IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CIVIL CASE NO: 86/2019**

In the matter between:

ABEL MPHILE SIBANDZE APPLICANT

And

MAGAGULA AND HLOPHE ATTORNEYS RESPONDENT

Neutral Citation: *Abel Mphile Sibandze vs Magagula & Hlophe Attorneys (86/2019) [2020] SZSC 25 (24/08/2020)*

CORAM: **S.P. DLAMINI JA**

R.J. CLOETE JA

J.M. CURRIE AJA

DATE HEARD: 05 August, 2020

DATE DELIVERED: 24 August, 2020

Summary: *Civil procedure: - Application for condonation of the late filing of Appellant's Heads of Argument - Application for condonation for the late filing of the Record of appeal - principles governing both Applications considered - Rule 30(4) and its effect vis-a-vis the late filing of a Record considered - Held that there was flagrant and unjustified breach of the Rules of this Court by the Applicant and his Counsel in the manner the Appeal has been prosecuted before this Court - Held that Appellant's Application for condonation for the late filing of his Heads of Argument does not meet the requirements of the law and is dismissed - Held that the Application for the late filing of the Record in the absence of leave to reinstate the matter having been sought and granted by this Court is fatally defective - Held that the Appeal is deemed abandoned and thereby dismissed and held that costs are awarded to Respondent on a punitive scale.*

JUDGMENT

INTRODUCTION:

[1] The matters falling for consideration before this Court are two Applications for condonation instituted by the Applicant who was the Respondent in the Court *a quo.*

[2] The first Application instituted by the Applicant is an application for condonation of the late filing of the Record of Appeal.

[3] The second Application instituted by the Applicant is an application for condonation of the late filing of his Heads of Argument.

[4] Both Applications are opposed by the Respondent who was the Plaintiff in the Court *a quo.*

[5] The Applicant and the Respondent in June 2009 agreed that the latter would render legal services to the former against payment of fees raised by Respondent.

[6] The Applicant was billed by the Respondent for the services rendered. However, no payment was forthcoming from the Applicant resulting in the Respondent instituting proceedings the High Court against the Applicant claiming the billed amounts. The details of what transpired

before the High Court are not necessary for the determination of the two Applications before this Court since the Court is not considering the merits of the Appeal at this stage.

[7] The High Court per Her Ladyship M Dlamini J. found in favour of the Respondent and stated that at paragraph 25 of the Judgment:

> " (25) In the final analysis, the following orders are entered:
>
> ***25.1 Plaintiff's action succeeds.***
>
> ***25.2 Defendant is ordered to pay plaintiff the following:***
>
> ***2.2 E612 075.81 (Six Hundred and Twelve Thousand and Seventy five Emalangeni and Eighty One Cents)***
>
> ***2.3 Interest thereon at the rate of 9% per annum a tempore morae***
>
> ***2.4 Cost of suit."***

[8] The Applicant was dissatisfied with the Judgment of the High Court and launched an Appeal in terms of a Notice of Appeal dated 10 December 2019. The said Notice of Appeal was issued by the Registrar of the Supreme Court on 17 December 2019 and was also served on the Respondent on that date. The Appeal is opposed by the Respondent. Again, it is not necessary to go into the grounds of Appeal because they are not falling for consideration by this Court at this stage.

[9] It is not in dispute that the Record of Appeal was not filed within the stipulated two months period as set out in Rule 30 of the Rules of this Court after the noting of the Appeal by the Applicant. Both parties have submitted their arguments in the two Applications before this Court seeking to persuade the Court to grant the relief that each party is seeking and to reject the relief sought in opposition. In addition, the Respondent has sought costs to be awarded against the Applicant and his Attorneys of record at a punitive scale.

APPLICANT'S CASE REGARDING CONDONATION FOR THE LATE FILING OF THE RECORD OF APPEAL

[10] The Applicant, in terms of the Notice motion dated 21 April 2020 which was issued on 7 May 2020 and served upon the Respondent on the same date, prayed that this Court, *inter alia* condone his late filing of the Record of Appeal. The Applicant based the application on Rule 17 of this Court.

[11] The Applicant deposed to both the Founding Affidavit and Replying Affidavit. There being no leave yet sought and granted to file the Applicant's Heads of Argument, the Court heard this Application

without the benefit of the Applicant's Heads of Argument. This issue will be revisited in detail below.

