**IN THE SUPREME COURT OF SWAZILAND**

Civil Appeal No: 17/2013

In the matter between:

**JABULANI PATRICK TIBANE** **APPELLANT**

**AND**

**ALFRED SIPHO DLAMINI** **RESPONDENT**

Neutral citation: *Jabulani Patrick Tibane v. Alfred Sipho Dlamini (17/2013) [2013] SZSC 61 (2013)*

**Coram:** **A.M. EBRAHIM, JA**
**M.C.B. MAPHALALA, JA**
**P. LEVINSOHN, JA**

Heard: 05 November 2013

Delivered: 29 November 2013

**Summary**

Civil Appeal – application for condonation for the late filing of the record of proceedings in terms of Rule 17 – essential requirements for condonation discussed – held that sufficient cause and good prospects of success have not been shown – appeal deemed to have been abandoned in terms of Rule 30 – application dismissed with costs.

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**JUDGMENT**

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**M.C.B. MAPHALALA, JA**

[1] This is an application for condonation for the late filing of the Record of Proceedings in terms of Rule 17 of the Rules of this Court. The rule provides the following:

> **"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."**

[2] The court *a quo* granted judgment against the appellant on the 28th February 2013. The appellant had to file the Notice of Appeal within four weeks of the judgment appealed against in accordance with Rule 8; and the appellant complied with the Rule and filed the Notice of Appeal on the 28th March 2013.

[3] The appellant contends that the delay in filing the Record timeously was occasioned by lack of funds on his part. He contends that whilst the proceedings were pending in the Court *a quo*, his wife Nomsa Tfobhi Tibane (nee Dlamini) instituted divorce proceedings at the Magistrate's Court in Mbabane which proved very costly for him to defend; the divorce action is awaiting the decision of the Court. He argues that his attorneys

had demanded that he settles their legal fees for the divorce action before they could attend to the filing of the Record of Proceedings. He contends that he is not formally employed but depends on Consulting Work for his livelihood from various clients from time to time.

[4] The appellant contends that his prospects of success on appeal are high. However, when looking at the evidence in the record, I cannot agree. The appellant instituted motion proceedings for an order directing the respondent to deliver forthwith and/or return to the appellant a motor vehicle, being a Nissan Bakkie 2006 Model registered SD 171 EG. He further sought an order authorising the Deputy Sheriff to seize the said motor vehicle wherever it may be found and to deliver it to the Appellant. He also sought an order directing the police to assist the Deputy Sheriff in effecting the main orders sought; in addition, he sought an order for costs of suit.

[5] The facts in this matter are common cause. The appellant is married to the respondent's sister Nomsa Tfobhi Tibane (nee Dlamini) by civil rites in community of property with marital power; and, the marriage still subsists pending the judgment of the Mbabane Magistrate's Court in respect of the divorce action instituted by the wife. The appellant and his wife are in separation, and prior thereto, they concluded an agreement in terms of

which the appellant would keep two motor vehicles belonging to the joint estate being a Toyota Hilux bakkie and a Jetta sedan. The wife was to keep the Nissan bakkie for her own use.

[6] Pursuant to the separation, appellant's wife was offered a job in Zimbabwe in 2010 which she duly accepted. She resigned from her job as a civil servant employed by the Swaziland Government and relocated to Zimbabwe. Subsequently, she moved to Tunisia where she is currently employed by the African Development Bank. It is not in dispute that the separation was a result of marital problems between the couple.

[7] When the appellant's wife emigrated to Zimbabwe, she left the motor vehicle in the custody of their elder son, Simiso Tibane. However, the son had to leave the country soon thereafter to pursue his tertiary education in South Africa and later in Malaysia; the appellant's wife directed the son to leave the motor vehicle in the custody of the respondent to keep it on her behalf. The appellant contends that he is the administrator of the joint estate and that he was not part of the decision to keep the motor vehicle with the respondent. He argues that in the circumstances the respondent is not lawfully in possession of the motor vehicle. The order sought in the Court *a quo* was based on '*rei vindicatio*' on the ground that the motor vehicle is registered in his name and therefore belongs to him. It is not in

dispute that the motor vehicle is still in the physical possession of the respondent or that it is registered in the name of the appellant. However, the motor vehicle belongs to the joint estate.

