IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 61/08**

In the matter between:

THULISILE NYAKURA
(BORN SIMELANE) **APPELLANT**

THE CHAIRMAN OF THE ELECTIONS AND BOUNDARIES COMMISSION AND 40 OTHERS **RESPONDENT**

CORAM M.M. RAMODIBEDI, ACJ A.M. EBRAHIM, JA P.A.M. MAGID, AJA

FOR THE APPELLANT MR. M. NKOMONDZE MR.
FOR THE 1st 85 2nd RESPONDENTS B. TSABEDZE MR. D.
FOR THE 3rd RESPONDENT MANICA

JUDGMENT

Ebrahim J.A.

In this matter the appellant brought an urgent application against the respondents in the High Court in which she

sought an order setting aside the election of the third respondent, Lizzie Mhlanga as Bucopho for Luhlangotsini Umphakatsi. It was her contention that the conduct of the election had been irregular and not free and fair because she alleged certain persons who were not eligible to vote at the Luhlangotsini polling station were allowed to do so. Amongst these were the 4th to the 41st respondents.

This application was dismissed with costs. The appellant lodged an appeal to this court. The 1st, 2nd and 3rd respondents oppose the appeal.

The judgment in the court below was delivered on 23rd October, 2008 and it is the assertion of all three respondents that the appellant only filed her Notice of Appeal, with the Registrar of the High Court on 5th December 2008. I will return to the significance of this contention later in this judgment. Suffice it to say at this stage, that it is my view that the appellant has been extremely dilatory in her prosecution of this appeal. My reasons for coming to this conclusion will emerge during the course of this judgment.

Rule 30 (1) of the Court of Appeal Rules (hereinafter referred to as the Rules) provides as follows:

> **"30 (1) The appellant shall prepare the record on appeal in accordance with sub rule (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."**

This was not done. In terms of this provision the appellant ought to have filed the record of appeal by 5th February 2009, but only did so on 9th April 2009. It was therefore incumbent on her to apply for condonation for not complying with the Rules.

It was only on 5/11/09, as we the judges hearing this matter were about to proceed to court, that an application, was served on the Registrar in terms of Rule 17 of the Rules. I consider such conduct inherently unsatisfactory. By this stage in excess of a year had passed since judgment was pronounced by the court below. Furthermore, since the appellant had filed her Heads of Argument in April, as the matter was to be heard during the May session of the sitting of this court, a period of almost six months has elapsed. Her counsel had filed fairly lengthy and full heads in this matter on 14th April 2009 in anticipation of it being heard during the May session. What is significant is, that nowhere in those heads was any attempt made to seek condonation for the late filing of the record. Appellant's counsel advised us that this matter was not heard during the course of the May session as counsel for the parties had not attended the roll call, and the matter was removed from the roll. This is yet another example of the cavalier approach taken in the prosecution of this appeal.

I note from the record that on 20th October 2009, the 1st and 2nd respondent's counsel filed with the Registrar of this court, and on the appellant's attorneys his Heads of Argument in which he highlighted the appellant's failure to comply with the Rules, in particular emphasising the late filing of the record. It is therefore surprising that the application for condonation was only filed by the appellant with this court, a few minutes before this court was about to commence hearing this matter on 5th November 2009, some sixteen days later.

The 3rd respondent's counsel opposes the appellant's application for condonation on a further ground. It is his submission that the judgment in the court below was delivered on 23rd October, 2008 and the Notice of Appeal was only filed with the Registrar of the High Court on 5th December 2008.

Rule 8 (1) of the Rules provides that:

> **"8 (1) The notice of appeal shall be filed within four weeks of the date of the judgment appealed against.**
>
> **Provided that if there is a written judgment such period shall run from the date of delivery of such written judgment:..."**

Rule 8 (2) of the Rules provides as follows:

> **"8 (2) The registrar shall not file any notice of appeal which is presented after expiry of the four weeks unless leave to appeal out of time has previously been obtained**

He submits that there is nothing on the record to indicate that leave was sought or obtained.

