the Court has a discretion whether to condone an application for the late filing of an appeal. The discretion must be exercised judiciously. The Court must consider all relevant factors having bearing on the matter. Such factors will usually include the degree of the delay in question, the explanation for such delay, the prospects of success and the importance of the case among other factors.

[20] Adv. Moshoeshoe attacks the explanation proffered by the applicant as set out earlier in this judgment. He argued that the applicant was reinstated with effect from 4th day of November 2009 and had been earning salary.

[21] The applicant cannot reasonably claim that because he was dismissed and did not earn salary for the period of his dismissal, prevented him from noting an appeal timeously. On the contrary the appellant did not note an appeal timeously because he had been well advised by a number of lawyers, he consulted that he had no prospects of success on appeal, which fact the appellant averred in his founding affidavit para 6.

[22] Counsel for the respondent further submitted that the applicant neglected to explain why he waited until 2021 after consulting with his present attorneys to lodge the appeal.

[23] The applicant also failed to give reasons why he could not lodge the appeal in person because the Rules of Court permit individuals to appeal in person. It was therefore Adv. Moshoeshoe's argument that all things considered, there was no sufficient and/or reasonable basis for the delay.

The appropriate approach in a condonation application

[24] The relevant facts that led to the non-compliance must be considered. Every period of 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. ***Estate Woolf v Johns 1968 (4) SA at 497***, is authority for the proposition that where non-observance of the Rules has been flagrant and gross, an application for condonation should not be granted whatever the prospect of success might be. The prospect of success is important, but not decisive. (See also, ***Darries v Sheriff Magistrate Court Wynberg and Another (1998) 3 SCA 34 at 41.***)

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

The degree of delay / approaching the Court for condonation, the adequacy of the reasons advanced for such delay, the prospects of the appellant's success on appeal, and the

respondent's interest in the finality of the judgment.

[26] Although, generally the Court will consider the prospects of success in adjudicating an application for condonation it may dismiss the application for condonation 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.⁵

[27] Even if the cause of delay or non-compliance with the rules is the conduct of the applicant's 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 judgments having a bearing on those Rules.⁶

[28] The Court may only condone any non-compliance with its Rules on 'good cause' shown. In the matter of ***Smith N.O v Brummer, N.O. and Another***⁷, Justice Brink said the following about what constitutes good cause:

"In an application for removal of bar the Court has a wide discretion which it will exercise in accordance with

⁵Per Damaseb AJA, in *Smith v T'sepong property Limited Cof A (CIV) 22/2020 (2021) LSCA 11 (14th May 2021* citing *Chetty v Laio Society Transval 1985 (2) SA 756 (A) at 765 NUM. v Council for Mineral Technology (1999) 3 BLLR 206 (LAC) at 211 G-H, National Education Health and Allied Workers Union on behalf of Mofokeny and Others v Charlotte Theron. Children's Home (2004) 25 ICJ 2195 (LAC) at para 23, with approval.*

⁶ *Moaki v Reckitt and Cohnan (FRICA) Ltd and Another 1968 (3) SA 95 (A) at 101.*

⁷ (1954) (3) Sa 325 (OPD)

the circumstances of each case. The tendency of the Court is to grant an application where:

- (a) The applicant has given a reasonable explanation of his delay;*
- (b) The application is bona fide and not made with the object of delaying the opposite party's claim;*
- (c) There has not been a reckless or intentional disregard for the Rules of Court;*
- (d) The applicant's action is clearly not ill-founded, and;*
- (e) Any prejudice caused to the opposite party could be compensated for by an appropriate order as to costs;*

The absence of one or more of these circumstances might result in the application being refused.

[29] In the matter of ***Flugel v Swart***⁸, Kannemeyer said the following constitutes 'good cause':

"in order to show 'good cause' an applicant must give reasonable explanation under oath for his failure to comply with the Rule of the Court in question and he must also in his affidavit, disclose a bona fide defence which need not be set in any great detail. It is sufficient if it is set out shortly."

Discussion/ Consideration

⁸1979 (4) SA 493 ECD

[30] It is undeniable that the condonation applications are permissible and regulated by Rule 15, which partly reads:

(1) If an appellant breaches provisions of these Rules, his appeal may be struck off the roll.

(2) The Court shall have discretion to condone any breach on the application of the appellant.

[31] In one breathe the appellant in his founding affidavit says he was impecunious and therefore, this is why he could not timeously note the appeal. In the other breath, he says he could not note an appeal timeously, because there were no written reasons available. The reasons became available two years after the court order, so the noting of the appeal was delayed by six years. He attributed the delay to the fact that he went around consulting lawyers who advised him that the appeal had no prospects.

[32] From all the above passage it is patently clear that his explanation for the delay is unsatisfactory and unreasonable and does not meet the test set out in the cases dealing with condonation. I am satisfied that he could have noted an appeal in absence of reasons, save and except when it comes to filing his heads of arguments.

Audience.

[33] Rule 19(1) is couched in these terms:

(1) The following persons are entitled to audience in the Court-

- (a) An appellant or respondent in person;
- (b) An attorney, and;
- (c) An advocate duly instructed by an attorney.

The tenor of the Rule is that a litigant need not be represented by an attorney or advocate in order to prosecute an appeal.

[34] The appellant from 4th November 2009 until 24th September 2021, when he filed the notice of Appeal, he was a salaried Correctional Officer, he could therefore not be heard to say that he had no financial means to prosecute the appeal.

[35] The appellant has given no reasonable explanation for the, gross disregard of the Rules and therefore, the application is not bona fide.

[36] It is a matter of public policy that the Judiciary should deliver quality, efficient and speedy justice. A delay in noting an appeal for 8 years has the potential of creating judicial backlog⁹ and resultant, loss of public's confidence in the administration of Justice.

[37] This court had previously said that 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

⁹ Judicial backlog in the Commonwealth and United States in practice is any case that has been in the Court System for five years and more.

was reasonably possible to do so much earlier. Worse still, where there is no satisfactory explanation for why the applicant for condonation waited for as long as it did before seeking condonation, Per **Damaseb AJA** in ***Christoffel Smith v T'sepong Property Limited (supra)***

Damaseb AJA in dismissing the condonation application had this to say:

“the glaring flagrant and unexplainable 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.”

[38] My learned brother was dealing with a delay of eight months in noting an appeal. In this case I am dealing with a delay of eight years which is unprecedentedly outstanding. The explanation rendered is most unsatisfactory and implausible. The application for condonation therefore falls to be dismissed without interrogating the merits.

[39] The Order

In the result:

- (a) The application for condonation is dismissed with costs.
- (b) The appeal is consequently struck off the roll with costs.



P. MUSONDA
ACTING JUSTICE OF APPEAL

I agree



P.T. DAMASEB
ACTING JUSTICE OF APPEAL

I agree



M. CHINHENGO
ACTING JUSTICE OF APPEAL

FOR APPELLANT: MR. K NDEBELE

FOR RESPONDENTS: ADV. M. MOSHOSHOE