

**IN THE INDUSTRIAL COURT OF APPEAL ESWATINI**

Case No. 9/2021

In the matter between:

**NOMSA MOTSA**

Appellant

And

**FIRST NATIONAL BANK ESWATINI LIMITED**

Respondent

**Neutral citation:** Nomsa Motsa v First National Bank Eswatini Limited  
[9/2021] [2024] SZIC 12 (31 May 2024)

**Coram:** **S. NSIBANDE J.P.**

**Date Heard:** 06 May 2023

**Date Delivered:** 31 May 2024

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## RULING

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- [1] This is an application to reinstate an appeal which was struck off the roll of the Court on 9<sup>th</sup> March 2022 following the non-appearance of the Appellant's attorneys and the failure of the Appellant to file a condonation application for the late filing of the Record of Appeal.
- [2] This Court then ordered that the appeal would not be enrolled for hearing unless leave to do so was sought and granted. The Appellant (*qua* applicant) has now brought the application for leave of Court to reinstate the appeal.
- [3] The facts pertinent to this application are that –
- 3.1 On 7<sup>th</sup> July 2021, the Industrial Court delivered a judgment in an unfair dismissal matter between the parties. The Applicant was unhappy with the judgment and noted an appeal against the whole judgment on 24<sup>th</sup> August 2021.



3.2 On 24<sup>th</sup> September 2021 the Applicant purported to file a record of appeal. The record was certified by the Registrar of the Industrial Court and was filed a day outside the time prescribed by the **Industrial Court of Appeal Rules, 1997**.

3.3 On 29<sup>th</sup> September the Respondent's attorneys addressed a letter to the Applicant's attorneys and also copied to the Registrar of the Industrial Court of Appeal, advising the applicant's attorneys that despite the certification of the record, it was incomplete in that it did not contain any of the evidence bundles filed by either party, any of the documents handed in as evidence in the trial; and the judgment appealed against. It was said that the record filed only contained the evidence of the first witness and omitted the cross-examination, re-examination and the entire evidence of the Respondent's second witness. In the circumstances, the Respondent's attorneys concluded that pending the filing of a complete record they were of the view that there was no appeal properly serving before the Court.

[4] The Applicant alleges that her attorneys became aware of the respondent's letter dated 29<sup>th</sup> September 2021 on 8<sup>th</sup> December 2021.

It thus became aware that there were issues with the completeness of the record for the first time, from that date.

- [5] On 29<sup>th</sup> November 2021 the respondent's attorneys again communicated in writing with applicant's attorneys advising that they considered that the appeal had lapsed because the record remained incomplete and had not been corrected despite their having pointed out those deficiencies in the record filed.
- [6] From 1<sup>st</sup> December 2021 the applicant started the process of trying to put together the missing component of the record and sought the indulgence of the Registrar of this Court and the respondent to file a supplementary record of appeal.
- [7] The applicant filed supplementary bundles of the record of appeal on 4<sup>th</sup> January 2021 (being the judgment of the Court a quo and a bundle of documents presented by the applicant as evidence at the Court a quo). Thereafter and on 12<sup>th</sup> August 2022, the applicant filed the last of the missing components of the record together with an application for condonation for the late filing of the record.



[8] By this time the appeal matter had been called by this Court on the 9<sup>th</sup> March 2022 and had been struck of the roll for non-appearance of the applicant and her attorneys with an order that the appeal could only be reinstated by application made for the Judge President on good cause shown.

[9] It is the applicant's case that she had a reasonable explanation for the delay in filing the application for leave to reinstate. The applicant alludes to the fact that neither she nor her attorneys were aware of the fact that the appeal had been called on 9<sup>th</sup> March 2022 and struck off. They only became aware of the position upon being appraised of same by the Registrar on 25<sup>th</sup> August 2022. This was further complicated by the fact that the attorney who had handled the matter passed away shortly after the appeal had been struck of, it was submitted.

[10] The applicant further submitted that she has strong prospects of success on the appeal and that it was in the interests of justice that the matter be reinstated and the appeal be disposed of on the merits. In the main the applicant states that her prospects of success are good because –

- 1.1 the court *a quo* shifted the onus of proof onto the applicant in that it required her to prove that she had been correctly or incorrectly charged on the disciplinary code when that onus was on the respondent by statutory imperative.
- 1.2 the court *a quo* made findings of fact not justified by the evidence placed before it. The Court *a quo* made findings of persistent negligence and violation of respondent's rules by the applicant when there was no evidence led to prove the same.
- 1.3 the Court *a quo* admitted hearsay evidence.
- 1.4 the Court *a quo* failed to grant a reinstatement order where the circumstances warranted same.

[11] It was submitted in argument, that there was no substantial prejudice to be suffered by the respondent if the matter was to be reinstated and that it was not in the interests of justice to close the door on the applicant in circumstances that the judgment was obviously erroneous.

