IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE Appeal Case No. 47/2015

In the matter between:

TQM TEXTILE SWAZILAND (PTY) LIMITED **Appellant**

and

SIFISO SIMELANE & 354 OTHERS **1st Respondent**

JUDGE OF INDUSTRIAL COURT N. O. **2nd Respondent**

Neutral Citation	:	TQM TEXTILE SWAZILAND (PTY) LIMITED VS. SIFISO SIMELANE & 354 OTHERS (47/2015) [2016] SZSC 12 (30 JUNE 2016)
Coram	:	CLOETE AJA, MAGAGULA AJA and MAPHANGA AJA
For the Appellant	:	MR M. P. SIMELANE
For the 1st Respondent	:	MR T. MHLANGA
Heard	:	11 MAY 2016
Delivered	:	30 JUNE 2016

Summary : **Application for condonation – Applicant to supply full, detailed and accurate account of causes of delay and date, duration and extent of any obstacle on which reliable placed to enable Court to assess responsibility – Prospect of success – Sufficient allegations to persuade Court.**

JUDGMENT

CLOETE -AJA

BRIEF BACKGROUND FACTS AND SEQUENCE

[1] 1. The Court *a quo* handed down a Judgment in this matter on 21 August 2015.

2. On 27 August 2015, the Appellant filed a Notice of Appeal setting out its grounds of appeal which will be dealt with later in this Judgment. The Notice of Appeal was filed timeously.

3. On the same date the current Attorneys, M. P. Simelane Attorneys placed themselves on record and replaced the previous Attorneys.

4. The Record of Appeal was filed on 25 February, 2016. According to the 1st Respondent (there was no appearance for the 2nd Respondent) the record was not complete in various aspects and contained material which should not have been included and the Appellant's Attorneys did not comply with the provisions of Rule 30 (5) in that they did not consult with the 1st Respondent's Attorneys in the completion of the Record as is required in that Rule.

5. The Appellant filed and served a Condonation Application on 03 March, 2016 for condonation of the late delivery of the Record of Appeal. It is to be noted that there is no Application before this Court for the late filing of the Heads of Argument in contravention of the provisions of Rule 31 in that the Heads of Argument were filed on 29 April, 2016 and worse still, the Bundle of Authorities was filed on 11 May, 2016, the date on which this matter was set down for hearing.

APPELLANT'S AFFIDAVIT IN SUPPORT OF THE APPLICATION AND THE ARGUMENT BY COUNSEL FOR THE APPELLANT

[2] 1. The Affidavit in support of the Application for Condonation was attested to by Muzi Simelane, an Attorney of the High Court of Swaziland practicing with the firm P. Simelane Attorneys. The Court and Mr Simelane on behalf of the Appellant traversed the Affidavit in itemised detail as set out below.

2. At paragraph 9 of the Affidavit, the Deponent states that **"The Court heard argument on 21 August 2015 and an *ex tempore* Judgment was made. Reasons as it appears from the record were handed down on 05 October 2015."**

3. At paragraph 10 thereof, and no specific dates are given to assist the Court, the Deponent states that **"We have been awaiting to be advised as per the norm of the date for delivery of the written reasons for the Judgment. When the Judgment was delivered, our office was never contacted."** Mr Simelane conceded

that he had done absolutely nothing relating to the obtaining of the reasons concerned at that point and sat back and waited for the delivery of the reasons by the Judge in the Court *a* quo.

4. At paragraph 11 he states **"The matter was further compound by the fact that His Lordship Mr S. V. Mdladla (as he then was) contract was not extended and we were left wondering as to what became of the reasons if any."** Mr Simelane conceded that no dates or full details of any attempts to communicate with the Judge concerned were placed on record to assist the Court.

