# THE SUPREME COURT OF APPEAL
# OF SOUTH AFRICA

Unreportable
Case no: 247/06

In the matter between:

**POGOSTICH BUSINESS BROKERS (PTY) LTD** First Applicant/Appellant

**COLIN FENN** Second Applicant/Appellant

and

**KENNETH MCLEOD** First Respondent

**RYAN MCLEOD** Second Respondent

---

**Coram:** *Zulman, Streicher, Cameron, Navsa JJA et Theron AJA*

Date of hearing: **7 November 2006**

Date of delivery: **21 November 2006**

**Summary: Application to reinstate lapsed appeal – after noting appeal applicants decided to abide by an adverse judgment and deliberately elected to take no further steps in its prosecution – more than eight months passed from the time of the noting of the appeal until the record was lodged – the fact that the correctness of the decision may be open to debate is not sufficient ground to reopen the dispute.**

**Neutral citation:** This judgment may be referred to as *Pogostich v McLeod* [2006] SCA 136 (RSA).

---

## *JUDGMENT*

---

NAVSA JA

NAVSA JA:

[1] We are faced with an application to reinstate an appeal that had lapsed for failure to lodge an appeal record timeously. Put differently, we are dealing with an application to condone the late lodging of the record.[1]

[2] On 8 June 2004 the Johannesburg High Court (Mailula J), at the instance of the two respondents (the McLeods), ordered the attachment of funds totalling R1 263 358.62 held in the first applicant's bank account with the South African Bank of Athens pending the finalisation of an action to be instituted against two peregrine defendants, namely, Patrick Mantle and Ozden Mantle (the Mantles). Furthermore, the first and second applicants were interdicted from withdrawing the moneys concerned from the account pending the finalisation of the said action.

[3] The second applicant is a chartered accountant who has control over the bank account of the first applicant. The McLeods had sought the orders to confirm jurisdiction in the contemplated action and to prevent dissipation of the funds. They alleged that the Mantles had made certain fraudulent misrepresentations to them which induced them to enter into a bogus transaction in terms of which they paid R1.2m to the Mantles who then disappeared with the money to the United Kingdom.

[4] The McLeods who are father and son alleged that the money in the account was the proceeds of the sale of immovable property that the Mantles had sold ─ thus the money belonged to the Mantles. This was disputed by the applicants. They alleged that the money standing to the credit of the first respondent's account belonged to the second applicant's siblings, Martin Fenn and Robynne Troskie. At material times the second applicant had power of

[1] See rule 11 of the rules of this Court in terms of which the court may *mero motu* or on application, extend or reduce any time period prescribed and may condone non-compliance with these rules.

attorney from the Mantles in respect of the proceeds of the sale of the immovable property.

[5] On the question of the ownership of the money Mailula J found in favour of the respondents and consequently ordered the attachment. The learned judge also rejected contentions by the applicant, first, that there had not been proper attachment on the authority of an interim order, and second, that there had been a consent to jurisdiction by the Mantles before the attachment obviating the need for an attachment.

[6] On 30 January 2005 Mailula J refused the applicants leave to appeal against her judgment. On 29 July 2005 this court granted the applicants leave to appeal to it. The appeal was noted on 26 August 2005. In terms of rule 8(1) of the rules of this court the appeal record ought to have been lodged by 26 November 2005 ie within three months of the notice of appeal. This was not done.

[7] It is necessary at this stage to deal with what occurred from August onwards. During August 2005 the McLeods' attorneys, through other legal proceedings, succeeded in withdrawing the funds from the account in question. This led to an unsuccessful application by the applicants in the Johannesburg High Court (Horn J) to have these funds returned to the account. The applicants were dispirited by the successive failures in that court and became locked in a dispute with their then attorneys concerning payment of the latter's fees and engaged in acrimonious exchanges concerning the quality of the legal advice they had received.

[8] On 16 November 2005 the second applicant's attorneys hand-delivered a letter advising him that applicants' prospects of success on appeal against the judgment of Mailula J were good. They notified him that in order to prosecute the appeal a record had to be prepared and lodged before the end of the month but

stated that because of the dispute about fees they were unable to do so. In his affidavit in support of condonation the second applicant stated that he realised that the failure to lodge the record within the time prescribed by rule 8(1) would result in the lapsing of the appeal.[2] He stated further that he believed that since the record had not been lodged timeously the appeal could not be revived.