[12] The respondent's position was that because the record had not been filed timeously and there had been no application for condonation on 9<sup>th</sup> March 2022 when the appeal was called and eventually struck off,



there was no appeal serving before the Court. That having known in December 2021 that the record they had filed was incomplete and having failed to apply for condonation or extension of time within which to file a complete record; there being no explanation for this failure there can be no other conclusion other than that the appeal is not properly before the Court.

[13] It was further argued that there was no explanation for the delay in actioning the matter between March 2022 and August 2022 when the condonation application was filed.

[14] Further, the respondent denied that the applicant had good prospects of success in the appeal should the matter be reinstated. It was argued that the applicant simply repeated her grounds of appeal and did not make any assertions that were persuasive to the Court that the judgment of the Court a quo may be overturned.

[15] Further, and finally it was submitted on behalf of the respondent that even as the matter was being argued the applicant had not yet filed a full record; that the record filed by the respondent remains incomplete and it could not be said in these circumstances that there was a proper

appeal before the Court. It was the respondent's prayer that the matter not be reinstated.

[16] In terms of **Rule 21 (1)** of the **Industrial Court of Appeal Rules, 1997** an appellant is required to "*prepare the record on appeal in accordance with sub rules (5) and (6) hereof and shall within one month of the date of noting of the appeal, lodge a copy thereof with the Registrar of the Industrial Court for certification as correct.*"

In *casu*, the notice of appeal was filed on 24<sup>th</sup> August 2021 thus the record was due on or before 23<sup>rd</sup> September 2021. The appellant filed the record in two parts on the 24<sup>th</sup> September 2021, a day after the record was due. The first part of the filed record consisting of a transcript of oral evidence, was certified by the Registrar while the 2<sup>nd</sup> part, consisting of pleadings was not.

[17] The record filed by the appellant was clearly incomplete. The appellant's attorney ought to have been aware of that because neither of the two parts of the record filed contains the judgement of the Court a quo contrary to **Rule 2** of the rules of the Industrial Court of Appeal. In terms of Rule 2 record means the aggregate of papers relating to an appeal



(including the pleadings, proceedings, evidence and judgements) proper to be laid before the Industrial Court of Appeal on the hearing of the appeal.

Consequently without the judgement being filed and in the absence of an application for extension (in terms of Rule 16) and/or condonation (in terms of Rule 17) the application is deemed abandoned in terms of Rule 21(4).

- [18] On 29<sup>th</sup> September 2021 the respondent alerted the applicant that the record, despite certification, was incomplete. I accept the appellant's submission that they only became aware of this letter after the respondent sent them a follow up letter on 29<sup>th</sup> November 2021. They were therefore aware that the record was incomplete from 30<sup>th</sup> November 2021, in terms of their letter of 1<sup>st</sup> December 2021. Despite this awareness there was no application for extension of time or for condonation for late filing of the record. Instead the applicant filed further two parts of the records being exhibits and the judgement, on 4<sup>th</sup> January 2022. These parts were not certified by the Registrar and the judgement filed was incomplete.

[19] These documents were filed without the applicant making an application for extension and/or condonation despite being aware that this part of the record was now about three (3) months out of time.

[20] On 12<sup>th</sup> August 2022 the applicant filed two more documents being the Respondent's bundle of documents presented as evidence in the Court *a quo* and a further transcript. Only the transcript bears the Registrar's certification. On the same day the applicant filed a Notice of Motion seeking condonation for the late filing of the Record of Appeal, condonation for the Appellant's failure to apply for an extension of time for filing the Record of Appeal and an order reinstating the appeal. By this time the appeal had been struck off the roll for at least five (5) months.

[21] The applicant explains in her founding affidavit, that between December 2021 and January 2022 they sought to rectify the record and to recover some documents from the Respondent's attorneys as well as audio recordings from the Court *a quo*. There is no explanation why an extension of time was not sought for the filing of the record even though the applicant's attorneys were aware that the record had not been filed



on time. There is no explanation or the papers why there was never an application for an extension between December 2021 and March 2022 when the matter was called, because it was quite clear that the record was incomplete and could never be filed on time.

[22] It is the applicant's assertion that they were not aware that the appeal had been struck off of the roll in March 2022, until 25<sup>th</sup> August 2022 when they heard from the Registrar. Appellant further asserts that the matter had been complicated further by the untimely demise of the attorney who had been handling it, at the end of March 2022.

[23] The authorities are clear that once a prospective "*appellant realises that he has not complied with the Rules of the Court she should, without delay, apply for condonation.*" (See **Timothy Khoza v Piggs Peak Town Council and Another (51/2015) [2016] SZSC 24 (30/06/2016); Dr Siphon Barrow v Dr Priscilla Dlamini and the University of Swaziland (09/2014) [2015] SZSC 09 (09/12/2015)**). If he fails to do so then the appeal is deemed abandoned in terms of **Rule 21(4)** of the **Industrial Court of Appeal Rules of 1997**. In the circumstances of

this matter and in the terms of **Rule 21 (4)**, therefore the appeal before this Court is deemed to have been abandoned.