5. At paragraph 12 the Deponent states **"It was only mid February 2016, that we learnt about the availability of the reasons when the Respondents Attorneys were again attempting to execute the Industrial Court Writ. When the issue of the Appeal was raised, they countered that argument by saying, the Appeal had not been prosecuted."** Mr Simelane conceded that there was no specific date when this allegedly occurred

and there is no information before the Court as to where and from whom the Appellant apparently learnt about the availability of the reasons concerned.

6. At paragraphs 13, again without giving any dates or details, the Deponent alleges that **"We then again perused the Court file only to find the written reasons inside the Court file dated 05 October 2015. There was no information relayed to us nor to the other Attorney who handled the matter, that the Judgment was ready. I annex hereto a Confirmatory Affidavit of Mr Thoba Simelane marked 'A'."** Mr Simelane conceded that there was no evidence before the Court that he or anyone else had looked in the file of the Court at any time and he could not explain the statement that **"We again perused the Court file…"**.

7. At paragraph 16, the Deponent, markedly states; **"The period of filing the Record lapsed on 05 December 2015. Clearly the Appeal would not have been heard in the November 2015 session. This aspect is relevant to the issue of prejudice to the other side. They have**

neither brought an Application to set aside the Notice of Appeal. So by all intents and purposes, they are braced to deal with the Appeal in the coming session". Mr Simelane conceded that by his own calculation, the Record of Appeal should have been delivered by 05 December 2015 and he conceded that he did not at any time before or after that date contemplate the bringing of any Application in terms of Rule 16 or for condonation in terms of Rule 17.

8. At paragraph 18, and again without giving any explanation or dates to assist the Court, he simply states **"I wish to state that the Applicant was keen to have the matter dealt with in time but we encountered problems as stated above in pursuing same hence the Court papers were filed late."**

9. Having fallen on his sword relating to the contents of his paragraph 16, Mr Simelane then attempted to confuse the situation referring to the proviso at Rule 8 (1) which provides that if there is a written Judgment the period shall run from the date of delivery of the said Judgment.

10. Mr Simelane baldly stated that there was no prejudice to the other side if the Application were to be granted.

11. Shockingly, as regards the prospects of success of the Appellant, without giving any detail or referring to any part of the proceedings, he simply states at paragraph 20 that; **"I further submit that the Applicant has good prospect of success as far as its Appeal is concerned as the Court *a quo* erroneously found that the Applicant has failed to show prejudice to warrant the grant of a review Application. Full legal argument in this regard will be advanced in due hearing of the Application."**

12. He accordingly applies for an Order in terms of his Notice of Motion.

ARGUMENT BY COUNSEL FOR THE 1ST RESPONDENT

[3] 1. That the Record of Appeal was incomplete in various aspects, including that it did not contain the transcript of the proceedings and on the other hand contained

documentation which should not be in the record and further stated that the Appellants Attorneys had not consulted with them relating to the completion and filing of the record as is required at Rule 30 (5).

2. That there was clearly no compliance with the Rules of this Court which culminated in them seeking to execute on the Judgment on their favour as they had argued that the Appeal had not been prosecuted and was deemed to have been abandoned. The Rules of this Court were put in place to be complied with and all litigants need to comply with these Rules and the Appellant had not bothered to bring any Application for extension of time as is required in terms of Rule 16.

3. The 1st Respondent was seriously prejudiced by the fact that it was unable to execute on the Judgment granted to it by the Court *a quo*.

4. The 1st Respondent left the matter in the hands of the Court.

REPLY BY APPELLANT'S COUNSEL

[4] 1. Mr Simelane conceded that there was no transcript of the evidence heard in the Court *a quo* set out in the record and that it was thus incomplete.

2. Mr Simelane indicated that he did not wish to reply to the points raised by Mr Mhlanga except to apologise to the Court for non-compliance with the Rules of the Court.

