



IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

CIVIL APPEAL CASE NO. 59/2013

In the matter between:

JUDGMENT

DOCTOR M. LUKHELE

1ST APPELLANT

JOSHUA SHONGWE

2ND APPELLANT

MANDLA NXUMALO

3RD APPELLANT

and

NEDBANK SWAZILAND

RESPONDENT

Neutral citation:

*Doctor M. Lukhele and Nedbank Swaziland (59/2013)
[2014] SZSC 21 (30 May 2014)*

Coram:

M.M. RAMODIBEDI C.J., S.A. MOORE J.A., DR.
B.J.ODOKI

Heard:

19 MAY 2014

Delivered:

30 MAY 2014

Summary: Notice of Appeal filed out of time – Record of Appeal filed out of time – Motion for Leave to Appeal – Application for condonation granted – Appeal allowed – Order granting summary judgment set aside – Matter remitted to High Court for hearing before a different judge.

JUDGMENT

MOORE JA

[1] This is an application by Notice of Motion for leave to appeal against the whole of the judgment of His Lordship Mr. M.C.B. Maphalala handed down on the 9th August 2013. Rule 8 (1) of the Rules of the Supreme Court mandates that where, as here, there has been a written judgment, a Notice of Appeal should have been filed on or before the 5th September 2013. Failing to meet this deadline, the appellants, filed a Notice of Motion for leave to appeal on the 3rd October 2013 to which elaborate grounds of appeal were attached.

[2] Rule 9 of the Rules of this Court allows for application for leave to appeal. Sub-rule (1) specifies that ‘An application for leave to appeal shall be filed within six weeks of the date of the judgment which it is sought to appeal against.’ In the context of this case, that application

should have been filed on or before the 19th of September 2013. In the event, that application was also tardy.

[3] The appellants' slothfulness persisted. However, they belatedly filed a Notice of Motion dated the 7th October 2013 praying for orders *inter alia* that:

1. The late filing of the Appellant's notice of appeal is hereby condoned.
2. The appellant is granted leave to appeal.
3. Costs against the respondent only if the matter is opposed.

[4] The Notice of Motion dated 7th October 2013 was supported by the founding affidavit of the 1st appellant Doctor M. Lukhele, the confirmatory affidavits of admitted attorney Muzi Simelane, Joshua Shongwe the 2nd appellant, and Mandla Nxumalo the 3rd appellant. Distilled to its essence, the 'Basis of Condonation' as this applicant puts it is that:

- The appellants' attorney did not communicate to his clients that judgment had been handed down.
- Even after hearing of the judgment on or about the 20th September 2013 the attorney could not be contacted because his 'cell was continuously unavailable'.

- New attorneys were retained on the 24th September 2013. They had to start from scratch compiling the High Court file.
- On the 1st October 2013 the appellant's attorney Mr. Muzi Simelane's attempts to register a Notice of Appeal floundered upon the advice of the Assistant Registrar that leave to appeal had become necessary by that stage.
- The applicant was not full time within the borders of the country as he had lost his job in May 2012. Communication therefore had become difficult and time consuming.
- The respondent would suffer no prejudice if condonation were to be granted since the matter has a long history and well known to both parties.
- There were favourable prospects of success for the reasons set out in paragraphs 10 – 16 of the affidavit.

[5] Unsurprisingly, the respondent's Collections manager traversed the assertions in the appellant's founding affidavit and averred that:

- The reasons advanced in the appellant's affidavit for not noting an appeal within the time stipulated in the rules did not set forth good and substantial reasons for the application.

- The grounds of appeal did not prima facie show good cause for leave to be granted.
- There were no realistic prospects of success in the appeal.
- All of the arguments advanced under this head were of a purely technical nature.
- The affidavit resisting summary judgment did not deny the appellants' liability as sureties having bound themselves jointly and severally under the written Deeds of suretyship executed by them.

[6] A convenient starting point is the judgment of the court a quo itself which lends support to the appellants' contention that judgment was delivered in their absence. The relevant portion of the record reads:

‘For the Applicant

For the Respondent

Attorney K. Simelane.’

[7] At the commencement of the hearing of the appeal, Counsel for the Respondent opposed both the application for leave and for condonation. This court thereupon decided to hear counsel for the parties of both applications before deciding upon them. Rule 16 of the Rules of the Supreme Court allows for condonation ‘for sufficient cause shown’. The

onus therefore lay upon the applicants to show sufficient cause to move this Court to grant their applications.

[8] The summary atop the judgment of the court a quo tells the story of what that court decided. It reads:

‘Application for summary judgment – requirements for the remedy discussed as reflected in Rule 32 of the High Court Rules as well as judicial precedent – Application granted on the basis that the defendants have no bona fide defence to the claim.’

