



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

In the matter between:

Civil Appeal Case No. 69/2015

THEMBA NZUZA	1st Applicant
JABU ZWANE (born NZUZA)	2nd Applicant
JOYCE DUBE (born NZUZA)	3rd Applicant
NOMSA MKHOMBE(born NZUZA)	4th Applicant
ALZIMA DLAMINI (born NZUZA)	5th Applicant
NELLIE MOTSA (born NZUZA)	6th Applicant

And

ENOCK MANDLA NZUZA	Respondent
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Neutral citation: *Themba Nzuza & 5 Others v Enock Mandla Nzuza (69/2015)*
[2016] SZSC 55 (30th June 2016)

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

Heard: **19th May 2016**

Delivered: **30th June, 2016**

Summary: *Civil procedure – application for condonation for non compliance with Rule 30 – to file record of proceedings out of time – application opposed by Respondent – Respondent deemed appeal abandoned for non compliance – late filing caused parties not to file heads of argument and bundle of authorities – Respondent’s application for matter to be struck off the roll and /or dismissed with costs.*

RULING

K. M. NXUMALO - AJA

- [1] This is an application made by the Appellants for an order condoning the Appellants’ non compliance with the provisions of Rule 30 of the Court of Appeal Rules and to grant the Appellants leave to file the record of proceedings out of time.
- [2] The Appellants filed the record of proceedings on the 11th April 2016 and served on the Respondent’s attorneys on the 19th April 2016.
- [3] The Respondent filed a notice of objection in terms of which Respondent:-
- 3.1 objects to:

3.1.1 the filing of the record outside the prescribed period in terms of Rule 30 of the Court of Appeal Rules; and

3.1.2 filing the record without an application for condonation of the late filing, and

3.2 submits that:-

3.2.1 in terms of Rule 30 (4) of the Rules the appeal should be deemed to have been abandoned for non compliance with Rules; and

3.2.2 that the matter should be struck off the roll and / or dismissed with costs.

[4] The Appellants made an application on the 21st April 2016 for condonation for non compliance with Rule 30 and for leave to file the record out of time. The Respondent has filed a notice to oppose the application for condonation.

[5] The Court *mero motu* granted the Respondent the right to address the court first and the Appellants to reply. The Appellants did not object.

RESPONDENT'S SUBMISSIONS

[6] *In limine* and before replying to the Appellant's allegations in the affidavit for condonation, the Respondent submits that:-

6.1 The belated application for condonation of the Appellants has been hastily prepared triggered by the notice of objection filed challenging the late filing of the record.

6.2 Appellants treat the application for condonation as a mere formality.

6.3 There is a cursory explanation for the default in compliance with the rules to file the record timeously; and

6.4 The Appellants have failed to demonstrate or even make an attempt to show that the Appellants have good prospects of succeeding on appeal.

[7] On the allegations in the affidavit for condonation of the Appellants the Respondent submits that:-

7.1 The reasons advanced for failure to comply with the mandatory provisions of the Rule are not valid and remain unsatisfactory in so far as:-

7.1.1 The Appellants do not disclose the reasons for the record not being available timeously or the cause or hindrance in the obtaining the record timeously;

7.1.2 The identity of the person the Appellants dealt with in the High Court is not given nor is there a confirmatory affidavit from that person to confirm why the record could not be prepared timeously;

7.1.3 The recording system of the High Court is now computerized, the process of downloading from the computer is easy and takes a short time.

7.1.4 The appeal was noted on the 10th November 2015 and the record should have been filed on or before the 9th January 2016. The delay of four months to file the record is unreasonable.

7.1.5 Appellants have failed to give reasons for not making an application for an extension of time to file the record outside the prescribed period.

7.1.6 Appellants did not only fail to file the record timeously but also failed to simultaneously make an application for condonation for late filing. The Appellants filed the application for condonation on the 21st April 2016 after the record had been filed on the 11th April 2016 and served on the Respondent on the 19th April 2016.

7.2 In terms of Rule 30 (1) it is the duty of the Appellants to prepare the record and not the Registrar of the High Court. To shift the blame to the Registrar does not advance the case of the Appellants.

7.3 Appellants have not made an attempt to demonstrate that they have prospects of success on appeal which is required by the Rules in addition to giving a reasonable explanation for the delay.

7.4 The Appellants have conducted the process of the appeal in a tardy manner with the results that they have caused inconvenience and prejudice to the Respondent in preparing for its case. The notice of appeal was filed on the 10th November 2015 and the amended Notice of Appeal filed on 24th March 2016. The Respondent could not prepare its case until the record which was only served on the 19th April 2016.

7.4 The Appellants failed to submit Heads of Argument and bundle of authorities.

7.6 The application for condonation is restricted to late filing of the record without an application for condonation for non filing of Heads of Argument and Authorities.

