

HELD AT MBABANE

CIV.APPEAL NO. 76/93

In the matter between:

JESSIE SHONGWE NO Appellant

And

SAMUEL SHONGWE Respondent

JUDGMENT

17 JUNE 1994

The Respondent, herein, brought an application in the High Court of Swaziland, against the Appellant in her capacity as executrix in the estate of her late husband, for the enforcement and execution of the provisions of a Deed of Sale entered into between him and her late husband. The appellant opposed the application on the grounds that the Respondent by his delay in the enforcement of the contract had waived his right so to do and abandoned his rights thereunder. The respondent denied that the delay was in any way due to any conduct on his behalf and was attributed to the loss of the Title Deeds and the failure of the Appellant's late husband or his legal representative to make application for certified copies of the lost Title Deeds.

The learned Judge, in the court a quo, on 4 June 1993 after having heard argument on behalf of the Appellant and the Respondent then delivered a written judgment in terms whereof he granted the Respondent the following relief:-

1. "1. That the First Respondent (Appellant herein) be ordered to sign all necessary documents and to do everything necessary in law in order to obtain certified copies of the Title Deeds pertaining to the properties described in paragraphs 4.1 and 4.2 of the Applicant's (Respondent herein) affidavit attached hereto.
- 2
2. That the First Respondent (Appellant herein) be ordered to sign all necessary documents and to do everything necessary in law in order to effect transfer of the properties described in paragraphs 4.1 and 4.2 of the Applicant's (Respondent herein) affidavit to the name of the Applicant (Respondent herein).
3. Restraining and interdicting the First Respondent (Appellant herein) from selling the properties described in paragraphs 4.1 and 4.2 of the Applicant's (Respondent herein) affidavit to anybody other than the Applicant (Respondent herein).
4. That until then the Second Respondent (Registrar of Deeds) be restrained or interdicted from registering a transfer of the properties referred to in paragraphs 4.1 and 4.2 of the Applicant's (Respondent herein) affidavit to anybody other than the Applicant (Respondent herein).
5. Ordering the Respondent (Appellant herein) to pay the costs of this application".

The words in brackets have been inserted by me in the order made for purposes of clarity herein. No application was made at the hearing of the matter in the Court a quo to hear oral evidence to resolve the disputes which had arisen on the affidavits of the respective parties.

An appeal, against the order made, was noted to this Court on 30 June 1993 although the said notice is not appended to the record of the proceedings now before the Court.

Rule 30 of the Court of Appeal rules provides that:

3

1. " The Appellant shall prepare the record on appeal in accordance with sub-rules (5) and (6) hereof and shall within 2 months of the date of noting of the appeal lodge a copy thereof with the Registrar of the High Court for certification as correct.

(2).....

(3).....

(4) 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 the Rule, the appeal shall be deemed to have been abandoned".

Rule 16 provides that:-

1. "The Judge President or any Judge of appeal designated by him may on application extend any time 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.

2. An application for extension shall be supported by an affidavit setting forth good and substantial reasons for the application and where the application is for leave to appeal the affidavit shall contain grounds of appeal which prima facie show good cause for leave to be granted".

On 10 September 1993 a "Set of Pleadings" was served on Respondent's attorneys. This did not constitute a copy of the record and was in any event out of time insofar as the record had to be filed by 30 August 1993.

4

A certificate in terms of rule 30(6) that the record submitted by the Appellant was a true and accurate record of the proceedings in the High Court was only issued by the Registrar of the High court on 16 February 1994 some five to six months after the date prescribed in the rules. A copy of the record was served on the Respondent's attorneys on that date.

No application in terms of rule 16 for an extension of the prescribed time within which to lodge the record has been made and in terms of rule 30(4) the appeal is deemed to have been abandoned.

It was contended on behalf of the Appellant that the provisions of rule 16 were to be made subject to the provisions of rule 17 which provides that:

"17. The Court of appeal may on application and for sufficient cause shown, excuse any party from compliance with any of these rules and may give such directions in matters of practice and procedure as it considers just and expedient".

Rule 16 provides a procedure for seeking an extension of the time prescribed in the rules for carrying out of certain specified procedures. Rule 17, on the other hand, deals with an application for condonation for the failure to have compliance with the provisions of any rule including that laid down in Rule 16. It is necessary, however, in either case to furnish good

and substantial reasons for the indulgence being sought by the applicant.

In the present case there has been no application in terms of rule 16 and no substantive application for condonation of the failure to comply with the provisions of rule 30. The Court has a discretion, to be exercised judicially, as to whether it will grant condonation of a breach of the rules.

5

There must be some basis for it so to do. There has been no explanation for the delay in filing the record. It is contended* that a "Set of Pleadings" was filed on 30 August 1993 but that does not explain why a certified copy of the record was only filed and served on 16 February 1994.

On behalf of the Appellant it was contended that there was a general ineptitude amongst practitioners in complying with the rules and that strict compliance with the rules was not regarded as essential. This comes as a surprise to me and if it is in fact so, it is a practice which must cease forthwith. The rules of the court are intended to introduce certainty and facilitate the speedy administration of justice. Non compliance, therefore, will introduce uncertainty and frustrate the administration of justice. It encourages negligence amongst practitioners and in the absence of good and sufficient reason will not be condoned.

In the present instance there has been no application in terms of rule 16 nor has any basis been advanced for the grant of condonation for the late filing of the record.

. In the premises the appeal is struck off the roll with costs which costs shall be on the scale as between Attorney and Client.

(SGD)

D.A. MELAMET JP

I agree

(SGD)

WHR SCHREINER JA

I agree

(SGD)

B. DUNN AJA

MR H.B. FINE FOR THE APPELLANT

MR P.E. FLYNN FOR THE RESPONDENT.