FINDINGS OF THIS COURT

[5] 1. The relevant provisions of Rule 30 of the Rules of this Court provide that: (with our underlining)

"**30. (1) The Appellant shall prepare the Record of Appeal in accordance with sub-rules (5) and (6) hereof and shall within two months of the date of noting of the Appeal lodge a copy thereof with the Registrar of the High Court for certification as correct.**

30. (4) Subject to Rule 16 (1), if an Appellant fails to note an Appeal or to submit or resubmit the

Record of Certification within the time provided by this Rule, the Appeal shall be deemed to have been abandoned.

30. (5) The Appellant in preparing the record shall, in consultation with the opposite party, endeavour to exclude therefrom documents not relevant to the subject matter of the Appeal and to reduce the bulk of the record so far as practicable. Documents which are purely formal shall be omitted and no document shall be set forth more than once. The record shall include a list of documents omitted. Where a document is included notwithstanding an objection to its inclusion by any party, the objection shall be noted in the index of the record."

2. Rule 31 (1) of the Rules of this Court provide as follows:

"**31 (1) In every Civil Appeal and in every Criminal Appeal the Appellant shall, not later than twenty eight days before the hearing of the Appeal, file with the Registrar six copies of the main Heads of Argument to be presented on Appeal, together with a list of the main authorities to be quoted in support of each head."**

3. Rule 16 of the Rules of this Court provides as follows:

> "**Rule 16 (1) The Judge President or any Judge of Appeal designated by him <u>may on application extend any time prescribed by these rules</u>: 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.**
>
> **Rule 16 (2) <u>An Application for extension shall be supported by an Affidavit setting forth good and substantial reasons for the Application</u> 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."**

4. Rule 17 of the Rules of this Court provides as follows:

> "**Rule 17 The Court of Appeal may <u>on application and for sufficient cause shown, excuse any party from compliance with any of these Rules</u> and any give such directions in matters of practice and procedure as it considers just and expedient."** (my underlining in all of the above)

5. All of these Rules are clear and unambiguous and set out the obligations of a party who is obliged to submit a Record of Appeal in the fashion set out in Rule 30 and Heads of Argument in the fashion set out in Rule 31 and failing that, as provided for in the case law which will be referred to below to bring Applications as set out in Rules 16 and/or 17 above.

6. The relevant case law relating to the activities referred to in 5 above can be referred to as follows:

6.1 In **Dr Sifiso Barrow v. Dr Priscilla Dlamini and the University of Swaziland (09/2014) [2015] SZSC09 (09/12/2015)** the Court at 16 stated **"It has repeatedly been held by this Court, almost *ad nauseam*, that as soon as a litigant or his Counsel becomes aware that compliance with the Rules will not be possible, it requires to be dealt with forthwith, without any delay."**

6.2 In **Unitrans Swaziland Limited v Inyatsi Construction Limited, Civil Appeal Case 9 of 1996,** the Court held at paragraph 19 that:- **"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. The same Court also referred, with approval, **to Commissioner for Inland Revenue v Burger 1956 (A)** in which **Centlivres CJ** said **at 449-G** that: **"…whenever an Appellant realises that he has not complied with the Rule of Court he should, without delay, apply for condonation."**

6.3 In **Maria Ntombi Simelane and Nompumelelo Prudence Dlamini and Three Others in the Supreme Court Civil Appeal 42/2015**, the Court 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 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."

6.4 In the said matter of **Hlatshwayo** referred to above, the Court at 4 stated as follows: **"The Appellant's Heads of Argument were filed on 25 October 2006 which was a period of only six days before the hearing of the matter. This was a flagrant disregard of Rule 31 (1) of the Court of Appeal Rules which provides as follows…** (the wording of the Rule followed)".