[8] After the appellant had instituted legal proceedings in the court *a quo*, appellant's wife wrote a letter to appellant's attorneys, and, the letter is annexed to the application by the appellant as annexure "JT3". It reads in part as follows:

> **" ….**
> **Re: Letter For Release of Nissan Bakkie SD 171 EG**
>
> **I wish to refer to the letter of demand for the above vehicle addressed to my brother Mr. Alfred Sipho Dlamini. I would appreciate that my brother is not harassed as he is only taking custody of the car. Otherwise, it is in my possession.**
>
> **Jabulani should have told you the real truth and that should have guided you in assisting him. He left the Nissan with me and took two vehicles – Toyota Hilux and Jetta which I do not even know their whereabouts nor do I bother him.**
>
> **Nonetheless, I wish to express my sincere surprise and disappointment at your involvement in this matter instituting the demand for release of the above vehicle. I had expected you especially to recuse yourself from this issue since you have been part of this family or at least offer the appropriate advice to your friend/client. You have an in-depth**

**knowledge of my relationship with Jabulani Tibane and that marriage in community of property does not under any circumstances give him the right to demand or withdraw property from my possession unless it's a decision from the court and part of the dissolution of the marriage.**

**In the interest of harmony and amicable resolution of any related problem, I would sincerely ask that Jabulani communicates directly with me …."**

[9] The respondent concedes that he is in physical possession of the motor vehicle; however, he contends that he is keeping the motor vehicle on behalf of his sister, the estranged wife of the appellant. It is apparent from the evidence that appellant's wife is legally in possession of the motor vehicle, and, that she would take it back upon her return to the country. The appellant is aware that the respondent is holding the motor vehicle on behalf of the wife.

[10] Contrary to the submissions made by the appellant's counsel that the matter deals with '*rei vindicatio'*, it is apparent from the evidence that the matter deals with private separation of the appellant and his wife. The issue is whether the appellant is entitled to vindicate the motor vehicle from the respondent in light of the agreement reached between the spouses during their separation. They agreed that the appellant would take the two motor

vehicles belonging to the joint estate and the wife would take the motor vehicle in question.

[11] It is well settled that a private separation agreed orally between the spouses is as binding as one that has been formally executed in terms of a written agreement in a notarial deed. It is legally accepted that the agreement should not amount to a prohibited donation in the sense that one spouse receives more than what he would have received in a judicial decree of separation. However, an agreement that each spouse receives what he has brought into the marriage is legally enforceable. Private separation, also known as voluntary separation or extra-judicial deed of separation provides a convenient and inexpensive remedy for spouses intending to separate. However, like a judicial decree, a voluntary deed of separation lapses automatically if the parties become reconciled. On the other hand, a private separation, unlike a judicial decree of separation may be cancelled by the consent of the spouses expressly or tacitly; the agreement is tacitly cancelled if one of the spouses persistently fails to comply with the terms of the deed culminating in the total disregard of the deed by both spouses. In that instant the deed becomes a nullity. Similarly, the deed may be set aside by the court at the instance of either spouse who can show that at the time the agreement was concluded, no grounds existed which would have justified the deed. Similarly, the Court may set aside the deed where the

other spouse has wilfully disregarded the material provisions of the deed or where the grounds which necessitate the deed no longer exist:

- The South African Law of Husband and Wife, fourth edition, *H.R. Hahlo, Juta* & Co. Ltd, 1975, at pp 352-360.
- *Scholtz v. Felmore* (1986) 4 SC 192 AT 194.
- Smith 1923 GWL 188 at 192-3.
- Xavier 1932 NPD 290.
- Chapman 1949 (3) SA 147 (N).
- *Sandile Xavier Frances Dlamini v. Bhekiwe Dlamini (born Hlophe)* Civil Appeal No. 35/2009.

[12] In light of the aforegoing, it is apparent that the appellant has no prospects of success on appeal. The private deed of separation still subsists and it is binding on the spouses; and, there is no evidence before this Court that it has been cancelled by the spouses whether expressly, tacitly or by the Court. In the circumstances it cannot be argued that the Court *a quo* misdirected itself on the merits.

[13] Notwithstanding the timeous filing of the Notice of Appeal in terms of Rule 8 of the Rules of this Court, the appellant did not file the Record of

Proceedings as required by Rule 30 hereof. Rule 30 provides, *inter alia*, as follows:

> **"30. (1) The appellant shall prepare the record on appeal in accordance with sub-rules (5) and (6) hereof and shall within two 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 so 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 days after receipt thereof.**
>
> **(3) Thereafter, the record may not be relodged for certification without the leave of the Chief Justice or the Judge who presided at the hearing in the Court a *quo.***
>
> **(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."**

[14] The Record of Proceedings had to be filed on or before the 28th May 2013 in accordance with Rule 30 of the Rules of this Court. However, it was filed on the 21st June 2013, more than three weeks late. Notwithstanding this default, the application for condonation was only lodged on the 24th

September 2013, three months later. Clearly the conduct of the appellant amounts to a flagrant disregard of the Rules of this Court when considering that Rule 30 (1) of the Rules of this Court is mandatory. The Court of Appeal of Swaziland, as it then was, in the case of *Unitrans Swaziland Limited v. Inyatsi Construction* Civil Appeal No. 9/96 quoted with approval two South African cases dealing with non-compliance with the Rules of Court, namely, Commissioner *for Inland Revenue v. Burger* 1956 (4) SA 446 AD at 449 G as well as *Moraliswani v. Mamili* 1989 (4) SA 1 AD at 9. In both cases the Appellate Division held that, "whenever an appellant realises that he has not complied with a Rule of Court, he should, without delay, apply for condonation.

