IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No: 88/12

In the appeal between:

KENNETH B. NGCAMPHALALA	**APPELLANT**
VS	
SWAZILAND DEVELOPMENT & SAVINGS BANK	**FIRST RESPONDENT**
NEDBANK (SWAZILAND) LIMITED	**SECOND RESPONDENT**
STANLEY MATSEBULA	**THIRD RESPONDENT**
NOAH NKAMBULE	**FOUTH RESPONDENT**
SIBUSISO KUBHEKA	**FIFTH RESPONDENT**
DUMSANI DLAMINI	**SIXTH RESPONDENT**
NELLY DE SOUSE	**SEVENTH RESPONDENT**
FRED MACFADDEN	**EIGHTH RESPONDENT**
ELLIAS NDZIMANDZE	**NINTH RESPONDENT**

Neutral citation: *Kenneth Ngcamphalala vs Swaziland Development & Savings Bank and 8 Others (88/12) [2013] SZSC33 (31 May 2013)*

CORAM: **M.M. RAMODIBEDI, CJ**
A.M. EBRAHIM, JA
M.C.B. MAPHALALA, JA

Heard : 22 May 2013
Delivered : 31 May 2013

Summary

Civil Appeal - flagrant disregard of the Rules of Court – appellant files notice of appeal eight months after judgment of the Court *a quo* – appellant initially filed a review application before this Court which was dismissed on the ground that this Court has no review jurisdiction over the High Court – appellant disregarded Rule 8 when filing the appeal by not obtaining leave to appeal out of time – appellant subsequently filed an application for condonation for the late filing of the notice of appeal which application is defective – no application for condonation for the late filing of the record is lodged – Rule 17 invoked by appellant is duly discussed – appeal found to have been abandoned in terms of Rule 30 and it is accordingly dismissed with costs.

JUDGMENT

M.C.B. MAPHALALA, JA

[1] The appellant lodged an urgent application in the Court *a quo* on the 12th December 2011 for an order setting aside the Garnishee Notice of the 6th December 2011 issued by the second respondent. He further sought an order committing the third to the ninth respondents to prison for a period of sixty days for contempt of the Order that was issued on the 30th November 2011, unless they comply with the aforesaid Order. Similarly, he sought an order for costs on the punitive scale.

[2] It is common cause that on the 30th November 2011, the Supreme Court under Civil Appeal Case No. 39/2011 ordered the first respondent to pay the sum of E113 795.12 (one hundred and thirteen thousand seven hundred and ninety five emalangeni twelve cents) plus interest and costs to the appellant in respect of terminal benefits. The total amount payable to the appellant inclusive of interest was the sum of E135 131.69 (one hundred and thirty five thousand one hundred and thirty one emalangeni sixty nine cents). Accordingly, on the 1st December 2011 the first respondent was served by the Deputy Sheriff with a Writ of Execution in respect of the amount payable to the appellant.

[3] It is not in dispute that the appellant was also indebted to the second respondent in the amount of E113 795.12 (one hundred and thirteen thousand seven hundred and ninety five emalangeni twelve cents), and, a judgment had been obtained in this regard against the appellant for payment of the debt. When the second respondent learnt that the first respondent was holding the amount of E135 131.69 (one hundred and thirty five thousand one hundred and thirty one emalangeni sixty nine cents) on behalf of the appellant, it issued and served upon the first respondent a Writ of Attachment – Incorporeal Property in terms of Rule 45 (13) (1) as well as a Garnishee Notice in terms of Rule 45 (13) (a) of the High Court Rules on the 6th December 2011. The appellant denies

that he was served with these documents; however, the Deputy Sheriff Phumelela Malindzisa has filed Returns of Service confirming that he served these documents personally upon the appellant at his place of business at Ezulwini area in the Hhohho region.

[4] The first respondent acted in terms of the Writ of Execution as well as the Garnishee Notice and paid to the second respondent the amount of E113 795.12 (one hundred and thirteen thousand seven hundred and ninety five emalangeni twelve cents). The balance of the judgment amount in the sum of E21 336.57 (twenty-one thousand three hundred and thirty six emalangeni fifty seven cents) was paid to the appellant. The appellant was duly advised in writing that the sum of E113 795.12 (one hundred and thirteen thousand seven hundred and ninety five emalangeni twelve cents) had been lawfully attached by the second respondent.