[12] The Applicant's case in summary is that his Attorney made an error in calculating the *dies* as he excluded the period when the Court was in recess. Therefore, according to the Applicant's Attorney, the *dies* could only run when the Court's recess ended. On the Attorney's calculations, the record of appeal was to be filed by the 5 March 2020.

[13] The Applicant proceeded to state the following at paragraphs 8.4, 8.5, 8.6, 9 and 10 of the Founding Affidavit;

> ***"8.3 Because of this understanding, I was of the view that the period will start counting from the end of January 2020 and that I was within time when filing on the 05th March 2020.***
>
> ***8.4 It is my humble submission that I labored under the misapprehension that it was only court days that are counted and not when the Honourable court is on recess for holidays.***
>
> ***8.5 Due to the miscalculation on our part, it is thus our fault that the record was filed late, but we humbly submit that it was not reckless and intentional in the circumstances.***
>
> ***8.6 I sincerely request the Honourable Court's pardon and mercy and ask that I be granted the opportunity to properly file the record of proceedings that has already been prepared and compiled accordingly.***

9.

It is my humble submission that the delay in filing the record has not been extraordinary long but it was about two (2) weeks margin.

10.

It is my further humble submission that there can be no prejudice suffered on the part of the Respondent as they were served with the record of proceedings accordingly. The appeal will ordinarily be enrolled accordingly in the second session and there is no delay and it will not have skipped its place on the roll."

[14] In conclusion, Applicant further states the following at paragraphs 12, 13 and 14 of the Founding Affidavit;

12

"It is, respectfully submitted that I honestly believe I have excellent prospects of success in the appeal as will more fully appear in the notice of appeal which has been filed with the record.

13

In support of the aforestated submission, I refer to the notice of appeal and pray that the contents therein be incorporated herein to demonstrate the prospects of success on the appeal.

14

I therefore respectfully submit that if have made out a case for the relief sought in the notice of motion.

RESPONDENT'S CASE IN OPPOSITION TO THE APPLICATION FOR CONDONATION OF THE LATE FILING OF THE RECORD OF APPEAL

[15] The Respondent's case is stated in both the Answering Affidavit and Heads of Argument together with the Bundle of Authorities filed of record.

[16] The Respondent's stance in opposition to the Applicant's Application is as follows;

16.1 Firstly, that the Applicant has failed to make out a case for the relief sought. Respondent states the following at paragraphs 5 and 6 of the Replying Affidavit.

> ***5. This Honourable court has stated time and again that the whole purpose behind Rule 17 of the Rules of this Honourable court on condonation is to enable the court to gauge such factors as; the degree of delay involved in the matter, the adequacy of the reasons given for the delay, the prospects of success on Appeal and the Respondents' interest in the finality of the matter. These factors must be set out succinctly in the founding affidavit establishing the Applicant's case.***
>
> ***6. The Applicant has not attempted in anyway to satisfy any of the requirements which are trite for a party to succeed on a***

condonation application. The explanation tendered, as will be demonstrated in the paragraphs hereunder, is not at all sufficient to explain the delay in filing a record. As pertains the prospects of success, the Applicant makes no attempt whatsoever to establish why he believes he has prospects of success on appeal."

16.2 Secondly, the Respondent relies on Rule 30 (4) and avers that the Appeal herein must be deemed abandoned. Therefore, the Respondent submits further, the Applicant's application in terms of Rule 17 is an irregular procedure. Mr. Hlophe for the Respondent, during the hearing of this matter, submitted that the correct procedure for the Applicant would have been to move an application for the reinstatement of the Appeal coupled with the application for condonation.

16.3 Thirdly, it was contended on behalf of the Respondent that the interpretation of Rule 30 (1) relied on by the Applicant regarding the *dies f*or the filing of the Record of Appeal is without merit, unreasonable and must be rejected by the Court for not being an acceptable cause for the delay in the filing of the Record of Appeal.

16.4 Finally, the Respondent contended that the Applicant's application amounts to an abuse of court process and that as result the Respondent prays that Applicant must be mulcted with cost on a punitive scale.

THE LAW AND ITS APPLICATION

Is the Appeal deemed abandoned?

