IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No. 73/2015

In the matter between:

SWAZILAND NATIONAL HOUSING BOARD	**1st Appellant**
MARIA NTOMBI SIMELANE (BORN MABUZA)	**2nd Appellant**
vs	
NOMPUMELELO PRUDENCE DLAMINI (BORN MAGAGULA)	**1st Respondent**
THE REGISTRAR OF DEEDS	**2nd Respondent**
THE ATTORNEY GENERAL	**3rd Respondent**

Neutral citation: *Swaziland National Housing Board and Another vs Nompumelelo Prudence Dlamini (Born Magagula) and Two Others (78/2015 [2016] [SZSC] 46 (30 June 2016)*

Coram: **K. M. NXUMALO AJA**
J. S. MAGAGULA AJA
C. MAPHANGA AJA

Heard: 11th May, 2016

Delivered: 30th June, 2016

Summary: *Civil Procedure - Notice of Appeal out of time in terms of the Rules regulating conduct of Civil Appeals - Supreme Court having dealt with and pronounced on 2nd Appellants status vis right to bring an appeal on account of effluxion of prescribed time limits and as such functus officio-appeal dismissed with costs.*

JUDGMENT

MAPHANGA AJA

[1] This is an appeal whose circumstances are somewhat unusual. This is so in light of the fact that the Notice of Appeal noting the same indicates that it is brought not only against a judgment by her **Ladyship Justice M. Dlamini** dated 30th June, 2015 but also certain orders issued by the same court on the 20th October 2015.

[2] The matter itself has had a long and checkered history. It arises out of a dispute and the attendant litigation over certain fixed property. I propose to briefly set out its key elements and its circumstances as it has unfolded. It began as a vindicatory action instituted by the 2nd Appellant Maria Simelane (born Mabuza) during June 2004 in the Court *a quo.* The facts underying the action are that Ms Simelane had been offered and purchased certain immovable property by the 1st Appellant; the property being a plot described as Lot 129, in a township scheme known as Mathendele Township, Extension No.2 in Nhlangano in the Shiselweni region. She alleged that pursuant to that transaction the property had been lawfully transferred to her which was duly registered by the Deeds Registry in her name.

[3] The 1st Appellant, the Swaziland National Housing Board is, as its name suggests, an agency established as a public enterprise with a mandate to promote the provision of affordable residential housing in the Kingdom. Initially it was not cited as a party in the proceedings before the Court *a quo*

but its joinder was incidental to the ensuing developments in litigation referred to above.

[4] It so happens that the 1ST Respondent was in occupation of the very same property. The object of the 2nd Appellant's action simply was vindication of the property and the ejectment of the 1ST Respondent Nompumelelo Dlamini, on the basis that she was in unlawful occupation thereof. The 1st Respondent contested the action and challenged Ms Simelane's claim to it on the basis of a countervailing claim that she had been allocated and had purchased the same property from the 1st Appellant and filed a counterclaim to assert her own claim to the same property. It was in that context that the joinder of the Housing Board was sought and was accordingly ordered by the Court *a quo* during the course of the litigation before it.

[5] The matter finally came to be heard at the trial before her Ladyship **Justice M. Dlamini** on the 16th February 2015 at the conclusion of which the court dismissed the 2nd Appellant's action and granted judgment in favour of the 1st Respondent in the counterclaim. In its written judgment dated the 30th June, 2015 the Court ordered that the registration of the property in favour of the 2nd Appellant be expunged and that instead it be registered in the name of the 1st Respondent. The Court also ordered that the Swaziland Housing Board and the Registrar of Deeds execute all the necessary documents to give transfer to the 1st Respondent.

[6] On the 20th August 2015 close to two months after the handing down by the court *a quo* of the judgment against which the appeal presently lies, the 1st Appellant approached the Supreme Court for condonation and leave to file a late appeal to the judgment of the court *a quo* of the 30th June 2015.

[7] That application was fleshed out in a notice filed before the Registrar of this court for the following orders:

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 (sic)

3) costs of suit against the Respondents in the event this application is opposed and

4) such further and / or alternative relief as the Honourable Court may deem fit.

[8] As reasons tendered for the lapse in filing an appeal on time in terms of the rules, the 1st Appellant alleged that its delay was due to ambiguity or paucity in the judgment handed down by the court *a quo* on account of an omission by the court a quo to pronounce itself and make an award as to costs.