[9] According to the applicants they were disillusioned with their attorneys and considered that no further purpose would be served by continuing with the appeal against the judgment of Mailula J or with any related litigation. The second applicant recorded this in a letter to the attorneys dated 18 November 2005, the relevant part of which reads as follows:

'In any event as you are aware the moneys have already been taken by Louis [the McLeods' attorney] and there appears to be no good purpose in proceeding with this matter other than be liable, which I deny for legal costs. There is no further moneys in the bank account and Pogostich has no assets and nor do I.'

[10] The second applicant states that on 6 April 2006, when he consulted with his new attorney and counsel in relation to another matter, he was advised that the appeal could in fact be revived. It was only then that he gave instructions that steps should be taken to have the appeal reinstated. The record was eventually lodged on 19 May 2006, more than eight months after the appeal was noted ─ more than double the three-month period provided in rule 8(1) for the lodging of a record.

[11] In *Cairn's Executors v Gaarn* 1912 AD 180 at 183 Innes J dealt with a matter in which no steps had been taken in the prosecution of an appeal for more than one year. He said the following about the court's power of condonation in terms of the rules of court:

'The language used is very general, and leave to this Court a wider discretion than that allowed under some of the statutory and other provisions to which reference has already been made. But

[2] Rule 8(3) of the rules of this Court states that failure to lodge the record within the prescribed period of 3 months or within an extended period as permitted by the Registrar or agreement between the parties results in the lapsing of the appeal.

still its effect is to throw upon the applicant in each instance the duty of making out a case for relief. The time prescribed for appeal having lapsed, the successful party has an interest in the judgment of which his opponent can only deprive him by satisfying the Court that "sufficient cause" exists to justify the favourable exercise of its discretion under the rule.'

At 185-186 he stated:

'But all we have to consider now is whether sufficient cause has been shown for granting an extension of time for appealing against a finding which the party aggrieved has accepted as final for more than a year. . . .It is enough to say that where a party had decided to abide by an adverse judgment and has deliberately elected to take no steps for a period of more than twelve months after the time allowed for appealing, the mere fact that the correctness of the decision is open to question is not sufficient ground for allowing him to reopen the dispute. Under all the circumstances, therefore, I am of opinion that this application should be refused with costs.'

[12] In the present case, after the noting of the appeal on 26 August 2005, nothing further was done in pursuance of the appeal until 6 April 2006. No satisfactory explanation is proffered as to why nothing was done to prosecute the appeal from 26 August 2005 to the beginning of November 2006. The second appellant's attorneys wrote to him on 16 November 2005 that they had 'made innumerable efforts to no avail to contact [him]' and that they had written to him 'in order to enquire when [they] could expect to receive payment of [their] account in order to enable [them] to proceed with' this matter and another matter. It was also in this letter that they pointed out that the record had to be filed by the end of the month. However, the appellants still did not do anything to prosecute the appeal, notwithstanding the advice by their attorneys that their prospects in the appeal were good and also the fact that they could have obtained legal advice from their present attorney in November when they consulted him in respect of other matters. The reason why the appellants did not prosecute the appeal at least from November onwards appears from the second appellant's letter dated 18 November 2005 ─ that is that they deliberately elected to accept and abide the judgment of Mailula J.

[13] It is true that in resolving the dispute of fact concerning the ownership of the money in the account Mailula J adopted a robust approach in ruling in favour

of the respondents. Like her, we have serious reservations about the veracity of the applicants' version concerning the ownership of the funds. However, having regard to the *dicta* quoted in para [11] and applying them to the facts of this case it is not necessary to debate that, or any other issue, in relation to the correctness of the order of Mailula J.

[14] The following order is made:

1. The application for reinstatement of the appeal is refused with costs.

_____
M S NAVSA
JUDGE OF APPEAL

CONCUR:

ZULMAN JA
STREICHER JA
CAMERON JA
THERON AJA