Mr. Nkomondze for the appellant attempted to explain away this difficulty raised by the third respondent, by stating that he personally had served the Notice of Appeal on the Registrar on 5th November, 2008, and therefore in time. He intimated that the Registrar's stamp may have reflected an incorrect date on the day the date stamp was affixed on the Notice of Appeal. I have some difficulty with this explanation. At the very least affidavits should have been filed from both the Registrar and the appellant, the Registrar commenting on whether such an error had, or could have been made, and the appellant deposing that the Notice of Appeal had in fact been filed on 5th November 2008 and not on 5th December 2009 as reflected on the Notice. In any event it is curious that Mr. Nkomondze did not notice the error, if it indeed was an error of the alleged wrong date being affixed on the Notice of Appeal. I am inclined to think that it is unlikely that the Registrar's date stamp would have been in error when the 5th December, 2008 was a Friday the 5th day of the week. It seems to me unlikely that the error in the date stamp could have continued to exist for so many days into the first week of December without being noticed by the staff in the office of the registrar. Be that as

it may the failure by the appellant to file affidavits to deal with this issue is yet a further example of the dilatory approach of the appellant to this matter.

I consider these cursory attempts by the appellant in seeking condonation as being totally unsatisfactory.

In OKH FARM (PTY) LTD VS CECIL JOHN LITTLER N.O. AND OTHERS Appeal Case No. 56/08 it was held at page 14 of the cyclostyled judgement.*

"From what I have indicated above it is my view that the appellant has clearly not complied with the rules of court. It was therefore incumbent on it to apply, without delay, for condonation see Salloojee and Anor No v. Minister of Community Development 1965 (2) SA 135 (A); Kgobane and Anor v Minister of Justice and Anor 1969 (3) SA 365 (AD) and Waikiki Shipping Co. Ltd v Thomas Balour and Sons (Natal) Ltd 1981 (1) SA 1040 (A)."

In Herbstein and van Winsen, "The Civil Practice of the Superior Courts in South Africa, fourth edition, the learned authors at page 903 state:

"The onus is on the applicant, and it is he who must persuade the court, that he has a good claim to the grant of condonation. Since the court, in the nature of the case, hesitates to deny a party the opportunity of enforcing a right because he fails to take procedural steps timeously, it is disposed to consider such applications indulgently; but the application is anything but a pure formality. The relief sought can only be granted upon sufficient and satisfactory grounds...

> **As a rule, an applicant who seeks condonation will need to satisfy the court that the appeal has some chance of success on the merits (see De Villiers v. de Villiers 1947 (1) SA 635 (A)). A court will not exercise its power of condonation if it comes to the conclusion that on the merits there is no prospect of success, or if there is one at all, the prospects of success are so slender that condonation would not be justified. See Penrice v Dickinson 1945 AD 6; De Villiers v. De Villiers (supra) and Herbstein and van Winsen. (supra) at page 902."**

See also CHIEF JUBIPATHI MAGAGULA v. ROBERT MATSEBULA, AND SISANA MATSEBULA Appeal Case No. 51/08.

In my view the appellant has not satisfied the onus which rested on her.

There is also merit in the point taken by the 1st and 2nd respondents that the appeal should be taken as having been abandoned.

Rule 30 (4) provides as follows:

> **"(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 this rule, the appeal shall be deemed to have been abandoned"**

The record is silent on whether any meaningful attempt was made to meet this challenge faced by the appellant.

On the issue of the merits I am of the view that the appellant has no prospect of success. There is no evidence to show that had the 4th to 41st respondents not voted on the Luhlangotsini polling station the appellant would have won the election. Neither is there any evidence that these "respondents" had voted for the 3rd respondent which had led to her being successful in the election. The real test is whether the irregularity complained of would have affected the result of the elections.

