



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Case No: 30/2012

In the matter between:

**THE PRIME MINISTER OF SWAZILAND
COMMISSIONER OF POLICE
THE ATTORNEY GENERAL**

**1ST APPELLANT
2ND APPELLANT
3RD APPELLANT**

v

CHRISTOPHER VILAKATI

RESPONDENT

Neutral citation: Commissioner of Police v Christopher Vilakati (20/12) [2012]
SZSC 63 (30 November 2012)

Coram: EBRAHIM J.A., MOORE J.A., and OTA J.A.

Heard: 20TH NOVEMBER 2012

Delivered: 30TH NOVEMBER 2012

Summary: Application for condonation of late filing of record – No sufficient cause shown for granting the application – Application for condonation refused – Preparation of record of appeal – Requirements of Rule 30 (1), (6), and (7) of the Court of Appeal Rules 1971 must be strictly observed – Registrar of the High Court under a duty to ensure that records prepared by appellants observe the above requirements – Registrar of the High Court should not certify records which do not comply with the Rules – Record in the instant appeal violating almost every requirement of the Rules – Appeal struck off the roll with costs.

MOORE J.A.

OPENING

[1] Christopher Vilakati, hereinafter Vilakati, was a member of the Police Force. He bought a white Nissan Sentra, hereinafter the Sentra, from one Peace Mabuza in September 2003. He paid E18,200.00 for the vehicle and took possession of it. The Sentra had a South African registration number. After a year, he sold the Sentra to one Nkosinathi Dlamini for E16,000.00. Trouble started some three months later when the Sentra was seized by the police at a roadblock in Matsapha. The police did so because they had information that the Sentra was in fact a stolen vehicle when Vilakati bought it. At all material times, Vilakati maintained that when he bought the Sentra he did not know, and there is no reason why he ought to have known, that it was in fact a stolen vehicle.

[2] The Police commenced investigations. The upshot was that a disciplinary hearing was held before a board of senior officers in terms of section 13 (1) of the Police Act 29 of 1957 as amended by Act No. 5 of 1987 at which Vilakati appeared as the Defaulter. At the end of a somewhat protracted hearing Vilakati was found guilty upon two of the three counts upon which he was charged and fined a total of E300.00 upon those counts. More to his detriment, however, the Board wrote: "Further recommended that, in

accordance to section 22 of the Police Act 29/1957 as amended you be dismissed from the Service. Such recommendation is subject to be reviewed by the Commissioner of Police.” The Board gave written reasons for its recommendation which involved serious criticisms of both the conduct and character of Vilakati. His whole career lay in ruins. He resolved to take action to protect his reputation and to preserve his career as a member of the Police Force.

[3] As M.C.B. Maphalala J put it in paragraph 1 of his judgment:

“[1] The applicant sought an order to review and set aside his dismissal from the Swaziland Police Service. He was employed as a police officer in February 1991 until he was dismissed by the second respondent on the 30th August 2007.”

The learned judge eventually made the following orders:

“(a) The application to review and set aside the decision of the respondents dismissing the applicant as a police officer pursuant to his disciplinary hearing is hereby granted.”

(b) The respondents are directed to reinstate the applicant as a police officer forthwith with effect from the date of dismissal on the 30th August 2007.

(c) The respondents are directed to pay the applicant his arrears of salary from the date of dismissal on the 30th August 2007.

(d) The second respondent is directed to pay costs of suit to the applicant on the ordinary scale..

Hence this appeal.

CONDONATION

[4] On the 19th September 2012 the appellant filed an “Application for condonation for late filing of record”. A founding affidavit in support was filed by Vusi Brian Kunene in which he deposed that “the record has filed after eight (8) weeks, (sic) which is the stipulated period for filing in terms of the Rules of this Honourable Court.” The flimsy reason underpinning the request for condonation is set that in paragraph 9 of the affidavit. It reads:

“The reason for the late filing is that the disciplinary record of proceedings that was conducted by the police against the Respondent got misplaced due to the death of the officer who had authority over

the record. The other reason for the late filing is that even the tape recordings in this regard were also misplaced and as such it took a long time to find it and re-transcribe it.”

[5] An answering affidavit was filed on the 23rd October 2012. Its predictable response to paragraph 9 of the founding affidavit reproduced above is:

“6.1 First I wish to point out that the reasons advanced for the late filing of the record are demonstrably false in the highest order, if regard be had to the following.

6.1.1 The disciplinary record of proceedings has been available from way back in 2009 when I instituted the review application.

6.1.2 In his judgment, Justice M.C.B. Maphalala referred to the record and quoted certain extracts thereof as appears on page 8 of the judgment. However, the record filed by the Applicant has left out the relevant 2 pages which contain the extracts which Justice Maphalala quoted from the record. This appears at paragraph 17 to 18 of the judgment. For the sake of completeness, I annexed the full judgment appealed against and is marked “A”.

6.1.3 The following has not been disclosed about the police officer who it is alleged had authority over the record:

- a) The name of the Police Officer.
- b) The date of his/her passing on.

