



**IN THE SUPREME COURT OF SWAZILAND**

**JUDGMENT**

Civil Appeal Case No.34/14

In the matter between:

**JABULANI A. SOKO**  
**t/a MAWANDLA INVESTMENTS**

**Appellant**

**vs**

**NGWANE MILLS (PTY) LTD**  
**t/a FEEDMASTER**

**Respondent**

**Neutral citation:** *Jabulani A. Soko t/a Mawandla Investments vs  
Ngwane Mills (Pty) Ltd t/a Feedmaster (34/14)  
[2014] SZSC 66 (3 December 2014)*

**Coram:** A.M. Ebrahim JA  
P. Levinsohn JA  
Dr. B.J. Odoki JA

**Heard:** 10 December 2014

**Delivered:** 3 December 2014

**Summary:** *Late filing of record of appeal – late filing of Heads  
of Argument – Late filing of Notice of Appeal – No  
sufficient cause shown – Prospects of success not*

*highlighted - Application for condonation refused - Appeal struck off - Costs awarded on an attorney and client scale.*

## **JUDGMENT**

### **EBRAHIM JA:**

- [1] The appellant was party to litigation in the High Court. Judgment in the High Court was delivered on 27 June 2014 in favour of the respondent. The trial was a protracted one, which resulted in an exceptionally large record, amounting to eight compacted lever arch files.
- [2] The appellant appeals against the judgment handed down by the learned Judge **a quo** on 27<sup>th</sup> June 2014 where-in judgment was granted in favour of the respondent in the sum of E742 212.60 together with interest and costs on an attorney and client scale. The appellants counterclaim was dismissed.
- [3] The applicant's attorney later filed an application for condonation of the late filing of the appeal and the record of appeal.

[4] The respondent opposes the application for condonation. In doing so, its attorney set out a list of breaches by the applicant's attorney of the rules of the court. He complains of breaches associated with the litigation in the High Court and the applicant's attorney's conduct during the trial. There has been no response by the applicant's attorney to these allegations. They appear to show a lamentable lack of regard for the rules. In addition the respondent's attorney has highlighted the respondent's failure to have regard the rules of this court relating to an application for condonation.

[5] The Law

**"Time for filing notice of appeal**

**8. (1) The notice of appeal shall be filed within four weeks of the judgment appealed against:**

**Provided that if there is a written judgment such period shall run from the date of delivery of such written judgment;**

**And provided further that if the appellant is in gaol, he may deliver his notice of appeal and a copy thereof within the prescribed time to the officer in charge of the gaol, who shall thereupon endorse it and the copy with the date of receipt and forward them to the Registrar who shall file the original and forward the copy of the respondent. (Amended L.N.102/1976)**

**(2) The Registrar shall not file any notice of appeal which is presented after the expiry of the period referred to in paragraph (1) unless leave to appeal out of time has previously been obtained.** (my underlining)

[6] "The record

**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.**

**(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 14 days after receipt thereof.**

**(3) Thereafter the record may be relodged for certification without the leave of the Chief Justice or the Judge who presided at the hearing in the court a quo."**

[7] Rule 16 is also pertinent and provides as follows:

**"Extension of time - Cri. Form 4; Civ. Form 4.**

**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. (Amended L.N. 102/1976)**

**(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.”**

[8] I also make reference to Rule 17 of the Rules which provides:

**“Condonation.**

**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.”**

[9] **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:

**“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.”**

[10] 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.”**

**[11] 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<sup>21</sup> 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,<sup>22</sup> Burger AJ expressed the opinion that the distinction is artificial and serves no real purpose.**

**In Tshivhase Royal Council v Tshivhase; Tshivhase v Tshivhase<sup>23</sup> 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."**

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

**"<sup>19</sup> 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.**" (my underlining)

[13] 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."**

[14] It is patently apparent that the record in this matter was filed late; the notice of appeal was filed out of time; no application was made in terms of Rule 8(2) of the rules; and that the appellant did not avail himself of rules 16 and 17 of the Rules. In addition the Heads of Argument were filed out of time and no application was made to condone this failure. A further unsatisfactory feature was the failure to file an affidavit from the appellant explaining why this was so. His legal practitioner



did file an affidavit in cursory terms explaining the breaches of the rules but he rather in a cavalier manner deposed that his client had prospects of success, in a bald statement. He made no attempt to outline what were his clients prospects of success.

[15] The principles on which an appeal court will determine an application for condonation are well established and have been the subject of judicial determination in this court on numerous occasions.

See: **Tsabedze v University of Swaziland (25/10 [2010]SZSC16 (31 May 2011);**

**Bani Enerst Masuku vs Maqbul & Brothers Investments (Pty) Ltd & 6 Others (25/11) [2012] SZSC 68 (30 November 2012);**

**Roots Civil Ltd v Inyatsi Construction Limited (4/12) [2012] SZSC 67 (30 November 2012);**

**Commissioner of Police v Christopher Vilakati; (2012) [2012] SZSC 63 (30 November 2012);**

**Unitrans Swaziland Limited vs Inyatsi Construction Limited, 7 November 1997** where **Kotze PJ** made the following observations:

**“In considering whether to grant condonation the court, in the exercise of its discretion must of course, have regard to all the facts. Amongst those facts are the extent of the non-compliance, the explanation therefor and the Respondent’s interest in finality.**