[5] It is apparent from the Writ as well as the Garnishee Notice that the second respondent obtained judgment against the appellant on the 24th September 2008 in respect of an overdraft facility. There is no evidence before Court that the said judgment was rescinded and set aside, abandoned or appealed against. In the circumstances the judgment is valid and enforceable. The first respondent was obliged to pay the

amount of the Writ and Garnishee Notice to the second respondent. It is on the same basis that the third to the ninth respondents cannot in law be held in contempt for not paying the full amount of E135 131.69 (one hundred and thirty five thousand one hundred and thirty one emalangeni sixty nine cents) to the appellant and disregard the Writ and Garnishee Notice, which documents were lawfully and legitimately issued. Similarly, the Garnishee Notice could not be set aside by the Court *a quo* in the face of a judgment lawfully obtained by the second respondent against the appellant.

[6] The Court *a quo* dismissed the application on the 19th April 2012, and, the appellant lodged a review application before this Court. The review application was subsequently dismissed on the 30th November 2012 on the basis that this Court does not have review jurisdiction over the High Court in terms of sections 146 and 148 of the Constitution. This Court is the final Court of Appeal in this country and can only review or reconsider its own decisions.

[7] It is common cause that after the dismissal of the review application, the appellant lodged an appeal against the judgment of the Court *a quo* on the 10th December 2012, after eight months of the judgment. This was done

without obtaining leave of appeal in terms of Rule 8 of the rules of this Court which provides the following:

> **"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:**
> **. . . .**
> **(2) The Registrar shall not file any notice of appeal which is presented after the expiry of the period referred to in paragraph (1) unless leave to appeal out of time has previously been obtained."**

[8] It is apparent from the evidence that the appeal was filed out of time, and that there was no compliance with Rule 8. The Rule further prohibits the Registrar from filing a Notice of Appeal which is presented after the expiry of the period of four weeks unless leave to appeal out of time has previously been obtained. In view of the fact that Rule 8 is mandatory in nature, this presupposes that there is no proper notice of appeal before this Court.

[9] In addition the appellant did not file the record on appeal in accordance with the Rules of this Court. It is not in dispute that the judgment of the Court *a quo* was issued on the 19th April 2012; hence, the appellant was

bound in terms of Rule 8 of the Rules of this Court to file the Notice of Appeal within four weeks from the date of judgment. Thereafter, the appellant had to file the record within two months of the date of noting the appeal; this could be in July 2012. However, the record was filed on the 7th March 2013, eight months later. On the 8th March 2013 the attorneys for the second respondent advised the appellant's attorneys in writing of their failure to comply with the Rules of this Court and that the appeal was not properly before Court. Upon receipt of the letter, appellant's attorneys then filed an application for condonation for the late filing of the appeal.

[10] In the condonation application, the appellant contends that the reason for the delay in noting the appeal is the initial filing of a review application. At paragraphs 3 and 5 of the founding affidavit, the appellant states the reasons for the late filing of the notice of appeal:

> **"3. As my attorney and myself were of the view that there were various errors in the said judgment, we thought that an appropriate remedy was a review. A review application to the Supreme Court was accordingly immediately launched on the 24th April 2012. However, the review application was only heard during November 2012 and dismissed on the ground that the Supreme Court had no power to review a decision of the High Court. Pursuant to that decision, on the**

10th December 2012. I noted an appeal against the dismissal of my application by the Court *a quo*.

. . . .

5. The delay in noting the appeal was occasioned by my pursuit of the review application which at the time I thought was the appropriate route to follow. I never at any stage intended to leave the decision of the Court a quo unchallenged. In the circumstances, I request this Honourable Court to allow me to pursue the appeal."

[11] It is apparent from the application for condonation that the decision by the appellant and his attorneys to pursue the review proceedings was a conscious and deliberate decision taken in disregard of the law. Sections 146 and 148 of the Constitution as well as several decisions of this Court make it clear that it is not competent for this Court to review decisions of the High Court because it is not an inferior Court or tribunal. The High Court is a Superior Court as reflected in section 139 (1) of the Constitution which provides the following:

"139. (1) The Judiciary consists of:

(a) The Superior Court of Judicature comprising
(i) The Supreme Court, and
(ii) The High Court

(b) Such specialised, subordinate and Swazi Courts or tribunals exercising a judicial function as Parliament may by law establish."