[17] Rule 30 (4) provides that:

> **"Subject to rule 16(1) if an appellant fails to note an appeal or to submit or resubmit the record for certification within the time provided by this rule, the appeal shall be deemed to have been abandoned."** (My own underlining)

[18] Rule 16 (1) provides that:

> **"The Judge President or any judge of appeal designated by him may on application extend any time limit prescribed by these rules:**
> **Provided that the Judge President or such judge of appeal may if he thinks fit refer the application to the Court of Appeal for decision. (Amended L.N.102/1976.)"**

[19] Section 30 (4) is straight forward and is couched in peremptory terms. Therefore, an Appellant who fails to submit the Record within the prescribed period of 2 months (See rule 30 (1) is deemed to have abandoned his or her Appeal unless he or she has launched an application for the extension of time as envisaged by Rule 16 (1). The

said application ought to be launched within the period of 2 months of noting of an Appeal.

[20] Firstly, in the present matter it is not in dispute that the Record was not filed within the prescribed period of 2 months.

[21] Secondly, it is common cause that the Applicant did not make an application for the extension of time before this Court as envisaged by Rule 16 (1).

[22] In the circumstances Rule 30 (4) applies and the Appeal must be deemed abandoned and stand to be dismissed. The Appeal having been issued and served on 17 December 2019, the Appellant ought to have filed the Record on or about 16 February 2020 but failed to do so.

[23] This Court previously had occasion to consider the operation and consequences of Rule 30 (4).

In this regard, see the following cases; **Debbie Sellstrohm versus Ministry of Housing and Urban Development and 4 Others (25/2014) [2018] SZSC 02 (27/02/2017), Timothy Khoza versus**

Pigg's Peak Town Council and Ian Van Zuydam (51/2015) [2017] SZSC 08 (12/2017), The Pub and Grill (Pty) Limited and

Another versus The Gables (Pty) Limited (102/2018 [2019] SZSC 17 (20/05/2019) Thandie Motsa and 4 Others versus Richard Khanyile and Another (69/2018) [2019] SZHC 24, (17/06/2019), Cleophas Sipho Dlamini versus Cynthia Mpho Dlamini (65/2018) [2019] SZSC 48 and Nhlanhla Macingwane versus Family of God Church and 2 Others (60/2018)[2019] SZSC 56 (26/11/2019). In all of these cases, this Court found that the Appeal was deemed to be abandoned and as such dismissed.

[24] In the **Nhlanhla Macingwane** case (supra) per Her Ladyship Justice **Currie AJA,** the court at paragraph 21 stated that**;**

"**[21]** ***In the matter of Cleophas Sipho Dlamini versus Cynthia Mpho Dlamini (65/2018) [2019] SZSC 48, in a unanimous judgment penned by J.P. Annandale JA and agreed to by M.C.B. Maphalala CJ and J.M. Currie AJA, it was held that if an appeal is deemed to be abandoned it has the same effect of it having been dismissed. By specific reference to the provisions of Rule 30 (4), it is stated as follows at paragraph [26] thereof:***

"By operation of law, Rule 30 (4) provides for such closure when an Appeal is not prosecuted in accordance with the Rules of Court.

In Thandie Motsa and 4 others versus Richard Khanyile and Another (69/2018) [2019] SZHC 24, in another unanimous judgment penned by S.P. Dlamini JA and agreed to by M.J. Dlamini JA and S.J.K. Matsebula AJA, it was again held that the Appeal was deemed to have been abandoned and as such dismissed.

At paragraph 17 of the judgment Dlamini JA states that "The courts have had occasion to consider and pronounce themselves on the status of the Rules and consequences of failing to comply with the Rules" and at paragraph 18 made reference to a number of these judgments including The Pub and Grill (Pty) Limited and Another versus the Gables (Pty) Limited (102/2018 [2019] SZSC 17 (20/05/2019)."

CONDONATION

[25] Notwithstanding this Court's findings referred to above that the Appeal is deemed abandoned and stands to be dismissed, for the sake of

completeness of the issues raised I will now consider the Application for the condonation for the late filing of the Record.

WRONG PROCEDURE?

[26] It was contended on behalf of the Respondent at the hearing of the matter that in the absence of an application for the reinstatement of an Appeal deemed abandoned in terms of the Rule, an application for condonation of the above was the wrong procedure and as such fatal to the Applicant's case.