[9] It is common cause that in light of the omission by the Court *a quo* to address the costs aspect much time and effort was expended by the 1st Appellants attorneys working jointly with their counterparts (the 1st Respondents attorneys) to persuade the court *a quo* to rectify the omission in its decision and accordingly supplement the judgment in that regard.

[10] It bears mentioning that the 1st Appellant did not intervene as an applicant and as such was not a party to the application for condonation. This court was however not moved by the 2nd Appellants reasons for the lapse or failure to file an appeal in the time-frame prescribed by the Rules of the Court of Appeal and in the outcome then it dismissed the 1st Appellants application for condonation with costs. The judgment of the Supreme Court on the application for condonation was delivered on the 9th December, 2015.

[11] In the judgment the Supreme Court in dismissing the 1st Appellants application for condonation and leave to file an appeal and condonation had this to say.

> **"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 in paragraph (19) of this judgment. For clarity I reproduce as follows:**
>
> **The Appellant failure to attach the judgment;**
>
> **The Appellant failure to state when the judgment was brought to her attention;**
>
> **The Appellant failure to indicate what aspects of the judgment she was dissatisfied with;**
>
> **The Appellant failure to demonstrate how the ambiguous question of costs impacted on aspect of the judgment he was dissatisfied with;**
>
> **The Appellant failure to disclose how long she was willing to wait for the desired clarification.**
>
> **The above omissions by the Appellant are fatal to the application. The lack of sufficiency of the Appellants 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.**
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> **The Appellant ought to have been aware that she was out of time when she filed the appeal on the 12th August, 2015 but it was not until the 29th August, 2015 that the present application was filed."**

[12] As a matter of interest the Appellants' attorneys presently were the same attorneys who acted as the attorneys for the 2nd Appellant in the ill-fated condonation application. In fact Mr Maseko, counsel for the Appellants also appeared before the Supreme Court in the unsuccessful condonation application. Now the said attorneys approach this court under the Notice of Appeal dated 18th November, 2015 for and on behalf of the appellant despite the implicit concession before the Supreme Court by the 2nd Appellant that its right to file an appeal had expired.

[13] A crisp threshold issue that was asked of the Appellant's attorneys is whether in light of the operation of the clear and mandatory effect of Rule 8 such an appeal is competent and whether the Notice of Appeal presently is properly before this court.

[14] The second question the Court put to the Appellant's counsel is on what basis do the Appellants now bring this appeal in the face of the Judgement of the Supreme Court of the 9th December 2015, especially in light of the Supreme Court having dealt substantially and pronounced itself in clear and unambiguous terms regarding the expiry of the timelines for the filing by the Appellants (or at the very least the 2nd Appellant) of their appeal,

[15] Mr Maseko in responding to these questions sought to make a series of startling but in my view tenuous arguments. He sets out in his heads of argument that the Appeal is being brought by and on behalf of the 1st Appellant and that the 2nd Appellant had been cited merely for purposes of convenience; that she was in fact not appealing to the court. Further he contends that effectively the judgment of the Court *a quo* became only final on the 20th October when certain orders as to costs were made.

[16] As regards the Appellants' statement in their Heads that the appeal of notice under the notice dated 18th November 2015 was so noted by the 1st Appellant –

this is untenable if one has regard to the wording and effect of the said notice in so far as it clearly indicates *ex facie* the document, that the notice is issued and addressed to the Registrar by '**the Appellants'**. This is evident in both the salutary (introductory) and concluding (the prayer) statements as well as the designation of the attorneys as representing the **Appellants** without qualification as to the ostensibly collective mandate from both Appellants (in plural).