[15] Whilst Rule 17 requires "sufficient cause" for condonation, Rule 16 requires "good cause." Rule 16 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:**
>
> **Provided that the Judge President or such Judge of Appeal may if he thinks fit refer the application to the Court of Appeal for decision.**
>
> **(2) An application for extension shall be supported by an affidavit setting forth good and substantial reasons for the application and where the application is for leave to appeal the affidavit shall contain**

**grounds of appeal which prima facie show good cause for leave to be granted."**

[16] The Supreme Court of Swaziland in the case of *Usutu Pulp Company v. Swaziland Agricultural Workers Union* Civil Appeal No. 21/2011 at para 42 quoted with approval two cases of the South African Supreme Court of Appeal, *Silber v. Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (AD) at 353-353 and *Minister of Agriculture and Land Affairs v. CJ Rance (Pty) Ltd* 2010 (4) SA 109 (SCA) at para 36. In the Usutu Pulp Company case, I had occasion to say that the expressions "good cause" and "sufficient cause" are synonymous and mean, that the defendant must at least furnish an explanation of his default sufficiently to enable the Court to understand how the default came about, and to assess his conduct and motives.

[17] It is a trite principle of our law that a party seeking condonation should give a reasonable explanation for the delay. In addition he must show that there are reasonable prospects of success on appeal. *Ramodibedi JA,* as he then was, in *Johannes Hlatshwayo v. Swaziland Development and Savings Bank and Others* Civil Appeal case No. 17/2006 at para 17 said the following:

**"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."**

[18] It is apparent from the evidence that there was a flagrant disregard of the Rules of this Court by the appellant and his Attorney in failing to file the Record of Appeal within the time provided in the Rules. The appellant's explanation that he instructed his attorney to prosecute the appeal timeously but failed to do so does not constitute a reasonable explanation for purposes of condonation for non-compliance with the Rules of Court. Similarly, the appellant's explanations that he did not have the money to pay his attorney to prosecute the appeal because he was still defending the divorce proceedings at the Mbabane Magistrate's Court is equally not a valid excuse because both cases were being handled by the same attorney; he could have prosecuted both matters simultaneously. The importance of complying with the Rules of Court cannot be over-emphasised.

[19] The Supreme Court in the case of *Kenneth B. Ngcamphalala v. Swaziland Development and Savings Bank and Eight Others* Civil Appeal NO. 88/12 at para 20 quoted with approval the South African Appellant Division case of *Saloojee v. Minister of Community Development* 1965 (2) SA 135 (AD) at 141 where *Steyn CJ* had this to say:

**"… 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. 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 who 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 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."**

[20] Similarly, *His Lordship Ramodibedi CJ* in the case of *Johannes Hlatshwayo v. Swaziland Development and Savings Bank and Others* Civil case No. 21/2006 at page 14 quoted with approval an earlier decision of this Court in the case of *Simon Musa Matsebula v. Swaziland Building Society* Civil Appeal No. 11/1998 where *Steyn JA* had this to say:

**"14. …. 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*."**

[21] It is apparent from the precedings paragraphs that the appellant has failed to satisfy the essential requirements for condonation, that is "sufficient cause" as well as prospects of success on appeal; in the circumstances this Court is entitled to invoke Rule 30 (4) of the Rules of this Court and hold that the appeal is deemed to have been abandoned.

[22] Accordingly, the following order is made:

(i) The appellant's application of condonation for the late filing of the Record of Proceedings is hereby dismissed.

(ii) The appeal is deemed to have been abandoned and it is dismissed with costs.

(iii) The appellant shall bear the respondent's costs of the application including the costs of appeal.

M.C.B. MAPHALALA
JUSTICE OF APPEAL

I agree

A.M. EBRAHIM
JUSTICE OF APPEAL

I agree

P. LEVINSOHN
JUSTICE OF APPEAL

For Appellant — Attorney B. Mndzebele

For Respondent — Attorney M. Manzini

**DELIVERED IN OPEN COURT ON 29 NOVEMBER 2013**