[27] I am persuaded by this argument. Where an Appeal is deemed abandoned because the *dies* have run out, a party requiring to be heard must at least simultaneously with any other necessary process seek a reinstatement of the Appeal. In instances where Section 30 (4) has come into operation, as is the case in the present matter, the Court has to be persuaded to suspend or reverse the operation of Section 30 (4) on good cause shown.

[28] In the present matter there was neither an application nor a prayer for leave of Court to reinstate the Appeal which is deemed abandoned.

Therefore the application for condonation alone is not helpful to the Applicant's case and such is improper procedure to bring back to life as it were an Appeal deemed abandoned.

MERITS OF THE APPLICATION

[29] Coming to the merits of the Application for condonation, the principles and requirements to be satisfied in order for the court to condone non-compliance with its Rules are now settled in our jurisdiction.

[30] Our Courts, drawing from decisions from other jurisdictions, have defined and refined the principles governing applications for condonation. For example the South African cases of **Melane versus Santam Insurance Company Ltd 1962 (4) SA 531(A), Commissioner of Inland Revenue versus Burger 1956 (4) SA 446 (A) and The Commissioner for the South African Revenue Service versus Candice Jean Van Der Merwe (20152/2015) [2014] ZASCA 86 (28/05/2015)** have been pivotal in the synthesis by our Courts when it comes to condonation applications.

[31] In this regard, see some of cases emanating from our jurisdiction namely; **Unitrans Construction Limited versus Inyatsi Construction Limited Appeal case No: 9 of 1996, Dr. Sifiso Barrow versus Dr. Priscilla Dlamini and The University of Swaziland (09/2014) [2015] SZSC 09 (09/12/2015), Dr. Barry Anita Belinda versus A.G. Thomas (Pty) Ltd (30/2015) [2016] SZSC 07 (30 June 2016) and Nokuthula Mthembu and Four Others versus Ministry of Housing and Another (94/2017) [2018] SZSC 15 (30/05/ 2018)** to mention but a few.

[32] In the **Commissioner of the South African Revenue** case (supra) the Court stated that;

> ***"Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefore, the importance of the case, a Respondent's interest in the finality of the judgment of the Court below, the convenience of this Court and the avoidance of unnecessary delay in the administration of justice……"***

[33] In addition to the factors adumbrated in the **Commissioner of the South African Revenue** case above, the Court in the **Melane** case (supra) added prejudice to the other party as a factor. In addition, the Court in that case (with approval of this Court in many of the instances referred

to supra) added a rider to the effect that "***without a reasonable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay may be an application for condonation should be refused***."

[34] In the **Nokuthula Mthembu** case (supra) per His Lordship Dr. Odoki JA, nearly all the cases referred to above coming from both within and outside our jurisdiction were considered and cited with approval thus the issue of the requisite factors for a party to succeed in an Application for condonation namely;

(a) That as soon as a party becomes aware of non-compliance with the Rules she or he must immediately take steps to remedy such by way of application;

(b) That in such an application the Applicant must provide a reasonable explanation for the default;

(c) That in the application the Applicant must demonstrate good prospects of success; and

(d) That the Court in granting or denying the relief sought ought to consider prejudice likely to be suffered by the innocent party and the importance of the case.

APPLICATION OF THE LAW

[35] At the outset it must be pointed out that what the Applicant sought to file was a Book of Pleadings before the High Court. Therefore, there was no transcript prepared nor required. Transcribing a Record may in appropriate circumstances justify a delay in the filing of the Record. However, in the present case, pleadings had been closed before the High Court and it was now those pleadings and nothing more that the Applicant seeks to have filed outside the prescribed time limits. There is no good cause that has been shown for this conduct. Even at the hearing Mr. Nzima for the Applicant when asked about it was of no assistance at all to the Court.

[36] When it comes to the issue of prospects of success, the Applicant does no more than to refer the Court to his Notice of Appeal. This definitely is not enough and falls short of the requirements for the Applicant to set out his or her prospects of success. Prospects of success must be set out in the Founding Affidavit not merely as a formality but also to allow the other party to respond if so advised. On this ground alone the Application must fail.

[37] The reason for non-compliance is dealt with above. The Applicant alleges that it was an error on the part of his Attorney in assuming that the *dies* stops running when the Court is in recess. This excuse is not reasonable. The Applicant could not point to any law or Rule that could be a basis for the position taken by his Attorney. In addition, Mr. Nzima is an Attorney of long service before our Courts and has appeared on numerous occasions before this Court. Therefore the reason for the non-compliance is not reasonable and as such unacceptable.