[17] What remains is the fact that by this notice at least the 2nd Appellant was attempting a second bite on the appeal – the original appeal and application for condonation and leave to file an earlier notice; albeit also late; having been dismissed. The circumstances admit of no other reasonable inference. The 2nd Appellant cannot escape the consequence and effect of the notice of appeal of 18 November 2015. Remaining nonplussed Mr. Maseko maintained his submission on behalf of the 1st Appellant that:

> **The judgment of the court only became as such final order after the issuing of the orders dated 20th October 2015; and**
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> **The 1st Respondent initially had no interest in the outcome of the judgment of the court *a quo* of the 30th June 2016; the interest being piqued by the adverse order as to costs granted against it on the 20th October 2016.**

[18] In support of this argument Mr Maseko referred this court to Section 14 of the Court of Appeal Act which provides**:**

> **'Right of appeal in civil cases.**
>
> **14. (1) An appeal shall lie to the Court of Appeal-**

(a) from all final judgments of the High Court; and

(b) by leave of the Court of Appeal from an interlocutory order, an order made ex parte or an order as to costs only"

[19] It must be said that in my view these submissions are without merit and therefore are untenable in regard to the notice of appeal itself. Firstly what Mr Maseko overlooks, even if for one moment the court would seriously consider the logic of his argument, is that in term of Rule 8 relating to the period for filing of notice of appeal the material date for reckoning the timeline is the date on which the judgment appealed against was delivered 'if there is a written judgement'. It is from this date then that the notice period runs. On that basis the deadline came and passed on the 30th July, 2015.

[20] In the main, the notice of appeal noted by the Appellant, does not confine itself to the matter of costs and the judgment but deals comprehensively in the grounds set out therein with the substantive issues on the merits and appears to address the costs award as an ancillary aspect.

[21] Secondly the notice clearly seeks to address itself to the judgment of the 30th June and substantially addresses mattes arising from the reasoned decision therein much less to the orders for the costs award. That is the clear intention behind the notice and the written submissions.

[22] There is no rational basis for explaining, if the 1st Appellant could and did not consider itself interested to note an appeal against the June 30 judgment or to seek condonation as the 2nd Appellant has done, but only intended to appeal the costs award, why it did not follow Rule 9 of the rules of this court as read with Section 14 of the Court of Appeal Act and make an application for leave to appeal against the costs order only as opposed to the late appeal that has been brought presently.

[23] It is noted that Appellants' stance in bringing this appeal is based on the misconceived notion that the effective date of delivery of the judgment *a quo* was the 20th October 2015. For that reason no application for condonation has been made nor one for an application for extension of time.

[24] In any event given that an earlier application by the 2nd Appellant for leave to appeal and an earlier notice of appeal have been adjudged by this court to be both out of time and without merit and accordingly dismissed, this court is effectively *functus officio.* It is not competent for the parties to come masquerading under the new guise of the Notice of Appeal presently.

[25] This is so in light of the fact that this is an appeal by the same parties before the court *a quo* and this court at the hearing of the condonation application in circumstances that are substantially against the same judgment.

[26] This is a matter that should not have been brought before this court in view of the historical background in the litigation and the twists and turns it has taken through its course and most especially in light of the Supreme Court having dealt with the issue of the Appellants status in relation to the right to bring an appeal against the judgment of the court *a quo.* That it has happened is regrettable indeed.

[27] At the inception of the hearing, the 1st Respondent made an application for condonation for the late filing of her heads of argument. This was an application on Notice supported by a founding affidavit deposed to by her attorney presently, Mr Dlamini. The application was opposed by the Appellants on various grounds. In view of the fact that this application turns on the preliminary issues as highlighted in this judgement I find it unnecessary to determine that application. It only leaves to add a word of caution, on the basis of the oft- repeated principles, the mandatory rules and decided cases by this Court against laxity in the conduct of appeals and applications before this

court. A more time and cost effective practice could be achieved by litigants and their attorneys by better attention to detail and adherence to the rules. This I say in view of the fact that one of the reasons advanced as cause for the delay in the filing of heads was that a judgment of this court that the party considered crucial in this case had been omitted in error when it had been intended to be attached to the heads. We observe that despite the fact that leave had not been obtained the 1st Respondent filed the heads but when it did, still filed the heads without attaching the judgment. The judgment was filed separately well after the late heads had been filed.

[28] Finally, in deciding this matter it is my considered view that the appeal is out of time and there being no proper appeal before this court it is dismissed with costs.

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C. MAPHANGA
ACTING JUSTICE OF APPEAL

I AGREE

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K. M. NXUMALO
ACTING JUSTICE OF APPEAL

I ALSO AGREE

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J. S. MAGAGULA
ACTING JUSTICE OF APPEAL

For the Appellants: S K Dlamini

For the Respondents: M. Maseko