**IN THE SUPREME COURT OF SWAZILAND**

**JUDGMENT**

Civil Appeal Case No.60/2013

In the matter between:

**SWAZILAND TOBACCO CO-OPERATIVE COMPANY (LIMITED)** **Appellant**

**vs**

**BERTRAM HENWOOD** **1st Respondent**

**LAZARUS MABHENGU HLOPHE** **2nd Respondent**

**NONHLANHLA FAKUDZE** **3rd Respondent**

**Neutral citation**: *Swaziland Tobacco Co-operative Company Limited vs Bertram Henwood and Others (60/2013) [2014] SZSC 29 (30 May 2014)*

**Coram:** Ramodibedi CJ
Ebrahim JA
Dr. Twum JA

**Heard:** 19 May 2014

**Delivered:** 30 May 2014

**Summary:** *Application for condonation for late filing of record – refused – on grounds of their being no prospects of success on merits – failure to comply with Rule 30(1) of the Court of Appeal Rules 1971 – Appeal dismissed with costs.*

**JUDGMENT**

**EBRAHIM JA:**

[1] The facts are quite simple. The appellant and the respondents were members of the Swaziland Tobacco Co-operative Company Limited. The Co-operative Society established under the Co-operative Societies Act 1964. At all times material to the issues relating to this matter it was governed by the Co-operative Societies Act 2003.

[2] On the 3rd September 2013 it is apparent from the record that counsel representing the parties to this appeal appeared before MCB Maphalala J (as he then was) following an application made by the Respondents. The record of that hearing reflects the following:

"**3rd September 2013**

**AC** ....

**JUDGE** **I'll proceed and issue the order. On the 8th December 2011 this court granted an order** inter alia **that the parties convene a meeting with the assistance of their attorneys within 7 days and appoint a firm of auditors registered in Swaziland to determine the value of each share held by the Applicants at the time of concluding the agreement in October 2008. The court further ordered that the firm of auditors would file their report with the Registrar of the High Court on the 30th January 2012 which would be made an order of court on the 3rd February 2012.**

**On the 18th October 2012 this court ordered that the Commissioner of Cooperatives should investigate the number of issued shares in the Respondent's company as at October 2oo8 and file a report within seven days. By letter dated 26th October 2012 and addressed to the Registrar of the High Court the Commissioner of Cooperatives advised that as at October 2008 there were 521 shares in the Respondent's company.**

**On the 1st October 2012 Interuron Swaziland a firm of auditors compiled a report which was subsequently filed before this court on the 2nd April 2013. This report sort to reconcile two reports compiled by Kobla Quashie Consultants dated 3rd October and Botti Consultants dated 30th March 2012.**

**The KQ report found that there were 521 shares at the requisite period and the price per share was E20, 000. On the other hand the Botti**

**report found that there were 1,165 shares at the requisite period at E7, 558 per share.**

**Interuron Swaziland concluded that if the shares were at the requisite period each share would cost E16, 900 and that if the shares were 1,165 each share would cost E7, 558. By letter dated 8th April 2013 written by the Respondent's attorneys and addressed to the Registrar of the High Court they reiterated the court's view at the time that Interuron had presented a report based on two different numbers of shares which in turn resulted in different share prices.**

**Subsequently the court directed Interuron Swaziland**
**to clarify its report for purposes of certainty. Interuron Swaziland wrote a letter dated 20th April 2013 in which it placed the shares at the requisite period at 521 shares at E16, 900 per share. This number of shares corresponds to the report made by the Commissioner of Cooperatives.**

**Accordingly I make the following order:**

**That the number of shares in the Respondent**

**Company as of October 2008 were 521.**

**That the value per share is E16, 900.**

**I will provide a full written judgment in this regard. But that's the order that I'm making.**

**AC** **As the court pleases."**

[4] Thereafter, what must have been a follow up to what the learned judge **a quo** had stated at the end of those proceedings, he prepared a written judgment also dated the 3rd September 2013 see **Civil Case No. (258/09)**.

[5] It is apparent that the rationale of what the learned judge **a quo** said at the conclusion of the hearing before him on the 3rd September 2013 as outlined in paragraph [3] of this judgment is almost identical to what is contained in his written judgment Civil Case No. 258/09.

