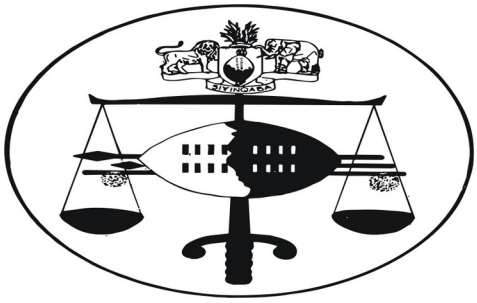

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal No. 85/12

In the matter between

ZAMA JOSEPH GAMA **Appellant**

and

SWAZILAND BUILDING SOCIETY **1st Respondent**
MELUSI QWABE N.O **2nd Respondent**
JUNED FARROK **3rd Respondent**
THE REGISTRAR OF DEEDS **4th Respondent**
THE ATTORNEY GENERAL **5th Respondent**

Neutral citation: Zama Joseph Gama *v Rex (85/2012)* [2013] SZSC 14 (31 May 2013)

Coram: RAMODIBEDI CJ, MCB MAPHALALA JA, and LEVINSOHN JA

Heard: 13 **MAY 2013**

Delivered: **31 MAY 2013**

Summary: **Civil appeal – Application for condonation of the late filing of the record of proceedings as well as the appellant's heads of argument – Rule 30 of the Court of Appeal Rules read with Rules 16 and 17 considered – Flagrant disregard of the Rules – No prospects of success on appeal. No *bona fide* defence established in the summary judgment principally sought to be rescinded – Application dismissed with costs – The appeal deemed to have been abandoned and accordingly dismissed with costs.**

JUDGMENT

RAMODIBEDI CJ

[1] The appellant has brought an application in this Court for an order condoning the late filing of the record of proceedings as well as heads of argument. The application is brought against the background highlighted below.

[2] Consequent upon an alleged breach of a written loan agreement between them, the first respondent brought an action against the appellant for the following relief:-

(1) Payment of the sum of E 1,323, 880.32 (One Million Three Hundred and Twenty Three Thousand Eight Hundred and Eighty Emalangeni Thirty Two Cents).

(2) Interest thereon at the rate of 9.5% per annum tempore *morae.*

(3) An order declaring certain: Portion 5 (a portion of Portion 1) of Lot No. 481 situated in Acacia Avenue in the Coates Valley Town, Manzini Area, measuring 1595 Square metres, held under Deed of Transfer 259/2002 dated 17 June 2002 to be executable.

(4) Costs of suit as well as further and/or alternative

relief.

[3] On 20 April 2012, and following the appellant's filing of a notice of appearance to defend, the High Court granted the first respondent summary judgment against the appellant. The appellant had inexplicably failed to file an affidavit resisting the first respondent's application for summary judgment application as provided for in terms of Rule 32 (5) of the High Court Rules.

[4] Thereafter, almost five months went by without the appellant challenging the summary judgment in question. No acceptable explanation has been furnished for that long delay.

[5] It was only on 17 September 2012 that the appellant filed a notice of motion against the respondents for an order in the following terms:-

> *"2. Declaring that the Summary Judgement granted on the 20th April 2012 was compromised and set aside by 1st Respondent through a letter dated* ***16th August 2012*** *written by J.L. Manana, Mortgage Manager.*

3. *Setting aside the sale of Portion 5 (a portion of Portion 1) of Lot 481 situate in Acacia Avenue in the Coates Valley Township, Manzini urban area, District of Manzini, Swaziland* ***held under Deed of Transfer 259/02****.*

4. *Interdicting and restraining the 4th Respondent from registering transfer of the said property held under Deed of Transfer 259/02 into the name of the 3rd Respondent pending finalization of this application.*

ALTERNATIVELY –

In the event registration of transfer into 3rd respondent's name has already been done;

4.1 Directing the 4th Respondent to cancel the Deed of Transfer referred to in (3) above and reviving the Deed under which the property was held immediately prior to the registration of the cancelled Deed.

4.2 Interdicting and restraining the 3rd Respondent from effecting any transaction whatsoever pertaining to Portion 5 (A portion of portion 1) of Lot no.

481 situate in Acacia Avenue in the Coates Valley Township, Manzini urban area, district of Manzini pending finalization of this application.

5. Alternatively the Summary Judgement granted by this Honourable Court on the 20th April 2012 be rescinded.

*6. Directing **prayers 1,2,3,4 and 5** to operate with immediate effect pending final determination of this application.*

7. Costs in the event of opposition.

8. Further and/or alternative relief."

[6] On 16 October 2012, the court *a quo* dismissed the appellant's application "*in its entirety*" with costs.

[7] On 7 November 2012, the appellant filed a notice of appeal against the judgment *a quo*. In terms of Rule 30 (1) of the Court of Appeal Rules, he was obliged to file the record of proceedings in the matter within two (2) months of the date of the noting of

the appeal, that is to say, on or before 8 January 2013. The Rule in question is mandatory. It provides as follows:-

> *"30. (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."* (Emphasis supplied.)

