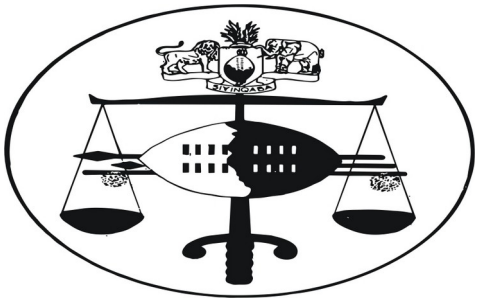

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE

Civil Case No. 29/2013

In the matter between

SIPHAMANDLA GININDZA **Applicant**

and

MANGALISO CLINTON MSIBI **1ST Respondent**
P. LEVINSOHN J.A. N.O. **2ND Respondent**
S.A. MOORE J.A. N.O. **3RD Respondent**
E.A. OTA J.A. N.O. **4TH Respondent**
THE ATTORNEY GENERAL **5TH Respondent**

Neutral citation: Siphamandla Ginindza v Mangaliso Clinton Msibi *(29/2013)* [2013] SZSC 45 (31 July 2013)

Coram: RAMODIBEDI CJ, MCB MAPHALALA JA, ANNANDALE AJA, MAMBA AJA, and HLOPHE AJA.

Heard: **30, 31 July 2013**

Delivered: **8 August 2013**

Summary

Review application – Section 148 (2) of the Constitution – The applicant seeking a review of the Supreme Court's decision dismissing his condonation application for gross non-compliance with the Rules and failure to tender a satisfactory explanation – No fault or gross irregularity found with the Supreme Court's approach – Application for review dismissed with costs.

JUDGMENT

THE FULL COURT

[1] This is an application for a review of the Supreme Court's decision made by the second to fourth respondents dismissing the applicant's condonation application for gross non-compliance with the Rules and failure to tender a satisfactory explanation.

[2] The application is made in terms of s 148 (2) of the Constitution which provides as follows:-

> *"(2) The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by an Act of Parliament or rules of court."*

[3] Subsection (3) provides that in the exercise of its review jurisdiction, the Supreme Court shall sit as a Full Bench. In terms of subsection 145 (3) of the Constitution a Full Bench of the Supreme Court consists of five Justices of this Court. Hence the Full Bench of five Judges as presently constituted in this matter.

[4] It is regrettably necessary for us to point out at the outset that this matter has a sad history of blatant delaying tactics on the part of the applicant, as will become apparent in the course of this judgment.

[5] The dispute between the applicant and the first respondent commenced on 23 April 2009 when the latter, as plaintiff, filed a summons against the former, as defendant, for payment of the sum of E 226,000.00, being monies paid by the first respondent to a company named Atalis South Africa (Pty) Ltd for photocopying paper following a verbal agreement between the parties. On 11 June 2009, the first respondent duly filed a declaration in the matter in which he prayed for payment of the sum of E 226,000.00 plus other ancillary relief.

[6] After the service of the summons and declaration upon him the applicant filed a notice of intention to defend.

[7] On 30 July 2009, the first respondent filed an application for summary judgment. He duly filed an affidavit in support of the application in which he averred on oath that the applicant had no *bona fide* defence. He further averred that the notice to defend had been filed "solely for the purpose of delaying the action."

[8] Instead of filing an affidavit opposing the application for summary judgment in terms of Rule 32 of the High Court Rules, and on 13 August 2013, the applicant filed "Defendant's Plea."

[9] On 21 August 2009, Maphalala PJ granted summary judgment as prayed. In doing so the learned Judge opined that "[a] plea though filed cannot be an opposition of [the summary judgment] application". We agree. In this regard the provisions of subrule 32 (5) (a) of the High Court Rules bear reference, namely:-

> *"(5) (a) A defendant may show cause against an application under sub-rule (1) (namely, for summary judgment) by affidavit or otherwise to the satisfaction of the court and, with the leave of the court, the plaintiff may deliver an affidavit in reply."*

[10] It is common cause that the applicant dismally failed to avail himself of any of the procedures laid down in the subrule to resist summary judgment. That being the case, the applicant in our

view has got only himself to blame for the outcome of the matter as ordered below.

