

**IN THE SUPREME COURT OF SWAZILAND
JUDGMENT**

Civil Case No. 6/2013

In the matter between:

SIPHAMANDLA GININDZA

Applicant

And

MANGALISO CLINTON MSIBI

Respondent

In re:

SIPHAMANDLA GININDZA

Appellant

And

MANGALISO CLINTON MSIBI

Respondent

Neutral citation : *Siphamandla Ginindza v Mangaliso Clinton
Msibi (6/2013) [2013] SZSC 38 (31 May 2013).*

Coram : **S.A. MOORE JA,
E.A. OTA,
P. LEVINSOHN JA**

Heard : **21 May 2013**

Delivered : 31 May 2013

Summary : *Application to reinstate appeal – explanation for non-compliance with rules unsatisfaction, – condonation refused.*

JUDGMENT

P. LEVINSOHN, JA

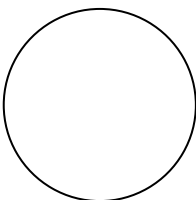
[1] Some three years and nine month ago on the 21st August 2009 the High Court entered summary judgment in amounts of E226, 000 and E14 666.00 respectively together with the costs of suit against the present applicant. It emerges that no affidavit resisting summary judgment was filed and the application was therefore unopposed.

[2] Rule 8 (1) of the high court rules provides that a notice of appeal should be lodged within four weeks from the date of judgment. Applicant caused a notice of appeal to be delivered on 28 January 2010 almost four months out of time. No application for condonation was made.

[3] Rule 30 (1) provides that the appeal record has to be lodged with the Registrar of the Supreme Court within two months of the date of noting the appeal. The appeal is deemed to have been abandoned in the event of a failure to comply. The applicant in fact did not file a record.

[4] The issue and service on him of a writ of execution against movables on 18 January 2012 once again stirred the applicant into action. He instructed fresh attorneys and they went on a new tack. An urgent application for rescission of judgment was launched. The matter came before the court on 17th of February 2012. There was no appearance and the presiding judge struck the matter from the roll.

[5] Thereafter for some eight months the applicant once again, took no steps to pursue his legal cause. He awakened from his apparent inertia when a writ of attachment of immovable property was served on him. He instructed his attorneys to reinstate the application for rescission for the 26th October 2012. On that date it was postponed until 7th of



December 2012. On the 7th of December the matter was not placed on the roll. There was however no appearance by the applicant or his legal representatives.

[6] The applicant thereupon instructed a new firm of attorneys .These caused the rescission proceedings to be withdrawn and launched the present application which is aimed at resuscitating the abandoned appeal.

[7] A reading of the chronology of events catalogued above proclaims that there has been a flagrant non-compliance with the various time-limits laid down by the rules of court A litigant seeking condonation is enjoined to show “good and sufficient cause” to obtain that relief. The cases decided in this court and the South African courts have consistently laid down that condonation is not simply to be given for the asking. An applicant must fully explain the reasons for his/her non compliance with the rules and the circumstances giving rise to the difficulties he/she experienced. At the end of the day the court will be in a position to assess such applicant’s bona fides and determine

whether he/she is entitled to the indulgence sought. A further important principle is gleaned from the case law and that is that where a prospective appellant realises that he/she has not complied with the rules, he/she should, apart from remedying his fault immediately, also apply for condonation without delay. (see *Usuthu Pulp Company v Swaziland Agricultural and Plantation Union* per M.C.B Maphalala J(as he then was) case number 21/2011).

- [8] In my view the applicant has dismally failed to furnish a satisfactory explanation for the series of failures to comply with the rules of court. It is simply unacceptable for litigant; particularly one who appears from the papers to have been engaged in business, to stand by in a state of total inaction apparently relying on his attorneys to do what is necessary to prosecute his case. There is no explanation as to whether he communicated with his attorneys during these lengthy delays and asked for feedback .A further important principle in regard to a litigant's reliance on his attorney is established in the case law. This is clearly articulated in *Saloojee vs. Minister of Community*

Development 1965(2) SA 135 AD at 141. Steyn CJ said the following and I quote his dicta extensively:

“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. In fact this Court has lately been burdened with an undue and increasing number of applications for condonaton in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. 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. (Cf. Hepworths Ltd. v Thornloe and Clarkson Ltd.. 1922 T.P.D. 336; Kings-borough Town Council. v Thirlwell and Another, 1957 (4) S.A. 533 (N)). A litigant, moreover, who knows, as the applicants did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that

there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney (cf. Regal v African Superslate (Pty.) Ltd., supra at p. 23 i.f.) and expect to be exonerated of all blame; and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. 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. That has not been done in this case. In these circumstances I would find it difficult to justify condonation unless there are strong prospects of success (Melane v Santam Insurance Co. Ltd., 1962 (4) S.A. 531 (A.D.) at p. 531.”

[9] Saloojee’s case has been followed in several cases in this court. I find it unnecessary to unduly burden this judgment by citing these. I also mention in passing that none of the attorneys concerned filed affidavits in support of the applicant.

[10] The applicant’s counsel submitted that notwithstanding the long delays and the failure to satisfactorily explain these, the applicant has good prospects of success in the contemplated appeal and this feature

tilts the balance in his favour. It is recalled that this appeal is directed against the granting of summary judgment in favour of the respondent/plaintiff. On the papers before it, the court a quo, in my view was perfectly entitled to grant summary judgment more especially, since the application was unopposed and the plaintiff's papers made out a case therefor. In my view there are no good prospects of an appeal court reaching a different conclusion.

[11] Even assuming that there are prospects of success, I am of the opinion that given the gross non compliance with the rules and the unsatisfactory explanation tendered to this court, this is a clear case where condonation ought to be refused without consideration of prospects of success.

[12] In the premises the application is dismissed with costs.

P. LEVINSOHN
JUDGE OF APPEAL

I agree

**S.A. MOORE
JUDGE OF APPEAL**

I agree

**E.A. OTA
JUDGE OF APPEAL**

For Appellant : Attorney S. Gumedze
For Respondent : Attorney I. Du Pont