



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case 42/2015

In the matter between:

MARIA NTOMBI SIMELANE (NEE MABUZA)

Appellant

And

NOMPUMELELO PRUDENCE DLAMINI

(BORN MAGAGULA)

1st Respondent

SWAZILAND NATIONAL HOUSING BOARD

2nd Respondent

REGISTRAR OF DEEDS

3rd Respondent

ATTORNEY GENERAL

4th Respondent

Neutral citation: *Maria Ntombi Simelane (Nee Mabuza) vs Swaziland National Housing Board and Three Others (42/2015) [2015] [SZSC 23] (9th December 2015)*

Coram: **S.B. MAPHALALA AJA, J.P. ANNANDALE AJA and R. CLOETE AJA**

Heard: 17th November 2015

Delivered: 9th December 2015

Summary: Civil Procedure – Application for condonation of late filing of appeal - sufficient cause to be shown – reasonable explanation for delay due to difficulty in obtaining ruling of the court – Appellant has failed dismally to advance sufficient cause - Application for leave is accordingly dismissed with costs.

JUDGMENT

MAPHALALA AJA

Application for condonation of the late filing of appeal

[1] Before court presently is Appellant’s Application for condonation of late filing of appeal.

[2] The Appellant filed a Notice of Motion on the 28 August, 2015 before the Registrar of the Supreme Court for an order in the following terms:

- 1. Condonation for the failure to adhere to the rules of the Honourable Court as they related to the filing of the notice of appeal.**
- 2. Granting the Appellant leave to file appeal**
- 3. Costs of suit against the Respondents in the event this application is opposed and**
- 4. Such further and / or alternative relief as the above Honourable Court may deem fit.**

[3] The Founding Affidavit of the Appellant is filed thereto stating in paragraph 11 thereof the reason for failure to comply caused by the ambiguity of the

judgment in the Court **a quo**. That her attorney had advised her that they are to seek clarity from the Judge **a quo** who issued the judgment and was then to note the appeal. That with the time passing the issue of costs not being addressed she decided to note the appeal. On the 21 August, 2015 Appellant was informed by the attorney representing the other side that the appeal was out of time.

- [4] The Appellant avers at paragraphs 12.1 to 12.5 of her affidavit the grounds on which the court **a quo** erred and that as such she has a reasonable prospect of success in the appeal.

The opposition

- [5] The 1st Respondent opposed the Application raising a point of law and that no case was made out for the relief sought advancing reasons for saying so in paragraph 8 to 21 of the Heads of Arguments of the 1st Respondent.
- [6] The Appellant has filed a Replying Affidavit to the 1st Respondent's Opposing Affidavit.

The arguments

- [7] The attorneys of the parties advanced their arguments before this court on the 17th November 2015 which I shall outline in brief in the following paragraphs:

(i) The Appellant's Arguments

[8] The attorney for the Appellant advanced arguments for his client, filing Heads of Argument where the attorney framed the issue for decision to be the following:

“To determine whether the condonation Application is sustainable”

[9] The attorney for the Appellant contended that the statement of facts is that the High Court issued a judgment on the 30th June, 2015. There was no pronouncement on the issue of costs. Thereafter there was consensus among the parties that the Judge **a quo** be approached to clarify the issue of costs.

[10] There were numerous occasions where the attorneys of both parties sought to see the Judge **a quo** in Chambers but the Judge would be unavailable.

[11] On the 12th August, 2015 the appeal was noted. Thereafter the Appellant was informed that the appeal is out of time hence the present Application.

[12] The attorney for the Appellant framed the 1st Respondent’s defence being that the explanation for the delay is unreasonable and the Appellant has no prospect of success.

[13] The attorney for the Appellant then canvassed arguments on the sustainability of the application on various topics including “reasonable explanation for the delay” in paragraph 4.1 to 4.1.4 of his Heads of Arguments. “Prospects of success ” in paragraphs 4.2 to 4.2.5 and cited pertinent cases including the High Court cases of **Unitrans Swaziland vs Inyatsi Construction Limited (SC) 7/11/97 @ 2, Terrence Mandlenkhosi Mabila vs Standard Bank & Another**

High Court Case No. 2110/99 (18/05/12) page 3, Jabulani Soko vs Ngwane Mills (SC) 34/14 dated 03/12/14 page 9 at 15 and that of Jabulane A. Soko t/a Mawandla Investments vs Ngwane Mills (SC) 34/14 dated 03/12/14 page 7 at 12.