[6] On the 4th October the appellant's attorneys filed a Notice of Appeal in the following terms:

> **"BE PLEASED TO TAKE NOTICE THAT Appellant hereby notes an appeal against judgment of the Honourable MCB Maphalala in High Court Case No.258/09 in terms of which judgment, reasons yet to be delivered, the Honourable Court** a quo **determined the price per share in Appellant as E16,900.00 as at October 2008.**
>
> **GROUNDS OF APPEAL**
>
> 1. **That on 12th December 2012 the Honourable Court ruled that in light of a factual dispute regarding how many issued shares there were in appellant** (sic)**. Two accountancy firms had given conflicting reports; one vouching that there were 521 issued shares while the other vouched for 1,165 issued shares.**

**2. The parties were ordered to a pre-trial conference in order to highlight the scope of evidence to be led.**

**3. Both sides accepted the order. Pursuant to the Order, the parties executed a pre-trial minute dated 20th March 2013.**

**(copy of minute attached)**

**4. The pre-trial minute was rejected by the Honourable Court for the reason that it introduced new issues which were beyond the scope of the enquiry before the Court at that time, namely the number of issued shares and the value thereof per share.**

**5. The Honourable court erred in ruling on the value of share without hearing oral evidence as it had so ordered on 12.12.12, in as much as that order was valid and binding upon all concerned.**

**6. There is a serious dispute of fact such that oral evidence was unavoidable.**

**APPELLANT makes the following prayers:-**

**a) The ruling of Honourable Maphalala J dated 2nd September 2013** (sic) **be and is hereby set aside.**

**b) The matter be remitted back to the High Court for oral evidence to be led to determine the number of issued shares in the Appellant as at October 2008.**

**c) Costs of suit to the Appellant.**

**d) Further and/or alternative relief."**

[7] Nothing further was heard from the appellant's attorneys until on the 14th February 2014 the respondents' attorneys addressed a letter to them couched in the following terms:

> **"RE: <u>SWAZILAND TOBACCO COOPERATIVE COMPANY LIMITED/BERTRAM HENWOOD AND OTHER – SUPREME COURT CASENO.60/2013</u>**
>
> **1. We refer to the above matter.**
>
> **2. Owing to the judgment by His Lordship Justice MCB Maphalala on the 4th September 2013 (sic) directing that your client pay ours a sum of E16, 900 (sixteen thousand nine hundred Emalangeni) per share, kindly indicate by close of business on the 21st February 2014 how your client intends settling the amounts due to our clients for their value of shares. Should we not receive any response from yourselves on or before the aforesaid date, we shall have no option but to issue a writ of execution of your client's assets in satisfaction of the aforesaid debt.**
>
> **3. All our clients' rights remain strictly reserved.""**

[8] The appellant's attorney responded by letter dated 21st February 2014 stating that their reasons for not prosecuting the appeal timeously, was because they had not been provided with the written reasons by the learned judge **a quo** making the order he made.

[9] The appellant's attorney, thereafter, only filed the record in order to prosecute this appeal on the 28th April 2014.

[10] The appellant ought to have filed the record of proceedings on or before the 3rd December 2013.

[11] The appellant's attorney seeks condonation for the late delivery of the record of proceedings and the heads of argument. The respondents oppose the granting of condonation.

THE LAW

[12] Rule 30(1) of the Court of Appeal Rules 1971 (Rules) provides as follows:

> **"30. (1) The appellant shall prepare the record on appeal in accordance with sub-rules (5) and (6) hereof and shall within 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."**

[13] Rule 16(1) is also pertinent and provides as follows:

**“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.”**

No such application was made.

[14] I also make reference to Rule 17 of the rules which provides:

**“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.**

[15] **Herbstein and van Winsen, The Fifth Edition** at page 723, is instructive on when a court may grant condonation on good cause shown. It is stated therein:

**“B. Condonation**

**The court may on good cause shown condone any non-compliance with the rules. The circumstances or ‘cause’ must be such that a valid and justifiable reason exists why compliance did not occur and why non-compliance can be condoned.**