7.7 Conduct of Appellants is calculated to prejudice Respondent in preparation for its case and amounts to abuse of court process and a denial of a right to a fair hearing.

7.8 The delay in filing the record finally afforded the Respondent six court days to prepare for its case. The Respondent's

attorney had to work over weekends and public holidays whilst the Appellants had all the time to prepare for its case.

7.9 Conduct of Appellants overlooks Respondent's interest in the finality of a matter in the High Court – High Court case No.2949/08 in which the Registrar is instructed to transfer immovable property.

APPELLANTS' SUBMISSIONS

[8] The Appellants in their affidavit for the application for condonation and also in response to the submissions made by the Respondent, submit as follows:-

8.1 After delivery of the judgment by the *court a quo* on the 10th November 2015, Appellants noted an appeal against the judgment with a request for leave to amend and / or amplify the grounds of appeal.

8.2 In pursuit of prosecution of the appeal, Appellants wrote a letter dated the 11th December 2015 requesting the Registrar of the

High Court to provide them with the tape recordings of the proceedings before the High Court.

8.3 When the Appellants did not receive a response, they wrote a letter dated the 29th January 2016 requesting the tape recordings so as to transcribe the record.

8.4 By the 16th February 2016 the Appellants had paid for the transcripts of the record of the proceedings which was incomplete, they informed the Registrar of the incomplete record.

8.5 The Appellants received another transcript of the record from the Registrar of the High Court on the 7th March 2016. This later transcript did not include the evidence of the Master of the High Court.

8.6 The Appellants only received the record of the full proceedings on the 21st March 2016.

8.7 The failure to lodge the record was not due to the willful disregard of the rules but was due to the failure of the office of

the Registrar of the High Court to timeously provide them with the tape recordings.

8.8 The explanations establish sufficient cause to allow the court to excuse the Appellants for their failure to comply with the provisions of Rule 30.

8.9 Since this is not an application for leave to appeal out of time, Appellants are not enjoined to establish and / or demonstrate prospects of success on appeal.

8.10 In an application for condonation for late filing of the record the Appellants need only show sufficient cause for failure to comply.

[9] None of the parties have filed their Heads of Argument nor their Bundle of Authorities in respect of the application for condonation. The Appellants were granted leave to file authorities to support their submissions in respect of the Application for condonation.

[10] The Appellants provided the court with a bundle of authorities listing the following cases:

10.1 **Samuel Zambia Maphanga v Sikelela Dlamini N.O. and Two Others, Civil Appeal No.26/2006;**

10.2 **Kenneth Ngcamphalala v Steven Hough and another, Civil Appeal No.37/2001;**

10.3 **The Government of the Kingdom of Swaziland and Martin Samson Banda, Appeal Case No.4/2001;**

10.4 **John Siphon Magagula v Standard Bank of Swaziland, Appeal Case No.17/2001**

10.5 **Shell Oil Swaziland (Pty) Ltd v Motor World t/a Sir Motors, Appeal Case No.23/2006**

FINDINGS OF THE COURT

[11] The Appellant has failed to comply with:-

11.1 Rule 30 which is peremptory and provides that:

11.1.1 The Appellant shall prepare the record on appeal in accordance with sub-rules (5) and (6) hereof and shall within two months of the date of noting of appeal, lodge a copy hereof with the Registrar of the High Court for certification as correct. The Appellants filed the record four months out of time. The notice of appeal was filed on the 10th November 2015, the record should have been filed by the 9th January 2016.

11.2 Rule 16 (2) provides that:

“16.2 An application for extension shall be supported by an affidavit setting forth good and substantial reasons for the application ...” Instead of making an application for extension the Appellant was busy writing letters to the Registrar of the High Court from the 28th January 2016, which was passed the two months period prescribed by

the rules. It is pertinent that none of the letters to the Registrar were copied to the Respondent's attorneys.

11.3 Rule 17 provides that:

“The Court of Appeal may on application and for sufficient cause shown, excuse any party from compliance with any of these rules ...”. When the Appellants filed the record four months out of time on the 11th April 2016, they did not make the application for condonation. The Respondent filed an objection on the 21st April 2016 and it was then that the Appellants filed the application for condonation for late filing of the record.

11.4 Rule 31 (1) (2) which is mandatory provides that:

“31 (1) In every civil appeal ... the Appellant shall not later than 28 days before hearing of the appeal file with the Registrar six copies of the main heads of arguments to be presented on appeal, together with a list of the main

authorities to be presented on appeal, together with a list of the main authorities to be quoted in support of each head.

31 (2) *A copy of such main heads of argument and list shall be served within the same period to the Respondent.”*

[12] There were no heads of argument filed by the Appellants. The Appellants only submitted at the order of the court a list of authorities to support the submissions made from the bar.

[13] What requires to be determined is the decision of the court on the breach of the rules made by the Appellants.