[24] The consequence of a matter being deemed abandoned is that “*of reducing the matter to a state of final res judicata*” (**per Cloete JA in Themba Nzuza and Others v Enock Nzuza and Others (69/2015) [2017] SZSC 30 (2 August 2017) at paragraph 27 (2).**

[25] On the application for reinstatement of the appeal before me, it is clear that there is no proper explanation for the failure of the applicant and/or her attorneys to:

(i) prepare a condonation application in terms of **Rule 17**, as soon as the appellant had become aware that she had not filed a proper and complete record of the proceedings in the Court *a quo*. The appellant became aware of this position in December 2021 and the condonation application was filed in August 2022. There is no explanation why the applicant did not make the application as soon as the respondent had pointed out the deficiencies in the record filed. I do however take into account the fact of the untimely demise of the attorney initially seized with the matter before end of March 2022,



makes it difficult, if not impossible to explain the lack of action between December 2021 and March 2022;

- (ii) for the delay in filing the condonation application after the appeal had been struck off the roll on the 9<sup>th</sup> March 2022 until 21<sup>st</sup> August 2022. Perhaps to be fair to the appellant there is an explanation for this delay being that the untimely demise of the attorney who was seized with the appeal so affected the appellant that she only approached her attorneys for progress, in June 2022 thus causing a delay in plotting the way forward and secondly that the attorney who **“inherited”** the matter had to consider same and did so over a period of two months before filing the condonation application in August 2022. On this aspect, my view is that the explanation for the delay is not a strong one. While the death of ones attorney may affect one adversely, this does not explain why it should take 3 months to approach the firm handling your matter for a way forward towards finalising your appeal. Further, there is no indication why the new attorney only took hold of the file in June 2022 – and not earlier; and
- (iii) finally, and more significantly, there is no explanation at all why the record remained incomplete even at the stage when the application

for reinstatement of the appeal was made. In this respect I refer to the incomplete judgement filed as a part of the record.

[27] In the matter of **Eswatini Trust Commission v Swaziland National Trust Commission Staff Association and 3 Others (12/202) [2021] SZICA 03 (17 August 2021)**, the Court confirmed that the approach of our Courts is in line with that of the South African Courts in deciding whether sufficient cause (required in an application in terms of **Rule 17 of the Industrial Court of Appeal Rules**) had been shown why condonation ought to be granted; that in making this decision the basic principle is that the Court has a discretion, to be exercised judiciously, upon a consideration of the facts and, in essence, is 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... What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for the prospects of success which are not strong... And the respondent's interest in finality must not be overlooked. **“(See Melane v Santam Insurance Co Ltd 1962 (4) SA**



531 cited in **Eswatini Trust Commission v Swaziland National Trust Commission Staff Association** (supra).

[28] The authorities further confirm that where the applicant relies on the ineptitude of his attorneys and his explanation is not strong the Courts will grant condonation/reinstatement if the prospects of success on appeal are strong. Further in the matter of **Ethel Dlamini v Prince and Chief Gasawangwane SZSC Case No. (93/2018 B) [2019] SZSC 40 (8 October 2019)**, the Supreme Court, *mero muto* granted the appellant condonation for non-compliance with the rules. The Court stated that

*“Notwithstanding the defects in the applicant’s application (late filing of record; or no application for extension of time or condonation) referred to above, the Court mero motu and reluctantly granted the application for condonation in the interests of justice, as is set out more fully hereunder...”*

[30] This judgement suggests that condonation may be granted even where the appellant’s conduct falls far short of that required, condonation

could be granted where it is in the interest of justice to do so. It follows that the appellant's prospects of success would have to be good to enable the Court to exercise its discretion in his favour.

[31] In the present case the appellant's failures are set out in the paragraphs above. While those failures may have been overlooked in the interests of justice and in the judicious exercise of this court's discretion the failure to file a complete judgement, is particularly fatal to the appellant's case in that one is unable to make a proper assessment of the prospects of success in the absence of same. Without a proper assessment of those prospects it is difficult to exercise the Court's discretion in favour of a reinstatement. The fact that the judgement was incomplete was pointed out by the respondent when this application was argued before Court and no action was taken by the applicant to address that position.

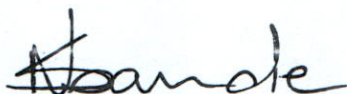
In the circumstances and for the reasons set out above it is ordered as follows:

**31.1 The application for reinstatement of the appeal is dismissed;**



**31.2 The appeal is deemed/abandoned and accordingly dismissed;**

**31.3 I make no order as to costs.**



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**S. NSIBANDE JP**

**For Appellant:**

Mr M. Magagula  
(Magagula Hlophe Attorneys)

**For Respondent:**

Mr. M. Sibandze  
(Musa Sibandze Attorneys)