[11] The record shows that more than five months after summary judgment had been granted in the matter, and on 28 January 2010, the applicant belatedly filed a notice of appeal against Maphalala PJ's summary judgment. He relied on a single ground of appeal, namely, that the learned Judge a *quo* erred in fact and in law in "finding that it was improper or unlawful for the Defendant to have filed a plea, instead of an affidavit, when resisting summary judgment in the above matter." He further complained that the Judge did not consider the defence raised in the plea.

[12] Thereafter, the applicant failed to prosecute his appeal for almost twelve (12) months. Notably, he only sprang to action after the first respondent had, on 18 January 2012, sued out a writ of execution against his movable property, attaching his motor vehicle in the process without removing it. It was only on 15

February 2012 that he filed an application for stay of execution of the summary judgment as well as its rescission. However, the application was struck off the roll on 17 February 2012 due to applicant's non-appearance in Court.

[13] Once again the applicant remained inactive for the next eight (8) months until 25 October 2012 when the Deputy Sheriff again attached his movable property. The next day, on 26 October 2012, the applicant filed a notice of reinstatement of his application seeking a stay of execution of the immovable property as well as rescission of the summary judgment in question.

[14] Typically insofar as the applicant's delaying tactics were concerned, judging by the record of proceedings, the applicant once again failed to prosecute his application for more than twelve (12) months. As if this inordinately long delay was not enough, on 20 February 2013 he finally withdrew the application in question.

[15] To add more confusion to the whole fiasco, on the same date, namely, on 20 February 2013, the applicant filed yet another notice of appeal against the summary judgment granted by Maphalala PJ on 21 August 2009. Typically, he failed to apply for condonation of the late filing of appeal notwithstanding the clear mandatory provisions of Rule 8 (1) of the Supreme Court Rules to the effect that an appeal shall be filed within four weeks of the date of the judgment appealed against.

[16] Shockingly, for that matter, the applicant also failed to file the record of proceedings within two (2) months of the date of the noting of the appeal as enjoined to do so by Rule 30 (1) of the Supreme Court Rules. No acceptable explanation was tendered for this breach of the Rules.

[17] Against the foregoing background, the matter finally came before this Court on 21 May 2013. Since the applicant's "appeal" was at that stage deemed to have been abandoned by operation of Rule 30 (1) of the Supreme Court Rules for failure to file the

record of proceedings within two (2) months of the date of the noting of the appeal, the applicant applied for condonation for reinstatement of the appeal.

[18] In dismissing the applicant's application for condonation for reinstatement Levinsohn JA, writing a unanimous decision of the Court, made the following apposite remarks which bear repeating:-

> *"[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 [a] 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) 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 condonation 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).'"

[19] In this Court the applicant's main submission was that the Supreme Court committed "an error of law" in failing to consider prospects of success as foreshadowed in the applicant's plea filed of record. It is, however, an elementary principle of law that a review court is not concerned with the merits of the decision under review. Accordingly, an error of law is not a review

ground but one of appeal. See **Council of Civil Service Unions and Others v Minister for the Civil Service [1984] 3 ALL ER 935 (HL)**. We are prepared to assume in the applicant's favour that what he really meant was that the Court committed a gross irregularity as opposed to an error of law. But even so, we are unable to fault the Supreme Court's approach in the particular circumstances of this case as fully set out above. We subscribe to the tried and tested principle that in a proper case the Court is fully justified in the exercise of its judicial discretion to refuse an application for condonation merely as a mark of its displeasure or in order to prevent abuse of court process where there has been a flagrant disregard of the rules, whatever the prospects of success may be. This is undoubtedly such as a case. See, for example, such cases as **Okh Farm (Pty) Ltd v Cecil John Littler N.O. and Four Others, Appeal case No. 56/08; Johannes Hlatshwayo v Swaziland Development and Savings Bank and Others, Civil Appeal No. 2/2010; Zama Joseph Gama v Swaziland Building Society and Others, Civil Appeal No. 85/12; Saloojee and Another v Minister of Community**

Development 1965 (2) SA 135 (A) at 141; PE Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A); Commissioner: SARS, Gauteng West v Levue Investments 2007 (3) All SA 109 (A) at 113.