See SAZI NGCAMPHALALA AND THREE OTHERS v. CHAIRMAN OF ELECTIONS AND BOUNDARIES COMMISSION AND THREE OTHERS Appeal Case No 48/08;
SIMON MBALEKELWA MHLANGA VS SIPHIWE KUNENE AND THE ELECTIONS AND BOUNDARIES COMMISSION APPEAL CASE NO. 63/08.

A further difficulty faced by the appellant is that there are numerous disputes of fact between the parties.

In the founding affidavit at page 21 of the record the appellant deposed:

> **"I must point it out to the Court that I have had no access to the voters roll as such I can not refer the Court to the numbers allocated to the Respondents."**

This was disputed by the Presiding Officer for the Luhlangotsini Umphakatsi. She deposed

> **"I deny that Applicant has had no access to the voters roll because the voters roll for Luhlangotsini Umphakatsi was kept as lying open for inspection by members of Luhlangotsini Chiefdom at the Chiefs Kraal. Applicant should have made a copy for herself, which is made free of charge, and scrutinized the list to ensure that people of Luhlangotsini Umphakatsi only should appear on the list."**

In her founding affidavit in paragraph 11 the appellant deposed:

> **"On the 23rd and 24th August 2008, the day of the elections, I was shocked to see residents of the neighbouring Nsangwini Umphakatsi, most of them being residents of Ndlembeni area, queuing at the polling station with other registered voters who are resident at our Umphakatsi at Luhlangotsini, to cast their vote."**

This was disputed by the presiding officer:

> **"I deny that those people were not eligible to vote at Luhlangotsini Umphakatsi for the reason that they appeared on the voters register for Luhlangotsini. If they were indeed not eligible to vote at Luhlangotsini, the chief of the area or his council could have barred them from registering at Luhlangotsini Umphakatsi. In any event I am advised that Ndlembeni is part of Luhlangotsini. In this respect may I refer this Honourable Court to Annexure "AG2" being a printout of the voters list for Luhlangotsini Umphakatsi, coded as Registration Centre 011303. The first two digits, 01, represents the region Hhohho, the next two digits, 13, represents Piggs Peak Constituency, and the last two digits, 03, represents Luhlangotsini Umphakatsi/Polling Station. The Elections Code book will be availed to the court.**

The presiding officer for the Luhlangotsini Umphakatsi also deposed:

> **"I admit that the 4th to the 41st Respondents are voters who were registered to vote under Luhlangotsini Umphakatsi but I deny that they are not from Luhlangotsini. In this respect may I refer this Honourable Court to Annexure "AG1", being the voters registration forms of the 4th to the 41st Respondent."**

This was disputed by the appellant. She deposed:

> **"I re-iterate the allegations in the Founding Affidavit that the 4th to 11th Respondent are neither residents of Luhlangotsini nor were they resident there for a continuous period of at least three months immediately preceding the date of applying for registration so as to qualify to be registered and vote under Luhlangotsini."**

There are just a few examples of where the parties are not ***ad idem*** on the facts. There are other disputes but I do not consider it necessary to highlight them here.

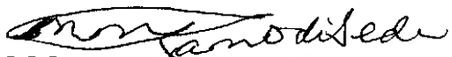
What is apparent however, is that the court ***a quo*** would have been entitled to dismiss the application for that reason only. See the High Court Rules and in particular:

> **"6 (17) where an application cannot properly be decided on affidavit, the court may dismiss the application or make such order as to it seems fit with a view to ensuring a just and expeditious decision."**

In my judgment, therefore, the appellant's prospects of success on the merits are not nearly adequate to counter balance the grave inadequacies of her performance on the procedural points.

Accordingly I would dismiss the appeal with costs.

A.M. EBRAHIM JUSTICE
OF APPEAL



M.M. RAMODIBEDI
ACTING CHIEF JUSTICE

P.A.M. MAGID

ACTING JUSTICE OF APPEAL

Delivered in open court at Mbabane on this ***JC*&*** day of November, 2009.