[14] In paragraph 6 thereof the Appellant applies that the Application be upheld because of the following:

- (a) **The appeal was not filed out of time as the judgment appealed against was incomplete at the time it was noted;**
- (b) **In the event the court holds that it was out of time, then the delay on the part of the Applicant was reasonable;**
- (c) **Lastly, the Appellant has prospect of success in the appeal.**

(ii) The 1st Respondent's Arguments

[15] The attorney for the 1st Respondent Mr. S. Dlamini advanced arguments for his client and filed Heads of Argument to the main proposition that the Application ought to be refused on a number of reasons.

[16] Firstly, that the Appellant's explanation for filing this appeal out of time is that she was awaiting clarity on the question of costs of the proceedings in the court **a quo**. That this explanation substantially falls short of the requirements set out in the legal authorities cited.

[17] The attorney for the 1st Respondent directed the court's attention to Rule 17 of the Court of Appeal Rules which 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.”

[18] In this regard the court was referred to the **dictum** in the Supreme Court case of **Johannes Hlatshwayo vs Swaziland Development and Savings Bank Case No. 21/06 at paragraph 7** to the following:

“It required to be stressed that the whole purpose behind rule 17 of the Rules of this Court on condonation is to enable the court to guage 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.”

[19] It is contended for the 1st Respondent that emphasising the Appellant’s failure to meet the aforesaid requirements, the 1st Respondent notes the following material omissions:

12.1 The Appellants’ failure to attach the judgment;

12.2 The Appellant’s failure to state when the judgment was brought to her attention;

12.3 The Appellant’s failure to indicate what aspects of the judgment she was dissatisfied with;

12.4 The Appellant’s failure to demonstrate how the ambiguous question of costs impacted on the aspects of the judgment she was dissatisfied with;

12.5 The Appellant’s failure to disclose how long she was willing to wait for the desired clarification.

[20] The attorney for the 1st Respondent further submitted from paragraphs 13 to 21 of his Heads of Argument citing the Court of Appeal Case of **Unitrans Swaziland Limited and Inyatsi Construction Limited Case No. 9/96** at page 11-12 and that of **OKH Farm (Pty) Ltd vs Cecil John Littler N.O and Four Others Supreme Court Case No. 56/08**.

[21] Finally the attorney for the Appellant prays that the Application be dismissed with costs such costs to include the costs occasioned by the irregular filing of the merits of the appeal in the record.

The Court's analysis and conclusions thereon

[22] Having considered the Application filed by the Appellant it is without question that it has failed to meet the requirements stated in the aforementioned legal authorities and has made the omissions mentioned at paragraph [19] of this judgment. For clarity, I reproduce as follows:

12.1 The Appellants' failure to attach the judgment;

12.2 The Appellant's failure to state when the judgment was brought to her attention;

12.3 The Appellant's failure to indicate what aspects of the judgment she was dissatisfied with;

12.4 The Appellant's failure to demonstrate how the ambiguous question of costs impacted on the aspects of the judgment she was dissatisfied with;

12.5 The Appellant's failure to disclose how long she was willing to wait for the desired clarification.

[23] The above omissions by the Appellant are fatal to the Application. The lack of sufficiency of the Appellant's explanation is compounded by the fact that her Application was not instituted simultaneously with the appeal notwithstanding the clear provisions of Rule 8 of the Rules of this Court. This in terms of which the 30th July, 2015 was the deadline to lodge the appeal. The Appellant ought to have been aware that she was out of time when she filed the appeal on the 12 August, 2015 but it was not until the 28th August, 2015 that the present Application was filed.

[24] In my assessment of the facts of the matter and the arguments of the attorneys of the parties the Appellant has dismally failed to discharge the burden cast on her in terms of the legal authorities cited by the 1st Respondent at paragraph [20] **supra**.

[25] In the result, for the foregoing reasons the Application for the condonation of the late filing of the leave to appeal is dismissed with costs - such costs to include the costs occasioned by the irregular filing of the record and Heads of Argument on the merits of the appeal.

S.B. MAPHALALA

ACTING JUSTICE OF APPEAL

I AGREE

J.P. ANNANDALE

ACTING JUSTICE OF APPEAL

I ALSO AGREE

R. CLOETE

ACTING JUSTICE OF APPEAL

For the Appellant: Mr. W. Maseko
(Waring Attorneys)

For the 1st Respondent: Mr. S. Dlamini
(Magagula & Hlophe Attorneys)