[14] The court was referred to the Supreme Court Case of **Samuel Zambia Maphanga, Civil Appeal Case No.26/2006** which is a matter of a: *“failure by the Appellant to comply with the rules and no application for condonation was filed.”* the Learned Judge **Zietsman J** says:

“As far back as 2001 all practitioners were notified by the Registrar of this Court that a failure to comply with the Rules may result in an appeal being struck off the roll, or in an order that the practitioners involved be subjected to adverse cost orders.” I repeat this severe warning to the Appellants in the present case. The Learned Judge in that case further goes on to state that: “the court is also concerned with compliance with its Rules, and that in all cases where the Rules have not been complied with an application for condonation should be filed.” I reiterate the desire of the court to have the rules strictly observed.

[15] In that case the court after considering the matter and the Appellant’s prospects on appeal, did not uphold the point raised *in limine* on the non compliance with the rules.

[16] However, *in casu*, it is regrettable that the Appellants in its affidavit has incorrectly stated that the Appellants are not enjoined to

establish /or demonstrate prospects of success on appeal if they show sufficient cause for failure to comply. This presumptuous attitude and statement should be avoided at all costs. A litigant should in addition to showing good cause for non compliance, demonstrate prospects of success for a court to lean in favour of the defaulting litigant and exercise the discretion in his favour.

[17] The case of **Samuel Zambia Maphanga** referred to a Supreme Court case of **Kenneth Ngcamphalala v Stephen Hough and Another, Civil Appeal No.37/2001** where an appeal was struck off the roll when the Appellant failed to submit the record within the time limits provided by Rule 31 (1) and to lodge heads of argument timeously.

[18] The Court was also referred the court to the Court of Appeal case of **The Government of the Kingdom of Swaziland and Martin Banda, Appeal Case No.4/2001**. The case has interesting pronouncements on the judicious exercise of a discretion by a court on non observance by a party of an order of court. I consider that the case is distinguishable from the present case of non observance of the rules of court.

[19] The Appellants also referred the court to the Court of Appeal case of **John Siphon Magagula v Standard Bank of Swaziland, Appeal Case No.17/2001** where the Appellant failed to prepare and lodge the record of appeal with the Registrar of the High Court within two months, the Appellant gave notice that it would apply in terms of Rule 17 for condonation for failure to lodge the record timeously. The Respondent opposed the application. In that case the Learned Justice **Tebbutt JA** stated that: *“In deciding whether to grant condonation, the Court exercises a judicial discretion considering such factors inter alia as the degree of lateness, the explanation therefor and the prospects of success in the appeal”*. The Learned Justice continued to state: *“It is unnecessary to decide if the delay was an inordinate one or whether the explanation for it is reasonable or not because of more importance is the question of his prospects of success on appeal.”* On the strength of the prospects of success on appeal, the court granted the Appellant the application for condonation. In our case we have been denied the opportunity to examine the prospects of success on appeal.

[20] The Court was also referred to the Court of Appeal Case of **Shell Oil Swaziland (Pty) Ltd and Motor World (Pty) Ltd t/a Sir Motors, Appeal Case No. 23/2006**. It is a case dealing *inter alia* with whether a deponent to an affidavit was properly authorized to do so. The Learned Judge in that case made very interesting statements on technical issues as opposed to procedural aspects. The Learned Judge quoted with approval a statement in **Nelson Mandela Metropolitan Municipality and others v Greyvenouw CC and Others 2004 (2) SA 81 (SE)** to the effect that: “*the court should eschew technical defects and turn its back on inflexible formalism in order to secure the expeditious decisions of matters on their real merits.*” In my view the case itself and the good statements are distinguishable and not applicable to the matter before this court.

[21] In the present case it is clear that:

21.1 the Appellants failed dismally to comply with Rule 30 to provide the record within the time limits. The record was provided four months late.

21.2 Appellant made the application for condonation after receipt of the notice of objection from the Respondent.

21.3 The Appellants did not make an application for extension of time in terms of Rule 16;

21.4 When the Appellants failed to file the record timeously, the Respondent was entitled to regard the appeal to have been abandoned in terms of Rule 30 (4);

21.5 The Appellants in their application for condonation failed to make a good cause to be excused from non compliance;

21.6 The Appellants did not show prospects of success on appeal.

[22] For the reasons set out above, it is ordered as follows:

22.1 The application for condonation is dismissed;

22.2 The appeal is deemed abandoned and accordingly dismissed.

22.3 The Appellants to pay the costs of the Respondent.

K. M. NXUMALO
ACTNG JUDGE OF APPEAL

I agree

J. S. MAGAGULA
ACTING JUDGE OF APPEAL

I agree

C. MAPHANGA
ACTING JUDGE OF APPEAL

For the Appellants: M. Mabila

For the Respondent: S. Hlophe