



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal No. 35/2016

In the matter between:

PHILILE MSIBI

1st Appellant

PHILA MSIBI

2nd Appellant

XOLANI MSIBI

3rd Appellant

SIFISO MSIBI

4th Appellant

VELI MSIBI

5th Appellant

SONNYBOY MSIBI

6th Appellant

VS

NELIE MSIBI

1st Respondent

DAMAZIO MADAU

2nd Respondent

THE MASTER OF THE HIGH COURT

3rd Respondent

THE REGISTRAR OF DEEDS

4th Respondent

THE ATTORNEY GENERAL

5th Respondent

FIRST NATIONAL BANK

6th Respondent

SWAZILAND BUILDING SOCIETY

7th Respondent

**LIBERTY GROUP LIMITED AND
CAPITAL ALLIANCE LIFE LIMITED**

8th Respondent

Neutral citation: *Philile Msibi & 5 Others vs Nelie Msibi N.O. & 7 Others*
(35/2016) [2016] SZSC 43 (30 June 2016)

Coram: **J. MAGAGULA AJA, R. CLOETE AJA AND M.
LANGWENYA AJA**

For Appellant: **G. Reid**

For 1st Respondent: **N. Mabuza**

For 3rd 4th & 5th Respondent: **N.T. Dlamini**

Heard: **30 May, 2016**

Delivered: **30 June, 2016**

Summary: *Application for condonation of late noting of an appeal –
Application made some twenty months after judgment –
Record not certified by Registrar of the High Court – Delay*

not adequately explained – Prospects of success not adequately addressed.

JUDGMENT

J. MAGAGULA AJA

- [1] This is an application for condonation of the late noting of an appeal against a judgment handed down by the High Court on the 8th August, 2014 (more than twenty months ago).
- [2] The record purported to be filed by the appellants has not been certified as a true record of the proceedings at the High Court. There was no way this court could make any reference to such record as in the view of the court it was a nullity.
- [3] The application is opposed by the respondents who filed an opposing affidavit. The applicants have not filed any replying affidavit.
- [4] In an effort to explain the cause of delay in noting the appeal which should have been noted within four weeks from the date of delivery of the judgment in terms of

Rule 8 (1) of the Court of Appeal Rules, 1971, the deponent stated the following in paragraph 30 of the founding affidavit:

“30. I left the matter in the safe hands of our executor and legal advisor/counsel Mr. Madau believing that this was a frivolous attempt by the co-executor to rob us of our rights and that the co-executor Mr. Madau would on our behalf (trustee/beneficiaries) deal with it and put it to rest.”

Surely this can never be an explanation of the delay, let alone sufficient cause for the court to condone the delay in noting the appeal. The deponent to the founding affidavit continues to make a wide range of allegations in paragraph 31 to 42 of her affidavit none of which explain the delay in noting the appeal. When the matter was heard the court requested Ms. Reid who appeared for applicants to pinpoint the paragraphs which explain the delay in the founding affidavit and she dismally failed to direct the court to any such paragraph.

[5] Such a dismal failure to explain the delay on the part of the applicant was sufficient for the court to dismiss the application. Whatever the prospects of success on the merits, the court could not come to the assistance of the applicants since a party seeking condonation must satisfy the court on both legs, to wit, explain the cause for delay and show prospects of success on appeal. In the Zimbabwean case of **Kodzwa Vs Secretary for Health and Ano. 1999 (1) ZLR 313 Mr. Justice Sandura J** stated the following:

“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 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.”

In **P.E. Bosman Transport Works Committee and Ors Vs Piet Bosman Transport (Pty) Ltd** 1980 (4) SA 794, Mr. Justice Muller JA stated the following at page 799:

“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.”

[6] In *casu* there is no explanation at all for the delay, let alone a sufficient one. Also there is the other aspect that the record filed has not been certified as correct by the registrar, and as such cannot be relied upon by this court. Also, it has taken the appellants about twenty months to bring the application for condonation when the courts have now and again emphasized the need for condonation to be applied for without delay. In **Dr. Sifiso Barrow Vs Dr. Priscilla Dlamini and the University of Swaziland (09/2014) [2015] SZSC 09 (09/12/2015)** the court at page 16 stated:

“It has repeatedly been held by this court, almost ad nauseam, that as soon as 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.”

Also in **Unitrans Swaziland Limited Vs 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 realizes that he has not complied with a Rule of court, he should apart from remedying his fault, immediately, also apply for condonation without delay.”

In **Commissioner for Inland Revenue Vs Burger 1956 (4) SA 446 Centlivres** CJ stated the following at 449 – G:

“Whenever an appellant realises that he has not complied with a Rule of Court he should, without delay, apply for condonation.”

[7] Manifestly, in *casu* there has been a flagrant disregard of the Rules of court in a number of respects. The extent or length of delay is shocking to say the least.

[8] The court also gave a chance to the appellants’ council to direct it to the paragraphs where prospects of success are dealt with. Ms. Reid did direct the court to some paragraphs purporting to deal with this aspect in the founding affidavit. However these proved to be a far cry from what would be sufficient

to address this aspect. The court took Ms. Reid through each and every one of these paragraphs being paragraphs 43 to 43.1.4 and she eventually conceded that the allegations therein were of no assistance in this regard and fell to be disregarded.

[9] The virtual absence of the record which would have contained the judgment of the court *a quo* also dealt a blow to the applicant's case in this regard.

[10] For the foregoing reasons the application for condonation cannot succeed and the court makes the following order:

1. The application is refused.
2. The appellants are ordered to pay costs

J.S. MAGAGULA

ACTING JUSTICE OF APPEAL

R.J. CLOETE

ACTING JUSTICE OF APPEAL

M. LANGWENYA

ACTING JUSTICE OF APPEAL

