



IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

JUDGMENT

Civil Appeal Case No. 28/2014

In the matter between

MARGARET MALAZA

Appellant

And

JAHA MALAZA

Respondent

Neutral citation: Margaret Malaza v Jaha Malaza (28/2014)
[2014] SZSC 63 (3 December 2014)

Coram: RAMODIBEDI CJ, MCB MAPHALALA JA
and DR ODOKI JA

Heard: 12 NOVEMBER 2014

Delivered: 3 DECEMBER 2014

Summary:

Appeal – Application for condonation of the late filing of appeal and leave to appeal out of time – Flagrant disregard of the Rules of Court – No prospects of success on appeal – Application dismissed with costs.

JUDGMENT

RAMODIBEDI CJ

- [1] The present respondent successfully applied on notice of motion in the High Court (Dlamini J) for an order against the appellant directing her to facilitate transfer and registration of certain immovable property described as portion 7 (a portion of portion 2) of Farm 950 situate in the district of Hhohho, Swaziland into his name. Her sole reason for refusing to effect the transfer was that the respondent was an illegitimate son of the deceased.
- [2] The order granting the application as prayed was handed down on 11 March 2014. It is not disputed that it was duly served on the appellant on 19 March 2014.

[3] In terms of Rule 8 (1) of the Court of Appeal Rules, the appellant was obliged to file her notice of appeal within four weeks of the date of the judgment appealed from. Rule 2 on interpretation defines the word “judgment” to include “order”. What this then means is that the appellant should have filed her appeal against the order of the High Court in question on or before 18 April 2014. However, she failed to do so. She only filed her notice of appeal on 8 July 2014. Admittedly, she was out of time by a period of almost three months. The respondent makes a telling point that this was only after the respondent’s conveyancers had made an application before the High Court for an order compelling her to transfer the property in terms of the order.

[4] Additionally, as far back as 2 May 2014, the respondent’s attorneys wrote to the appellant’s attorneys and said the following:-

“Mabila Attorneys

Office No.7

Asakhe House

MBABANE

Dear Sir

**RE: JAHA MALAZA/MARGARET LOMDUMO MALAZA –
HIGH COURT CASE NO. 952/2013**

1. *The above matter refers.*
2. *Pursuant to the order of Court dated the 17th March 2014, we advise that our client is ready to make the payment of E26 925.28 in favour of the estate.*
3. *Kindly advise your client to comply with the order.*

Yours faithfully

C.J. LITTLER & CO.”

This letter elicited no response from the appellant’s attorneys.

There was not even a courtesy of a reply.

[5] The appellant flouted the Rules of this Court in another respect.

It is this. In terms of Rule 30 (1), she was obliged to file a certified record of the proceedings with the Registrar within two

months of the noting of the appeal. A simple calculation shows that she should have done so on or before 9 October 2014. However, that was not to be. She only filed the record on 14 October 2014, by which date she was once again out of time.

[6] On 24 October 2014, the appellant filed heads of argument in the matter. No attempt was made to address the flagrant disregard of the Rules as highlighted above. No application for condonation was made even at that stage.

[7] On 28 October 2014, the respondent filed heads of argument. As was to be expected in the circumstances, he took a point in limine that the appeal had been filed out of time, contrary to Rule 8.

[8] On 4 November 2014, the appellant filed a notice of application in this Court. She sought an order that in the event this Court found that her appeal had been filed out of time, the Court should grant condonation for her late filing of the notice of appeal. She also

sought leave to pursue the appeal. The application was hotly contested.

[9] At the hearing of the matter, this Court directed that both the application for condonation and the merits of the appeal be heard simultaneously in order to avoid piece-meal litigation.

[10] Insofar as condonation is concerned, this Court has warned on several occasions that flagrant disregard of the Rules of Court, as has happened here, will not be tolerated. See, for example, such cases as **Johannes Hlatshwayo v Swaziland development and Savings Bank and Others, Civil Appeal No. 21/2006; Jabulani Patrick Tibane v Alfred Siphon Dlamini, Civil Appeal No.17/2013.**

[10] In paragraph 10 of her founding affidavit, the appellant makes a startling averment that it would have been premature for her to appeal before the reasons for judgment were given. In my view this is not an acceptable explanation, especially because she was

legally represented. In any event, she did file the appeal before the reasons for judgment were handed down after all. As will be recalled, she filed the notice of appeal on 8 July 2014. The reasons for judgment were delivered on 22 October 2014.

[12] It is trite that in an application for condonation, one of the fundamental requirements that the applicant must establish is prospects of success on appeal. In determining this aspect of the matter it is necessary to revisit the facts, even if briefly. In this regard it is undoubtedly convenient, and indeed appropriate, to rely on the judgment of this Court in the case involving the appellant and one Thandie Elizabeth Malaza in 1993. The full citation is **Thandie Elizabeth Malaza v Margaret Lomdumo Malaza, Appeal case No. 9/93.**

[13] The material findings of this Court in that case may be summarised as follows:-

- (1) that the deceased had four sons irrespective of whether they were legitimate or illegitimate;
- (2) that in his lifetime the deceased and the appellant owned the disputed property in partnership;
- (3) that the probable intention of the deceased was to divide up the property so as to avoid a family dispute “by taking as his share the four portions designated in the plan for his sons and by agreeing that the remaining portion would represent the respondent’s (now appellant’s) share arising from the partnership.”

[14] The parties are on common ground that the deceased passed away on 8 January 1991.

[15] It is further common cause between the parties that on 19 August 1994, the appellant, in her capacity as the executrix of the deceased’s estate, filed a liquidation and distribution account in

the estate. In relevant part under the distribution account she recorded the following:-

“Remaining Extent of Farm of Portion 2 of Farm 950 awarded to Thandi Malaza in terms of court order in case No. 885/91 (deceased’s share) Portion 4,5,6 and 7 awarded to Margaret Malaza in terms of her marriage in community of property to Henry Butana Malaza (to be sold or awarded to deceased’s male sons who are to pay the cash shortfall of E 26,925 28 to settle the liabilities of the estate.” (Emphasis added.)

[16] It is apparent from the underlined words in the distribution account that it made no distinction between legitimate and illegitimate sons. This, as will be recalled, was in accordance with the deceased’s intention. It is, therefore, strange for the appellant to now claim that only legitimate sons should benefit from the deceased’s estate. The respondent has characterised this as unfair discrimination. I agree.

[17] It follows from these considerations, in my view, that there are absolutely no prospects of success on appeal. The judgment of the *court a quo* cannot be faulted.

[18] In the result, the following order is made:-

- (1) The appellant's application for condonation of the late filing of her appeal as well as leave to pursue the appeal is hereby dismissed.

- (2) The applicant shall bear the respondent's costs of the application including the costs of hearing the merits of the purported appeal.

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

**MCB MAPHALALA
JUSTICE OF APPEAL**

I agree

**DR. B.J. ODOKI
JUSTICE OF APPEAL**

For Appellant : Mr M. Mabila

For Respondent : Mr N.W. Fakudze