**In** Nedcor Investment Bank Ltd v Visser NO *Patel AJ* **(as he then was) stated as follows:**

> **Rule 27(3) requires 'good cause' to be shown by the plaintiff. This gives the Court wide discretion.** C Du Plooy v Anwes Motors (Edms) Bpk 1983 (4) SA 212 (O) **at 216H-217A). The requirements are, first, that the plaintiff should at least tender an explanation for its default to enable the Court to understand how it occurred.** (Silver v Ozen Wholesalers (Pty) Ltd 1954 (2) SA **at** 435A. **Secondly, it is for the plaintiff to satisfy the Court that its explanation is** bona fide **and not patently unfounded.**

**In** Standard General Insurance Co Ltd v Eversafe (Pty) Ltd **it was stated that:**

> **"It is well-established that an application for any relief in terms of Rule 27 has the burden of actually proving, as opposed to merely alleging, the good cause that is stated in Rule 27(1) as a jurisdictional prerequisite to the exercise of the court's discretion.** Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) **at 325G. The applicant for any such relief must, at least, furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about and to assess his conduct and motives (**Silber v Ozen Wholesalers (supra **at 353A)). Where there has been a long delay, the Court should require the party in default to satisfy the Court that the relief sought should be granted.** Gool v Policansky 1939 CPD 385 **at 390. This is, in my view, particularly so when the applicant for the relief is the** dominus litis **plaintiff.**

**In a number of cases the courts have drawn a distinction between an irregular procedure, which is condonable, and a procedure that is a nullity and is therefore not condonable. In** Myhardt v Mynhardt, van Zyl L[21] **expressed serious reservations as to whether this distinction is justified, and suggested that the effect is to place far-reaching limitations on the court's discretion to grant condonation. In** Chasen v

Ritter,[22] Burger AJ **expressed the opinion that the distinction is artificial and serves no real purpose.**

**In** Tshivhase Royal Council v Tshivhase; Tshivhase v Tshivhase[23] **the Appellate Division indicated that condonation is an indulgence which may be refused in cases of flagrant breaches of the rules. Condonation may also be refused where it would defeat the purpose or object of the rule of which the applicant is in breach."**

[16] Reference is also made to footnote 19 at page 73 of where the learned authors referred to the following authorities:

**"[19]** 2002 (3) SA 87 (W) **at 93. See also** Sanford v Haley NO 2004 (3) SA296 (C) **at 302.** Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA) ([2002] 4 B All SA 37 **at [6]**.
**It is generally accepted that condonation is not to be had merely for the asking. The party asking for condonation must provide a full, detailed and accurate account of the reasons for the delay to enable the court to understand and assess such delay. If the non-compliance is time-related, the date, duration and extent of the problem that occasioned such delay, should be set out. It is trite that where non-compliance of the rules has been flagrant and gross, a court should be reluctant to grant condonation whatever the prospects of success might be.** Darries v Sheriff, Magistrate's Court, Wynberg 1998 (3) SA 34 (SCA) **at 41D."**

[17] As a rule, an applicant who seeks condonation will need to satisfy the court that there are good prospects of success on the merits see: **Johannes Hlatshwayo vs Swaziland**

**Development and Savings Bank and Others, Civil Case No.17/2006** where the learned Chief Justice in paragraph 17 stated:

> **"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] Against the background of this legal learning I turn now to consider the pertinent facts of this case.

[19] The appellant noted its appeal on the 4th October 2013 having prepared its Notice of Appeal on the 1st October 2013.

[20] In terms of the Rules the record should have been lodged with the Registrar of the High Court by the 4th December 2013 at the latest.

[21] The record was only filed in 28 April 2014 some seven months after the noting of the appeal.

[22] It seems to me that, had the respondent's attorneys not communicated with them in February 2014, putting the appellant on notice in terms of the letter I have referred to in paragraph [7] the appellant's would in all likelihood not have filed the record when they finally did.

[23] Despite being alerted of its failure in lodging its record it took the appellant's attorneys a further 2 months to lodge the record with the Registrar of the High Court.

[24] The explanation tendered for this failure is that the delay had been the result of not being provided with the "promised" written judgment of the learned judge **a quo.**

[25] We are told that on being alerted on its failure to lodge the record the appellant's attorneys, following an enquiry by them, were advised by the Registrar's office that all parties had been furnished with the written reasons of the judge **a quo.** I have no reason to doubt this assertion emanating from the Registrar's office.