[38] In the circumstances of this case, it is highly prejudicial to the Respondent not being able to benefit from the judgment of the High Court which was in its favour.

[39] The Applicant has failed to establish a case in his Application for condonation. Therefore, the Application has no merit and stands to be dismissed.

[40] In the case of **The Prime Minister of Swaziland and 3 Others versus Thulane Maseko and Others (73/2016) [2018] SZSC 01 (05/03/2018)** it was stated that;

"This Court notwithstanding the inadequacies found by the court to exist in the Application for condonation for non-appearance before court and reinstatement of an Appeal struck off the roll, the court mero mutu granted the relief sought. The importance of a case is one of the factors that the Court may consider. But all cases are important particularly to the litigant therefore importance as a test must be viewed beyond the interest of the parties but must go beyond those interests and be of a public character."

[41] In that case a constitutional matter was decided by the High Court whereby the majority judgment struck down certain provisions of an Act of Parliament. There was a dissenting judgment. Therefore, that matter was important to the High Court, the Legislature, the public and indeed the parties. Even the default was different to the present matter as in that case there was non-appearance on behalf of the State when the matter was called for hearing before the court. However, there was an existing appeal ready for hearing by the Court unlike in the present matter and as such the two cases are distinguishable. Therefore, the reliance by Applicant on this case during Counsel's submission is not helpful at all to his case. Such reliance is totally misguided. I believe the Court in the **Thulani Maseko** case exercised its discretion judiciously.

APPLICATION FOR THE LATE FILING OF

HEADS OF ARGUMENT

[42] In view of the findings of this Court above whose effect is that there is no Appeal before this Court, it is not necessary to consider this Application. This Application has automatically fallen by the wayside. I must however point out that even if this Application were to be considered it suffers similar deficiencies as in the first Application.

COSTS

[43] In view of the manner in which the Applicant as a *dominis litis* has gone about his Appeal, I am satisfied that the Respondent is entitled to costs on a punitive scale. There was an argument at the hearing for part of the costs against the Applicant to be *de boniis propriis*, but no such prayer was made in the papers before this Court. Therefore, no costs *de boniis propriis* are awarded.

[44] The papers filed before this Court amply demonstrate that the Applicant has conducted the prosecution of the appeal in flagrant and unjustified disregard of the Rules of this court that warrants a punitive order of

costs. Infact I agree with Mr. Z. Hlophe, Counsel for the Respondent, in submission that the manner in which the appeal has been prosecuted amounts to an abuse of this Court process and his reliance on the *obiter dictum in* the case of **Sepheka versus Du Point Pioneer (Pty) Ltd (J267/18) [2018] ZALCJHB 336; (2019) 40 ILJ 613(LC) (9/10/2018),** in which the court considered and granted punitive costs and stated

as follows:

*" **Next, it must be considered when punitive costs are justified. In this regard, and also in Stainbank, 38 the Court held: 'Punitive costs have been granted when a practitioner instituted proceeding in a haphazard manner; willfully ignored Court procedure or rules; presented a case in a misleading manner; and forwarded an application that was plainly misconceived and frivolous.' And in Geerdts v Multichoice Africa (Pty) Ltd39 it was said: 'In awarding costs on the attorney and client scale, the Court has a discretion, to be exercised judicially upon a consideration of all the facts. As between the parties, it is a manner of fairness to both sides. Vexatious, unscrupulous, dilatory or mendacious conduct on the part of an unsuccessful litigant may render it unfair for his opponent to be out of pocket in the matter of his own attorney and client costs…"***

COURT ORDER

[45] In view of the aforegoing, this Court makes the following order;

1. That the Appeal is deemed to be abandoned and, as such, the Appeal is hereby dismissed.
2. That the Application for condonation for the late filing of the Record is hereby dismissed.
3. That the Respondent is awarded costs on the scale between attorney and client.

S. P. DLAMINI

JUSTICE OF APPEAL

I agree

R. J. CLOETE

JUSTICE OF APPEAL

I agree

J. M. CURRIE

ACTING JUSTICE OF APPEAL

FOR THE APPLICANT:	O. NZIMA (Nzima Attorneys)
FOR THE RESPONDENT:	Z. HLOPHE (Magagula & Hlophe Attorneys)