Sub-rules (5) and (6) in turn do not have a direct bearing on the issue at hand. They are merely concerned with directives on what the record should or should not contain as well as such issues as the typesetting required.

[8] Notwithstanding the mandatory provisions of Rule 30 (1), the appellant only filed the record of proceedings on 13 March 2013, a period spanning two full months after the deadline of 8 January 2013. To make matters worse, no application for extension of time in terms of Rule 16, or for condonation of the late filing of the record in terms of Rule 17, was made at that stage. In my

view, this amounted to a flagrant disregard of the Rules of this Court. Indeed, the present application was only filed on 16 April 2013. Significantly, this was after the first respondent had filed its heads of argument on 10 April 2013 and after it had made the following objection in paragraph 2.1 in respect of condonation:-

> *"No application for condonation for failure to file timeously the record of appeal has been instituted in terms of Rule 16 (1) (sic)."*

Undoubtedly, the first respondent meant Rule 17 which is specifically on condonation. It provides as follows:-

> *"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."*

[9] Now, as a matter of fundamental principle a party seeking condonation should ordinarily satisfy two requirements, namely, (1) he/she must give an acceptance explanation for the delay in

question and (2) he/she must show that there are reasonable prospects of success on appeal. It requires to be stressed, however, as the Supreme Court of Appeal of South Africa held in such cases as **Ferreira v Ntshingila 1990 (4) SA 271 (A)**; **Commissioner: SARS Gauteng West V Levue Investments [2007] 3 All SA 109 (SCA)**, that a party applying for condonation "*cannot rely solely on prospects of success to entitle it to be excused for not complying with the rules.*" See **Commissioner: SARS, Gauteng West** case (supra) at paragraph [11]. In **Johannes Hlatshwayo v Swaziland Development and Savings Bank and Others, Civil Appeal No. 21/06** 1 had occasion to state the following apposite remarks which bear repeating :-

> "*[14] This Court has on diverse occasions warned that flagrant disregard of the Rules will not be tolerated. Thus, for example, in* ***SIMON MUSA MATSEBULA v SWAZILAND BUILDING SOCIETY, Civil Appeal No. 11 of 1998*** *the Court expressed itself, per Steyn JA, in the following terms:-*

'It is with regret that I record that practitioners in the Kingdom only too frequently flagrantly disregard the Rules. Their failure to comply with the Rules conscientiously has become almost the rule rather than the exception. They appear to fail to appreciate that the Rules have been deliberately formulated to facilitate the delivery of speedy and efficient justice.

The disregard of the rules of Court and of good practice have so often and so clearly been disapproved of by this Court that non-compliance of a serious kind will henceforth result in appropriate cases either in the appropriate procedural orders being made - such as striking matters off the roll - or in appropriate orders for costs, including orders for costs **de bonis propriis**. *As was pointed out in* ***SALOJEE VS THE MINISTER OF CUMMUNITY DEVELOPMENT 1965 (2) SA 135 at 141,*** *"there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence." Accordingly matters may well be struck from the roll where there is a flagrant disregard of the Rules even though this may be due exclusively to the negligence of the legal practitioner concerned. It follows therefore that if clients engage the services of practitioners who fail to observe the required standards associated with*

the sound practice of the law, they may find themselves non-suited. At the same time the practitioners concerned may be subjected to orders prohibiting them from recovering costs from their clients and having to disburse these themselves.'"

[10] As mentioned earlier, apart from his failure to file the record of proceedings timeously, the appellant was also guilty of unconscionable delay in filing his heads of argument. Whereas the deadline for filing the appellants' heads of arguments was on 18 March 2013, the appellant only filed his heads of argument more than a whole month late, that is to say, on 22 April 2013.

[11] In his application for condonation the appellant explains his delay in observing the time frames in the matter on the basis that he was struggling to acquire financial means to enable him to instruct attorneys to represent him. The so-called financial difficulty was, however, neither communicated to the Court nor to the opposing party. In any event, there is no acceptable

explanation why the appellant could not appear in person if he had financial problems.

[12] It follows from these considerations that I am driven to the inescapable conclusion that the appellant has failed to give an acceptance explanation for the several instances of delay as fully set out above. I conclude that the non-observance of the Rules was flagrant.

[13] On the question of prospects of success, it is shocking to record that the appellant has not even bothered to address the matter at all in his founding affidavit. Undoubtedly, this is a classical case of a litigant who treats condonation of the non-observance of the Rules of this Court as a mere formality, contrary to several warnings of the courts both in this jurisdiction and in South Africa. As to the latter, see, for example, **Darries v Sheriff, Magistrate's Court, Wynberg and Another 1998 (3) SA 34 (SCA)** at 401.