That summary was underscored in the final paragraph of the judgment which reads:

‘Accordingly, the application for summary judgment is granted with costs on the scale as between Attorney and own client including collection commission and interest as prayed for in the Notice of Application.’

It might be noticed *en passant* that the court a quo gave no reasons for acceding to the prayer for costs on a higher scale.

[9] One of the principal questions for determination in this appeal is whether, in the circumstances of this case, M.C. B. Maphalala J was correct in conferring upon the respondent the stringent remedy of summary judgment which effectively deprived the appellants of the opportunity of having their defences heard upon their merits. At paragraph 16.4 of their Heads of Argument, the appellants stated the well-established principle that:

‘In addition to a full and satisfactory explanation for the default or defaults being given, the courts have regard to such factors as

- The prospects of success in the appeal.
- The respondent’s interest in the finality of his judgment.
- The convenience of the court,
- The avoidance of unnecessary delay in the administration of justice, and
- The importance of the case.’

REASONABLE PROSPECTS OF SUCCESS

[10] Under the above heading, Counsel for the appellants argued in his Heads of Argument that:

- i. The Learned Judge a quo erred by granting Summary Judgment in circumstances where it was not competent to do so. To that extent, an application for leave to appeal would succeed if it is

demonstrated that the impugned judgment is reasonably assailable on appeal.

- ii. Because Summary Judgment is such a robust remedy, it is imperative that the Application for Summary Judgment be founded upon papers that are not technically defective. The cause of action was founded upon a written loan agreement but those were not annexed to the papers.
- iii. The principal debtor, The Wheel Centre (Pty) Ltd was not cited despite the fact that the allegations in the declaration were about the agreement reached by The Wheel Centre (Pty) Ltd and the Respondent.
- iv. There is no final order of liquidation of The Wheel Centre, only a provisional order of liquidation was obtained. Therefore The Wheel Centre should have been cited and served.
- v. In respect of claim No. 1, the money lent and advanced to the Wheel Centre was E130,000.00, but the claim instituted was for E170,279.72. There is no breakdown of how this amount was arrived at. The Respondent had earlier raised a concern about intermitted payments. There is no reflection of what was paid. Instead only an abridged and extremely short statement is given. A full statement would have been necessary as similar to the one filed in respect of claim No. 2.
- vi. The claim in respect of the assets in the sum of E241,168.29 is riddled with serious disputes of fact. Those assets were misappropriated by a deputy sheriff whilst executing an instruction

of the Respondent. So it was not competent for the Respondent to again sue the Applicants for assets taken away from The Wheel Centre (Pty) Ltd. The Respondents failed to recover those assets when it instituted case No. 144/2010.

- vii. In view of the banks (Respondents) own admission that assets were misappropriated by the Deputy Sheriff, it was necessary that prior to instituting the claim for E241,168.29 a deduction of the value of the missing assets be made.
- viii. The Learned Judge *a quo* ignored the fact that when The Wheel Centre (Pty) Ltd was placed under provisional liquidation, a compromise was reached and the provisional liquidation order was discharged.
- ix. Once a compromise was reached, the Respondent had to enforce the terms of the compromise and not to revert to the original agreement as the same had been novated. The effect of novation *in casu* was to extinguish the suretyships.
- x. In view of the above, it was not competent for the court *a quo* to have granted Summary Judgment. The Respondent had not presented an unanswerable case. To that extent, the court erred by granting Summary Judgment.

[11] Counsel for the respondent argued that no triable issues were disclosed in the appellants' affidavit resisting summary judgment. As he argued this contention orally before this court, however, he could not escape from making propositions regarding issues of fact which should properly have

been ventilated before the court a quo. Accordingly, without burdening this judgment by a recitation of the averments contained in the affidavit resisting summary judgment, this Court is satisfied that those averments contain a number of triable issues which the court a quo should have heard and determined. In failing to do so, that court misdirected itself, and its decision cannot therefore be allowed to stand. See, for example, **Jake (Pty) Ltd v Samuel Solomon Nkabinde**, Civil Case No. 54/2013.

ORDER

It is the order of this court that:

- i. The appeal is allowed with costs to the appellants.
- ii. The judgment of the court *a quo* is set aside and replaced with the following order.
- iii. The matter is remitted to the High Court for hearing upon the merits by different judge of that court.
- iv. The application for summary judgment is dismissed with costs.

S.A. MOORE
JUSTICE OF APPEAL

I agree

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

DR. B.J.ODOKI
JUSTICE OF APPEAL

For the Appellant : Mr.M. P. Simelane

For the Respondents : Mr. K. Simelane