[26] What causes concern is that the appellant was well aware of the order made by the judge **a quo** on the 3rd September

2013. A notice of appeal was filed against this decision by the 4th October 2013. Any diligent practitioner would have been aware that in terms of the rules, a record, needed to be lodged two months from the date of the filing of the Notice of Appeal.

[27] The questions which arise are, did the appellant's attorney diarise the date when the record was required to be lodged? Did he keep check on his obligation to do so, if he did in fact diarise the matter? We are none the wiser on these aspects of what he may or may not have done. We are not told whether this was done.

[28] Against the background of these facts I conclude that the "non-compliance of the rules has been flagrant and gross."

PROSPECTS OF SUCCESS

[29] I have some difficulty, in any event in concluding that the appellant has any prospects of success on the merits.

[30] In this regard one cannot ignore the Court Order (consent order) signed by both parties on the 18th October 2012 which was in the following terms:

**"1. The Commissioner of Co-operatives be and hereby authorised and directed to conduct an investigation in order to establish the correct number of issued shares in the entity The Swaziland Co-operative Tobacco Company Limited as at October 2008 and file a report to this court within a period of seven (7) days from date of the Order."**

[31] The Commission of Co-operatives reported, in response, as follows:

**"We were served with a court order requesting information regarding the number of shares in the Swaziland Tobacco Cooperative Company Limited.**

**We have perused through our records and they show that there are five hundred and twenty one (521) shares in the cooperative. We refer to the annual financial statements from Ndallahwa and Company dated 31 March 2007 which come** (sic) **to this conclusion. The said financial statements are also backed by Kobla Quashie and Associates financial statements dated 31 March 2006.**

**We wish to highlight that our attempts as an office to try and inspect the Cooperative in 2008 were unsuccessful, we were advised by the leadership of the cooperative in the same year that it has been converted into a private company.**

**Our conclusion therefore is that at October 2008 there were 521 shares in the Cooperative."**

[32] This conclusion is consistent with the findings of Inter-neuron who confirmed that or in October 2008, there were 521 shares lodged with the Co-operative Society and each share was valued at E16900 per share.

[33] Counsel for the appellant submitted that it was the report filed by Botti Consulting Inc which was the report that the learned judge **a quo** should have placed reliance on. A simple arithmetical calculation on the figures provided by them leads to the following conclusion 1165 shares at E7558 per share leads to a total value of E8 805 070. A calculation of the figures provided by Interneuron, that is, 521 shares as E16900 per share gives a total value of 8,804 900. A mere difference of E170. In other words, whichever, calculation one takes into account the amounts add up to almost the same figure (less US$17). I, therefore cannot fault the learned judge **a quo** for concluding as he did, given the fact that he took into account the report from the Commissioner of Cooperatives as supported by Interneuron. The difference in the calculations as regards the valuation to be adopted is venial.

[34] This conclusion is consistent with the findings of Inter-neuron who confirmed that as at 28 October 2008, there were 521

shares lodged with the Cooperative Society and each share was valued at R16900 per share. See letter from Inter-neuron:

**"Valuation of shares – Swaziland Tobacco Ltd**

**Your letter dated 8 April 2013 refers.**

**I apologise for the late response to this letter which is due to the fact that I was out of the country. We respectfully request the Court to condone the late response.**

**Based on the Court finding that the number of shares in issue is 521, and that all of the properties do belong to the Company, we hereby confirm that we value each share in the company at E16 900**.

**This valuation is based on all of the assumptions mentioned in our report on this matter, dated 1 October 2012, which report is incorporated in this letter by reference.**

**We trust that this letter meets your requirements. We once again thank you for your trust in us. Please do not hesitate to contact the writer if you require any further clarification."**

[35] In my judgment, therefore, the appellant's prospects of success are not adequate to counter balance the inadequacies of its performance on the procedural points taken.

[36] In the result the application for condonation fails and as a consequence the appeal is dismissed with costs.

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A.M. EBRAHIM

JUSTICE OF APPEAL

I AGREE :

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M.M. RAMODIBEDI

CHIEF JUSTICE

I AGREE :

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DR. S. TWUM

JUSTICE OF APPEAL

**FOR THE APPELLANT : Mr. B.J. Simelane**

**FOR THE CROWN : Mr. B. Mndzebele**