6.5 In the same matter, the Court referred to **Simon Musa Matsebula v Swaziland Building Society, Civil Appeal No. 11 of 1998** in which Steyn JA stated the following: **"It is with regret that I record that practitioners in the Kingdom only too frequently flagrantly disregard the Rules. Their failure to comply with the Rules conscientiously has become almost the Rule rather than the exception. They appear to fail to appreciate that the Rules have been deliberately formulated to facilitate the delivery of speedy and efficient justice. The disregard of the Rules of Court and of good practice have so often and so clearly been disapproved**

of by this Court that non-compliance of a serious kind will henceforth procedural orders being made – such as striking matters off the roll – or in appropriate orders for costs, including orders for costs de bonis propriis. As was pointed out in <u>Salojee vs The Minister of Community Development 1965 92) SA 135 at 141</u>, *"there is a limit beyond which a litigant cannot escape the results of his Attorney's lack of diligence"*. Accordingly matters may well be struck from the roll where there is a flagrant disregard of the Rules even though this may be due exclusively to the negligence of the legal practitioner concerned. It follows therefore that if clients engage the services of practitioners who fail to observe the required standards associated with the sound practice of the law, they may find themselves non-suited. At the same time the practitioners concerned may be subjected to orders prohibiting them from recovering costs from the clients and having to disburse these themselves."

6.6 In **Nhlavana Maseko and Others v George Mbatha and Another, Civil Appeal No. 7/2005**, the Court stated at 15 **"In a circular**

dated 21 April 2005 practitioners were again warned that failure to comply with the Rules in respect of the filing of Heads of Argument would be regarded with extreme disapproval by this Court and might be met with an order that the appeals be struck off the roll or with a punitive cost order. This warning is hereby repeated."

6.7 In the matter of **Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA),** the summary of the matter is as follows: **"Appeal – Prosecution of – Proper prosecution of – Failure to comply with Rules of Supreme Court of Appeal – Condonation Applications – Condonation not to be had merely for the asking – Full, detailed and accurate account of causes of delay and effect thereof to be furnished so as to enable Court to understand clearly reasons and to assess responsibility – To be obvious that if non-compliance is time-related, then date, duration and extent of any obstacle on which reliance placed to be spelled out."**

6.8 **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."

6.9 **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)).

6.10 In the **Unitrans** matter referred to supra, the following observation is also made:

"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."

6.11 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."

7. In the present matter it is clear that:

7.1 No Application was brought in terms of Rule 16 at any time, let alone without delay, when by their own admission the Appellant stated that the Record of Appeal was to have been filed by 05 December 2015. Even if that is not the actual date on which it fell due, the fact is that it was filed out of time and no Application was brought in terms of Rule 16 and the Application for condonation was brought as an afterthought in terms of Rule 17. And worst still, it would appear that the record filed is in any event incomplete and does not contain the transcript of the proceedings in the Court *a quo*.

7.2 As set out in the **Uitenhage** matter, no full, detailed and accurate account of causes of delay and effect thereof were put before the Court.

7.3 The Appellant through its Counsel conceded at all the relevant time frames dealt with by him and the Court, that the Appellant knew that it was out of time and not in compliance with the provisions of Rules 30 and 31 and despite that, no Application to this Court was brought in terms of Rule 16.

7.4 Accordingly the Appellant must dismally fail the first test relating to the giving of detailed and acceptable reasons for delay and non-compliance with the Rules.

8. As regards the issue of prejudice, Mr Simelane stated that the Appellant should not be punished because of the actions or omissions of its Attorneys. In this regard, the words of Steyn CJ in **Saloojee and Another, NNO v Minister of Community Development, 1956 (2) SA 135 (A)** at 141 C – E, which was also referred to in **Unitrans** (*supra*), are apposite. With reference to **R v Chetty, 1943 AD 321** at 323 and **Regal v African Superslate (Pty) Ltd, 1962 (3) 18 (AD)** at 23, where non-compliance with the Rules was also attributed to the laxity of legal representatives, he held that, **"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 effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity."