**See: HB Farming Estate (Pty) Limited and Another vs Legal General Assurance Society Ltd 1981(3) SA 129 at 134B-C).**

**‘The courts have often held that whenever a prospective Appellant realises that he has not complied with a Rule of Court, he should, apart from remedying his fault immediately, also apply for condonation without delay.**

**See: Moraliswani v Mamili 1989(4) SA 1 at 9E-F;**  
and

**Commissioner for Inland Revenue vs Burger 1956(4) SA 446 (A) in which at 449G Centlivres CJ said, “whenever an appellant realises that he has not complied with a Rule of Court he should, without delay, apply for condonation.”**

**‘We have come to the conclusion that it would be unfair to the Respondent in this case were we to overlook the flagrant disregard for the rules exhibited by the Appellant irrespective of the Appellant’s prospects of success on the merits of the matter. (my underlining)**

**See in this regard SA Allied Workers Union (in liquidation) and Others v de Klerk N.O. and Another 1992(3) SA (AD) at page 4F-G.**

**Blumenthal and Another v Thompson N.O. and Another 1994(2) SA 118 (AD) at 121 in fin 122(b).**

**The decision to dismiss the application for condonation has not been arrived at without some sympathy for the Appellant and its attorney. Nonetheless this is a matter of serious principle and our view is encapsulated in what was said by Steyn CJ IN Saloojee & Another v The Minister of Community Development 1965(2) SA 135 (A) at 141C-B:**

[16] Assuming, without deciding, that there are reasonable prospects of success on the merits that would not necessarily be decisive. As was pointed out in **Kodzwa v Secretary for Health & Anor 1999(1) ZLR 313 (S)** by **Sandura J** (with whom McNally JA and I concurred):

**“Whilst the presence of reasonable prospects of success on appeal is an important consideration which is relevant to the granting of condonation, it is not necessarily decisive. Thus in the case of a flagrant breach of the rules, particularly where there is no acceptable explanation for it, the indulgence of condonation may be refused, whatever the merits of the appeal may be. This was made clear by Muller JA in P E Bosman Transport Works Committee & Ors v Piet Bosman Transport (Pty) Ltd 1980(4) SA 794 (A) at 799D-E, where the learned Judge of Appeal said:**

**‘In a case such as the present, where there has been a flagrant breach of the Rules of this court in more than one respect, and where in addition there is no**

acceptable explanation for some periods of delay and, indeed, in respect of other periods of delay, no explanation at all, the application should, in my opinion, not be granted whatever the prospects of success may be.” (my underlining)

[17] The manifold failures of the applicant’s attorney, both in the court **a quo** and in this court, to comply fully with the rules of court persuade me that this is not a case where our discretion should be exercised in favour of the applicant.

[18] As was said in **Kombayi v Berkhout 1988(1) ZLR 53 (S)** at 56 by **Korsah JA**:

“Although this Court is reluctant to visit the errors of a legal practitioner on his client, to whom no blame attaches, so as to deprive him of a re-hearing, error on the part of a legal practitioner is not by itself a sufficient reason for condonation of a delay in all cases. As Steyn CJ observed in Saloojee & Anor NNO v Minister of Community Development 1952(2) SA 135 (A) at 141C:

A duty is cast upon a legal practitioner, who is instructed to prosecute an appeal, to acquaint himself with the procedure prescribed by the Rules of the Court to which a matter is being taken on appeal.”

[18] In **M M Pretorius (Pvt) Ltd & Anor v Mutyambizi S-29-12; 012 (2) ZLR 295 (S)**, **Ziyambi JA** said that a legal

practitioner is not engaged by his client to make omissions and to commit oversights. He is paid for his professional advice and for the use of his skills in the representation of his client. He is not paid to make mistakes. These could be costly to his client. He is professionally, ethically and morally bound to exercise the utmost diligence in handling the affairs of his client. She went on to hold that where the blame for the numerous defects in an application for condonation of late noting of an appeal was entirely attributable to the applicants' legal practitioner's flagrant disregard of the rules of court and his casual attitude, it would be appropriate to make an order that the practitioner should pay the costs personally.

[19] I also make reference what **Chief Justice Steyn** (as he then was) said in the case of **Saloojee and Anor NNO v Minister of Community Development 1965(2) SA 135(A)** at 141C-E:

**“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 affect upon the observance of the rules of this court. Considerations ad misericordiam should not be allowed to become an invitation to laxity... The attorney, after all, is the representative whom a litigant has chosen for himself, and there is little reason why, in regard to**

**condonation of the failure to comply with the rule of court, a litigant should be absolved from the normal consequences of such relationship, no matter what the circumstances of the failure are.”**

[20] It is for the above reasons that at the conclusion of the hearing of the application we refused condonation and we indicated that no reasons would follow. These are they.

[21] The appeal is struck off and that costs are awarded on attorney and client scale. The appellants repeated breach of the rules and court orders justify the order of costs on the basis of an attorney and client basis.

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A.M. EBRAHIM  
JUSTICE OF APPEAL

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P. LEVINSOHN  
JUSTICE OF APPEAL

I AGREE :

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DR. B.J. ODOKI  
JUSTICE OF APPEAL

**FOR THE APPELLANT** : M. NKOMONDE

**FOR THE CROWN** : PIETER VAN DER BERG S.C.