[14] I have attached significant weight to the fact that the appellant never had a *bona fide* defence to the summary judgment application in the first place. In this regard, it will suffice to point out that on 17 August 2012, the appellant brought an application in the High Court for an order staying the sale in execution of his homestead consequent upon the summary judgment in question. In paragraphs 9, 10 and 14 of his founding affidavit he, in effect, admitted liability in these terms:-

"*9.*

I need to mention that at the time the 1st Respondent obtained the Judgment, I had already paid towards the Loan the total amount of more than E1,200,000.00 (One Million Two Hundred Thousand Emalangeni) most of it going to interest resulting in principal Loan decreasing by E300,000.00 (Three Hundred Thousand Emalangeni) over six (6) years.

10.

After Judgment had been obtained against me, I still made means to regulate my payments with the 1st Respondent and on the 20th

of January 2012, I paid into the Account a sum of E70,000.10 (Seventy Thousand Emalangeni, Ten Cents).

'

'

'

14.

I do not dispute that there is a Judgment that entitles the 1st Respondent to have my home sold, however I submit it is not just for the Respondents to proceed with the sale of my home in view of the efforts I have done to correct the situation."

[15] Furthermore, the first respondent duly filed a certificate of indebtedness showing that the appellant owed it E1, 323,880.32 at that stage. I may add for the sake of completeness that the certificate was filed in terms of clause 7.4 of the mortgage bond between the parties which provided that a certificate such as the one filed of record would be *"sufficient and satisfactory proof of the facts stated therein for the purpose of obtaining judgment."*

[16] It is not seriously disputed that the appellant had defaulted on his mortgage bond repayments. He had fallen into arrears and thus

committed a material breach of the contract as a result of which the first respondent was forced to issue summons. When the appellant filed a notice of appearance to defend the action, the first respondent applied for summary judgment on the ground that there was no *bona fide* defence and that the notice of appearance to defend was made solely for the purposes of delay.

[17] Despite the fact that the appellant was legally represented at that stage, the summary judgment application was not opposed. There was no affidavit resisting the application.

[18] Similarly, in paragraph 15 of his founding affidavit in support of the prayers fully set out in paragraph [5] above, the appellant admitted having made payments after the summary judgment in question. He said this:-

> *"15 After the issuance of summons on the 6th March 2012 but before judgement on the 20th April 2012, I continued making payments and the 1st Respondent accepted same. After judgement but before the auction sale on the 24th*

*August 2012, I continued with the payments and 1st Respondent accepted same. All this appears in my statement, a copy of which is annexed as "ZJG1". I had paid **E113 000.00** by then far in excess of the arrears."*

[19] It follows from these considerations that the appellant has, in my view, failed to establish a *bona fide defence*. Accordingly, he has no prospects of success on appeal. Nor do I think that it would make any difference in the circumstances of this case any way. In this regard I find myself in agreement with the following principle enunciated in **Chetty v Law Society, Transvaal 1985 (2) SA 756 (A)** at 765:-

"And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."

[20] In this Court it was submitted on the appellant's behalf that the particulars of claim in the matter were excipiable on technical grounds, namely:-

(1) that there was no demand made. It requires to be noted, however, that in paragraph 7 of its particulars of claim the first respondent stated that a demand was duly made but simply ignored;

(2) that prayers (a) and (c) in the combined summons referred to in para [1] above were not only inconsistent with each other but they also had the effect of overcompensating the first respondent;

(3) that the appellant foreclosed the bond and then cancelled the contract in question; and

(4) that the summary judgment was compromised by virtue of a letter, annexure "ZJG5", dated 16 August 2012 in which the first respondent gave the appellant until 31 August 2012 to redeem his account in the sum of E 1, 291,299.11.

[21] It is strictly unnecessary to address each of the appellant's submissions. It is enough to say that they are being addressed for the first time in this Court. The court *a* quo was never asked to deal with them. It would, therefore, be unfair to that court to criticise it on matters which did not arise for determination before it. In any event, the appellant's main complaint that the first respondent foreclosed the bond and cancelled the contract is without merit. The fact of the matter is that the first respondent merely exercised its right under clause 7 of the bond to foreclose the bond in the event of a material breach of the contract for non-payment as happened. It did not cancel the contract. Indeed, it is common cause that it continued to receive repayments even after the summary judgment had been granted.

[22] Counsel for the first respondent urged upon this Court to invoke sub-rule 30 (4) of the Rules of this Court and declare that the appeal be deemed to have been abandoned. This sub-rule reads 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."*

I see much force in this submission in the special circumstances of this case. It is in the interests of justice that this Court puts an end to this senseless and yet costly litigation.

[23] In the result the following order is made:-

(1) The appellant's application for condonation of the late filing of the record of proceedings as well as his heads of argument is dismissed.

(2) The appeal is deemed to have been abandoned and is accordingly dismissed with costs.

(3) The appellant shall bear the first respondent's costs of the application including the costs of the appeal. Such costs shall include the certified costs of counsel.

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M.M. RAMODIBEDI

CHIEF JUSTICE

I agree

_____

MCB MAPHALALA

JUSTICE OF APPEAL

I agree

_____

P. LEVINSHON

JUSTICE OF APPEAL

For Appellant : **Adv M.L.M. Maziya**

For 1st Respondent : **Adv P. Flynn**