9. The Appellant in any event will, given the adverse findings of this Court, be able to pursue an alternate remedy.

10. Having failed to jump the first hurdle, it is perhaps not necessary to deal with the issue of the prospects of success of the Appellant. However, we wish to do so and in that regard:

10.1 The purported grounds on which the Appellant relies in the Founding Affidavit (on which it is bound to stand or fall in terms of trite law) comprise a single unsubstantiated statement which is totally devoid of any substance and can never be said to constitute any argument which would show that the Appellant has any prospect of success. In the matter of **Jabulani**

A. Soko t/a Mawandla Investments v Ngwane Mills (Pty) Ltd t/a Feedmaster, Swaziland Supreme Court 34/14, the Court in that matter stated that:

"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 client's prospects of success."

10.2 There is no reference to any circumstance or law or any decision of any other Court relating to any of the purported grounds which would make this or any other Court believe that there are reasonable let alone good prospects of success. As and aside, the Appellant filed what Mr Simelane himself termed a bald Notice of Appeal which he appears to have substituted himself in his documentation despite the fact that Rule 12 specifically provides that the Court Appeal may allow an amendment of the Notice of Appeal on

Application and there is no such Application before this Court;

10.3 In the **Uitenhage** matter referred to above it was stated that:

"It is trite that where non-compliance of the Rules has been flagrant and gross, a Court should be reluctant to grant condonation <u>whatever the prospects of success might be. Darries v Sheriff, Magistrate's Court, Wynberg</u> 1998 (3) SA 34 (SCA) at 41D." (my underlining)

10.4 As was pointed out in **<u>Kodzwa v Secretary for Health & Anor</u> 1999 (1) ZLR 313 (S)** by **Sandura J** (with whom McNally JA and I concurred):

<u>"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.</u> 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 <u>Muller JA</u>

in <u>P E Bosman Transport Works Committee & Ors v Piet Bosman Transport (Pty) Ltd</u> 1980 (4) SA 794 (A) at 799 D-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, <u>not be granted whatever the prospects of success may be</u>." (my underlining)

10.5 Under those circumstances this Court has not been persuaded that the Appellant has made out any case for this Court to find that it has a reasonable prospect of success. However, the Appellant having failed dismally in the first leg of its obligations, the second leg does not need to be canvassed in any greater detail and also fails miserably.

11. The issue of the non-compliance with the provisions of Rule 31 relating to the late filing of the Heads of Argument was not canvassed at the hearing but it follows

that for the same reasons of non-compliance with the Rules, those Heads were filed out of time and this Court expresses its displeasure at the lack of courtesy, in the least, in the filing of such Heads two days (including a weekend) before the matter was to be heard and the words of the Court in the **Hlatshwayo** matter are applicable here.

12. As is set out in another Judgment which will be handed down in session, despite numerous Judgments, circulars, warnings from Judges, practitioners in this Court nevertheless continue to fail to abide by the Rules of this Court with seeming impunity and we hope that this Judgment that this Court will no longer tolerate non-compliance of the Rules of this Court nor the flagrant disabuse of such Rules. Having said that, this Court will always consider genuine, well documented Applications in terms of the Rules provided that full acceptable details are set out in Founding Affidavits, the Court taken into the confidence of the Applicant and such Applications brought in terms of the Rules of this Court immediately upon a problem arising.

13. In many of the cases referred to above the issue of punitive costs has been debated and ordered. See the **Matsebula** and **Saloojee** matters *supra*. In this instance, the Court seriously considered the matter and in view of the fact that the Respondent did not seek such a punitive costs order, the Court will abide with the Order sought by the Respondent. Save that the Appellant should not be required to suffer the consequences of the disregard of the Rules by their representatives who under the circumstances shall bear the costs out of their own pockets.

14. **JUDGMENT**

14.1 In the result the Application for Condonation is dismissed with costs on the ordinary party and party scale, to be paid by the Appellant's attorneys *de boniis propriis*;

14.2 It follows that the Appeal is also dismissed and the Judgment of the Court *a quo* is confirmed.

R. J. CLOETE
ACTING JUSTICE OF APPEAL

I agree

J. S. MAGAGULA
ACTING JUSTICE OF APPEAL

I agree

C. MAPHANGA
ACTING JUSTICE OF APPEAL