[20] Because the applicant has curiously had the temerity to unfairly criticise eminent Judges of this Court for a job otherwise well done, we consider it necessary to repeat in particular the apposite remarks of the Court in **Hlatshwayo's** case (supra) at paragraphs [14] – [17] per Ramodibedi JA as he then was (with Browde AJP and Zietsman JA concurring). We do so extensively in the hope that the message will finally reach home that litigants who treat the Rules of Court with disdain and contempt as the applicant has done in this case cannot expect the court's sympathy automatically in condonation applications merely because they have good prospects of success. The Court said this:-

> *"[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 Community 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.'

[15] Once again, in Nhlanhla Maseko and Others v George Mbatha and Another, Civil Appeal No. 7 of 2005 this Court said the following, per Zietsman JA:-

'The matter was in fact heard on 16 June 2005. The appellants' heads of argument, which should have been filed 28 days before the hearing of the matter, are dated 8 June 2005. The respondents' heads of argument are dated 13 June 2005. There was no application by either counsel for condonation of the late filing of the heads of argument, and no written reason given for this failure to comply with the rules of this Court. This disregard for the rules is becoming prevalent. In a circular dated 21 April 2005 practitioners were again warned that failure to comply with the rules in respect of the filing of heads of argument would be regarded with extreme disapproval by this Court and

might be met with an order that the appeals be struck off the roll or with a punitive cost order. This warning is hereby repeated.'

[16] Similarly, it is evident in my view that the attitude evinced by the appellant in the instant case is that the Rules of this Court are unimportant and fall to be disregarded with impunity. It is thus necessary to disabuse litigants of such attitude lest the justice system in this jurisdiction falls into disrepute. To make matters worse, the appellant has not even bothered to make an application for condonation of all of the breaches of the Rules as fully set out above. He has thus treated the Court in a cavalier manner.

[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."

[21] In any event, we have come to the inescapable conclusion in the present matter that the applicant's criticism of the impugned judgment on the basis that it failed to consider prospects of

success is completely unjustified. It is, in our view, baseless. We point to paragraphs [10] and [11] of the judgment which clearly tell a different story from the applicant's unfounded allegations:-

> *"[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 any 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."*

[22] It follows from the foregoing considerations that the applicant's application for review of the Supreme Court's decision in the matter is completely unmeritorious. The Court judicially exercised its discretion upon relevant considerations. It has not been shown to have committed any fault, either reviewable or at all. Accordingly, the review application falls to be dismissed with costs. We must warn, as we hereby do, that in future litigants who pursue frivolous and scandolous applications such as the present matter shows may expect to pay punitive costs. Similarly, legal practitioners involved in such cases may themselves expect to pay costs *de bonis propriis*. We point out for completeness that the applicant and his attorney escaped punitive costs in this matter primarily because they had not, in all fairness to them, been given prior warning to argue the point. Others following in their footsteps may not be so lucky.

[23] In light of all of the foregoing considerations the applicant's application for review is dismissed with costs.

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M.M. RAMODIBEDI

CHIEF JUSTICE

_____

MCB MAPHALALA

JUSTICE OF APPEAL

_____

J.P. ANNANDALE

ACTING JUSTICE OF APPEAL

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M.D. MAMBA

ACTING JUSTICE OF APPEAL

N.J. HLOPHE

ACTING JUSTICE OF APPEAL

For Applicant	**:**	**Mr S. Madzinane**
For 1st Respondent	**:**	**Mr I. Dupont**
For 2nd to 5th Respondents	**:**	**Mr V. Kunene**