6.1.4 Nothing is stated about how the tapes got missing, when and by whom and where they were eventually found. How long it took to transcribe the record, and who did the transcription. All these questions have not been fully disclosed to enable this Honourable Court to conclude whether there exists sufficient cause to condone the late filing of the record.

6.1.5 The affidavit fails to give detailed particulars of (a) when did the deponent become aware that the record was not filed (b) what steps were taken to ensure that the record is filed.

6.1.6 The Applicant has not stated or disclosed to this Honourable Court that an application for leave to execute was instituted on 12th June 2012, and argued on 18th September 2012 and judgment reserved.

6.1.6.1 It is from arguments made in court on 18th September 2012 that the deponent realized the need to file a record from what Justice Dlamini

raised. The record was subsequently filed on 19th September 2012, a day later, together with the hastily prepared application for condonation.

6.1.7 The question of prospects of success then also arises. The affidavit does not deal with that at all. In any event, given the well reasoned findings by the learned Judge, it is difficult to see how the applicant could establish prospects of success. The procedure followed at the hearing violated the basic tenets of natural justice.

6.1.8 The grounds of appeal do not attack the core findings. The record shows that there was evidence led at the disciplinary hearing that I was not aware and did not know that the vehicle was stolen. In fact the record does show that if I had known that the vehicle was stolen, I would have arrested the person in possession of same.

[6] No replying affidavit has been filed on behalf of the appellant refuting the foregoing assertions. The application for condonation must accordingly fail for the above reasons as well as for those set out in the following paragraphs.

THE RECORD

[7] A written judgment was delivered by M.C.B. Maphalala J on the 30th April 2012. A notice of appeal was dated the 29th May 2012. This means that the appellant should have prepared the record of appeal and, by the 28th July 2012, lodged a copy with the Registrar of the High Court for certification as correct. Sub-rule (4) of Rule 30 of the Rules of the Supreme Court is of the greatest importance. It provides that, subject to rule 16 (1), which allows for an extension of time, if an appellant fails to submit or re-submit the record for certification within the time provided by the rule, the appeal shall be deemed to be abandoned.

[8] The appellant's application for condonation for the late filing of the record admits in paragraph 8 that it was out of time as has already been noted in paragraph [4] above. It has been submitted by the respondent that the bald and un-particularized assertions in paragraph 9 of the appellant's affidavit do not show sufficient cause for excusing the appellant's non-compliance with the rules of court. Furthermore, the respondent contends forcefully and persuasively that the unfortunate passing of the officer who had authority over the record did not amount to sufficient cause meriting the grant of condonation. The work of the Police Force as an institution and that of its

surviving members could not be stymied by the death of a single one of its officers.

[9] Many records reaching this court recently have been of extremely poor quality. The record in this case is a particularly unfortunate example. It has failed to meet almost every requirement stipulated in Rule 30 (6) of the Court of Appeal Rules which is so important that I set out its essential components sequentially. All copies of the record shall be:

- i. Clearly typed on one side of the paper only.
- ii. On stout foolscap paper.
- iii. Double-spaced.
- iv. In black ink.
- v. Every tenth line of each page of the record shall be numbered.
- vi. At the top of each page there shall be typed the name of the witness whose evidence is recorded thereon.
- vii. Photostats or original documents are permissible only if they are clearly legible.
- viii. The pages of the record must be consecutively numbered.
- ix. The record must be properly indexed and securely bound in suitable covers.
- x. Bulky records must be divided into separate conveniently sized volumes.

[10] The above requirements are cumulative. They must **ALL** be observed. These rules are to be found in Act 54/1974 – nearly two decades ago. Meanwhile, time and technology continue marching on. Modern records, besides observing **ALL** of the above rules, are indexed, tabulated and paginated and covered in ring-binder or lever-arch files which, besides meeting all of the above requirements of a suitable cover, allow for ease of handling, and of reference to its contents. Several records have been presented recently in ring-binder or lever-arch files which appear to be readily available upon the local market. There is therefore no good reason for the submission of records which do not conform with the rules and keep up with modern technological developments.

[11] Before departing from this topic, a word to the Registrar of the High Court who has been charged with certain duties under the rules. Rule 30 (7) stipulates that:

“The Registrar of the High Court shall satisfy himself that the provisions of sub-rule (6) hereof have been complied with before furnishing the certificate required by sub-rule (1) hereof.”

I entertain no doubt but that if the Registrar of the High Court in this case had had the requirements of Rule 30 (7) uppermost in mind, he could not possibly have certified the record in this case which fell at every hurdle posted by the rules.

CONCLUSION

[12] The record which was presented to this court was illegible, incomplete and as has been said earlier totally inadequate for use by this court in determining the appeal. It is to be hoped that the record in this case is not replicated in any future cases. There being in essence no record before this court the appeal must accordingly be struck from the roll.

ORDER

[13] It is the order of this court that the appeal be and is hereby struck from the roll with costs.

S.A. MOORE
JUSTICE OF APPEAL

I agree

A.M. EBRAHIM
JUSTICE OF APPEAL

I agree

E.A. OTA
JUSTICE OF APPEAL

For the Appellant : Mr. Vusi B. Kunene

Form the Respondent : Mr. M.P. Simelane