[12] Furthermore, the condonation application does not satisfy the requirements for such an application. It is well-settled that an application for condonation for the late filing of an appeal must give a reasonable explanation for the delay in complying with the Rules of Court; in addition, there must be reasonable prospects of success on appeal. The appellant is bound to fail on both requirements: Firstly, negligence on the part of the litigant's attorney does not constitute a reasonable explanation for the delay. Secondly, there are no reasonable prospects of success on appeal in this matter when considering that the Garnishee Notice was properly issued in respect of a valid judgment duly obtained by the second respondent against the appellant on the 24th September 2008.

[13] In addition, the first respondent was obliged to comply with the Writ of Execution and Garnishee Notice and pay the money to the second respondent; hence, no contempt of Court was committed either by the third to the ninth respondents for not paying the full amount of the judgment to the appellant. Similarly, the appeal is not properly before Court in light of Rule 8 of this Court which precludes the Registrar from filing a notice of appeal which is presented after the lapse of four weeks

from the date of judgment unless leave to appeal out of time has previously been obtained. Moreover, the application for condonation does not deal with prospects of success on appeal in the founding affidavit; it is therefore bound to fail.

[14] The appellant has not applied for condonation for the late filing of the record; hence, the appeal is deemed to have been abandoned. Rule 30 provides the following:

> **"30. (1) The appellant shall prepare the record on appeal in accordance with sub-rules (5) and (6) hereof and shall within two (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) If the Registrar of the High Court declines to certify the record he shall return it to the appellant for revision and amendment and the appellant shall relodge it for certification within fourteen (14) days after receipt thereof.**
>
> **. . . .**
>
> **(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."**

[15] Rule 16 (1) referred to in Rule 30 (4) above provides the following:

> **"16. (1) The Judge President or any judge of appeal designated by him may on application extend any time prescribed by these rules."**

[16] During the hearing of the appeal before this Court, appellant's counsel conceded that the appellant has not complied with Rule 8 by filing the Notice of Appeal timeously or by obtaining leave to appeal out of time. He further conceded that the appellant has not applied for condonation for the late filing of the record. However, he argued that in terms of Rule 17, this Court may excuse the appellant from compliance with the rules of Court.

[17] Rule 17 provides the following:

> **"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."**

[18] *Ramodibedi JA,* as he then was, in *Johannes Hlatshwayo v. Swaziland Development and Savings Bank and Others* Civil Appeal case No. 21/2006 stated the following at para [17]:

> **"[17] It requires to be stressed that the whole purpose behind Rule 17 of the Rules of this Court on condonation is to enable the Court to gauge such factors as (1) the degree of delay involved in the matter (2) the adequacy of the reasons given for the delay, (3) the prospects of success on appeal and (4) the respondent's interest in the finality of the matter."**

[19] Rule 17 cannot avail the appellant in the circumstances. He has not only failed to comply with Rule 8 by applying for leave to appeal out of time but he has not complied with Rule 30 in filing the Record timeously. Similarly, he has not applied for condonation for the late filing of the Record. In addition his application for condonation for the late filing of the appeal does not meet the essential requirements for the remedy. Furthermore, Rule 17 requires the appellant to show "sufficient cause" in order for the Court to condone non-compliance with the Rules of Court; however, "sufficient cause" has not been shown on the application for condonation. In the circumstances this Court cannot exercise its discretion in favour of the appellant.

[20] *Steyn CJ* in *Saloojee v. Minister of Community Development* 1965 (2) SA 135 (A) at 141 dealt with the consequences of the failure to comply with the Rules of the Court:

"...it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity.... The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.... If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself."

[21] This decision was approved and applied by this Court in *Johannes Hlatshwayo v. Swaziland Development and Savings Bank and Others* (supra) at para [14] where *His Lordship Ramodibedi JA,* as he then was, stated the following:

"[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 case 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 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 v. Minister of Community Development* 1965 (2) SA 135 (A) 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 off 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."

[22] Accordingly, the following order is made:

(1) The appellant's application for condonation of the late filing of the appeal is dismissed.

(2) This appeal is deemed to have been abandoned and it is dismissed.

(3) The appellant shall pay the costs of both the application and the appeal.

M.C.B. MAPHALALA
JUSTICE OF APPEAL

I agree

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

A.M. EBRAHIM
JUSTICE OF APPEAL

For Appellant — Attorney S.C. Dlamini
For First, Third to Ninth Respondents — Attorney M. Sibandze
For Second Respondent — Attorney E.J. Henwood

DELIVERED IN OPEN COURT ON 31 MAY 2013.