



**IN THE SUPREME COURT OF SWAZILAND**

**JUDGMENT**

Case No. 7/12

In the matter between

**DANIEL JACKSON MWAISENGELA**

**Appellant**

and

**NEDBANK SWAZILAND LIMITED**

**Respondent**

**Neutral citation:** *Daniel Jackson Mwaisengela v Nedbank Swaziland Limited (7/12) [2012] SZSC 27 (31 May 2012)*

**Coram:** EBRAHIM JA, DR.TWUM JA and MAPHALALA JA

**Heard:** 10 May 2012

**Delivered:** 31 May 2012

**Summary:** Civil law – application for postponement of appeal to next session; application for condonation of various breaches of the Court of Appeal Rules; failure to establish favourable prospect of success in appeal; postponement of appeal refused; condonation application not successful; appeal ordered to be struck off the roll as dismissed.

**TWUM J.A.**

- [1] On 19<sup>th</sup> January 2012, the High Court, presided over by Mamba J., gave judgment in this matter against the appellants. Being aggrieved and dissatisfied with that judgment, the 2<sup>nd</sup> Appellant filed Notice of Appeal in this Court on 17<sup>th</sup> February, 2012. The record shows that thereafter the appellant literally went to sleep.
- [2] He appeared to have been aroused from his slumber on 30<sup>th</sup> April 2012 when he filed an application substantially seeking a postponement of the hearing of the appeal to the next session.
- [3] The substantive appeal was enrolled for hearing on 3<sup>rd</sup> May 2012.
- [4] Needless to say, on 3<sup>rd</sup> May 2012 the Respondent filed Notice of Intention to oppose the postponement application. He also filed Respondent's Heads of Main Points of Argument.
- [5] When the appeal came to be heard on 3<sup>rd</sup> May 2012 Counsel for the appellant intimated to the Court verbally that indeed the appellant had not filed the necessary documents for the hearing of the appeal. It was also admitted that there was no application for condonation of those lapses.

[6] As a special concession and entirely without prejudice to the outcome of the application for postponement of the appeal, the appeal was adjourned to 10<sup>th</sup> May 2012 for the appellant to file any relevant application he deemed desirable in the circumstances to motivate condonation of the litany of breaches of the Court of Appeal Rules.

[7] Thereafter the appellant filed Heads of Argument for the postponement application on the morning of 10<sup>th</sup> May 2012, the date fixed for the further hearing of the appeal. Undaunted, the appellant filed a condonation application on 11<sup>th</sup> May 2012. In it he prayed the court to condone the appellant's late delivery of:-

- (i) The Notice of Appeal
- (ii) The Record of Appeal
- (iii) The Heads of Argument.

Naturally he offered to render costs of the application.

[8] When hearing resumed on 10<sup>th</sup> May, Counsel for the appellant had only that morning filed Heads of Argument in respect of the postponement application. In it, it was stated that the application had been prompted by lack of preparedness on the appellant's part, owing largely to poor resources of finance.

[9] After some preliminary discussion with both counsel, the matter was stood down to enable the court repair to an adjoining room to consider the impasse created by the appellant's unpreparedness.

[10] When the Court resumed, counsel were told that the arguments for the condonation of the breaches and also the postponement application would be heard together that morning and that the Court's decision on the application for condonation and postponement would be announced at the end of the session – ie 31<sup>st</sup> May 2012.

[11] The Condonation Application

Counsel for the appellant put a brave face on the obvious lack of preparedness and argued that indeed, there were no substantial breaches, even though he conceded that the record had not been properly prepared and filed. He also confessed that the real difficulty was his client's lack of finance. Those difficulties were captured in the Appellant's founding affidavit in support of the application. In paragraph 27-29 of the affidavit the appellant tackled the requirement of "favourable prospect of success."

[12] Counsel for the respondent submitted Respondent's Heads of Argument in respect of the condonation application in court in view of the fact that the

appellant's motion for postponement was filed on 10<sup>th</sup> May, 2012. He dealt fully with the "question of prospects of success in the appeal." In his opening salvo, Counsel opined that "the manner in which this is dealt with by the applicant in his founding affidavit is probably the most serious deficiency in the condonation application."

[13] I have carefully read the judgment of the court a quo. During the hearing on 10<sup>th</sup> May, 2012, Counsel for the respondent supplied us with a near-perfect copy of the "suretyship" document which appeared to have been the focus of attack by the appellant. I have carefully read it. There are no illegal insertions on it.

[14] The kinpin of the appellant's defence was that he had been advised (or perhaps ill-advised) by an employee he talked to at the bank to the effect that he should provide a surety bond to cover the company's existing indebtedness to the bank as a prelude to his own application for a loan from the bank. As the court a quo held, the appellant did not challenge the validity of the surety bond. He merely contended that it did not relate or pertain to the debt that was under consideration. I must say I do not believe his story of being advised to provide a surety bond. In my view, it is implausible.

[15] The requirement for demonstrating a favourable prospect of success does not contemplate that the applicant should necessarily provide arguments which, if the court were actually sitting on the appeal that day, would have won the day. But there must be an argument directed to the prospects of success.

[16] It is common cause that the Company acted through the appellant who was its managing director. A company, being an artificial person, has no ears, eyes, hands etc. It must necessarily act by the hands, brain, eyes of a human being. Normally, there are three organs of a company – the shareholders, the Board of Directors and the Managing Director who will often be responsible for the day-to-day management of the company. It was under the veil of incorporation that that appellant was carrying on his business. The appellant's complaint about he being made to pay the company's debt is clearly misplaced and is calculated to overreact the respondent bank. I dismiss it.

[17] In my considered opinion, the appellant failed to persuade the court that his appeal had any meaningful prospect of success even if it is postponed to the next session. The application for postponement had tucked to it an application for condonation of various breaches of the rules governing appeals in this court. In one moment of candour, the appellant stated in his

Heads of Argument, paragraph 6.4, that the reasons for his non-preparedness for the appeal stems largely from financial difficulties. Unfortunately, lack of funds by itself, is not a sufficient explanation of an appellant's unpreparedness for an appeal.

[18] In conclusion I hold that the appellant did not demonstrate to the Court that his appeal had any prospects of success. Added to that are the several breaches of the procedure for processing an appeal to hearing. On a balance of probabilities, it is my opinion that the application for adjournment is unmeritorious and is dismissed. The condonation application for the breaches of the rules is also refused. The appeal is accordingly struck off as dismissed.

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**DR. SETH TWUM**  
**JUSTICE OF APPEAL**

I agree.

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**A. M. EBRAHIM**  
**JUSTICE OF APPEAL**

I also agree.

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**M.C.B. MAPHALALA**  
**JUSTICE OF APPEAL**

**COUNSEL:**

**For Appellant:**

**M.P. Simelane**

**For Respondent:**

**R.M. Wise, S.C.**