



IN THE SUPREME COURT OF SWAZILAND
JUDGMENT

Civil Appeal Case No. 7/2016

In the matter between:

THANDEKA MAZIYA
NTOMBIFUTHI ZIKALALA

1st Appellant
2nd Appellant

And

SIPHESIHLE MBATHA
MASTER OF THE HIGH COURT
ATTORNEY GENERAL
PUBLIC SERVICE PENSION FUND

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent

Neutral citation: *Thandeka Maziya and Another vs Siphesihle Mbatha and Three Others (5/2016) [SZSC] [2017] 19 (29th May, 2017)*

Coram: **DR. B J. ODOKI JA**
R. CLOETE JA
S.B. MAPHALALA JA

Heard: 4th April, 2017

Delivered: 29th May, 2017

Summary: *Civil Procedure – Application for condonation of the late filing of the record – Applicants’ attorney was not in attendance when the matter was called – In view of the attorney’s default in appearance the court heard Respondents’ attorney – court rules in favour of the Respondents – the court dismisses the Application and the Appeal to be deemed to be abandoned with costs.*

JUDGMENT

S.B. MAPHALALA JA

[1] On the 5th July, 2018 the 1st Appellant filed a Notice of Motion for prayers in the following terms:

- 1. In so far as it may be necessary, the late filing of this condonation application by the Appellants is hereby condoned.**
- 2. The Appellants are hereby condoned for their late filing of the record of proceedings of the High Court so that the appeal could have been enrolled and prosecuted in the May 2016 session of the above Honourable Court.**
- 3. Ordering that costs be costs in the appeal, save in the event that of it being opposed, in which event the costs of opposition are to be borne by the Respondents.**
- 4. Further and/or alternative relief.**

[2] The Founding Affidavit was filed in support of the said Application outlining facts of the matter. Annexure “A” being Notice to Appeal before this court is filed in support thereto. Annexure “B” being letter from the 4th Respondent is filed thereto.

[3] The 1st Respondent opposed the Application and filed an Answering Affidavit raising points **in limine** and the merits of the Application.

[4] The appeal was called before this Court on the 4th April, 2017 where Counsel for the Appellant was not in attendance and that of the Respondent Mr. Z. Magagula appeared. In view of the non attendance of the Appellant at 9.30 a.m. the Court proceeded with the matter hearing the attorney for the Respondents.

The background

[5] By Notice of Motion the Appellants sought the following relief from the court **a quo:**

1.1 **That the winding up of the estate of the late Freddy Zikalala and the processing of his pension benefits be stayed pending the final determination of the application and the paternity tests results if so ordered.**

1.2 **That the contested paternity of the 1st Respondent's children be determined by medical (DNA) tests at the Mbabane Clinic or such other facility as may be agreed between the 1st Respondent and the Applicants.**

1.3 **That the costs of the application be paid by the 1st Respondent.**

[6] The Appellants' Application was grounded upon the deceased, **Freddy Zikalala** alleged failure to acknowledge the children as his. The deceased, (**Freddy Zikalala**) who was, during his life time a Police officer, was the father of the two minor children born out of wedlock, with the 1st Respondent.

[7] After he died the Appellants, who consist of the deceased's wife and sister then sought to prevent the 4th Respondent from considering the minor children in the pension distribution on the ground that their paternity was in doubt.

- [8] In her answering affidavit, the 1st Respondent demonstrated that the deceased had accepted paternity of the children by **inter alia** living with them at his parental home for a period of two years while 1st Respondent was at school and by never raising the issue of doubt with 1st Respondent.
- [9] It was also established that the deceased and 1st Applicant or Appellant were estranged for some time, actually until his death. It was therefore put to doubt that he would raise his doubts with her as opposed to either his mother or sister, 2nd Applicant.
- [10] The matter was called in the court **aquo** before **Justice Q.M Mabuza** who, after hearing the matter dismissed the Application with costs. In an **ex-tempore** judgment, **Mabuza J** ruled that the Applicants / Appellants had the necessary **locus standi** to institute the proceedings because they are not executors in the estate of the late Freddy Zikalala. Judgment in the court **a quo** was delivered on the 29th January, 2016 and apparently on the 8th February, 2016 the Appellant noted the appeal.

The arguments

- [11] The attorney for the 1st Respondent advanced a two pronged argument. First, that Applicant has contravened the Rules of the Supreme Court in particular Rule 6 (2) thereof. That the Appellant was enjoined to deliver the Notice of Appeal to the Registrar and also serve a copy thereof to the Respondent.

Rule 6 (2) provides: “subject to the proviso to rule 8 (1), the Appellant shall deliver such notice or cause to be delivered to the Registrar within the period in Rule 8, and shall at the same time serve a copy thereof on the Respondent” (emphasis added)

- [12] Further that Applicants / Appellants failed to comply with the peremptory Rule in that the appeal was not served on the Respondents. In this regard I am in

agreement with the 1st Respondent's contention that effectively, there is no appeal pending before this court.

[13] On the second leg of the 1st Respondent's arguments it is contended that the Applicants/ Appellants have failed to comply with Rule 16 and 17 of the High Court Rules. That in terms of Rule 16 (1) the Chief Justice or any Justice of this court may on application extend any time prescribed. An Application for extension shall be supported by the affidavit setting forth good and substantial reasons for the Application.

[14] Rule 17 provides that the court may on application and on sufficient cause shown excuse any party from compliance with any of the Rules.

[15] In terms of the Rules the Applicant is required, (to) upon realizing that she / he is not able to comply with the Rules, to make Application for the extension of time within which to file the record. It is contended for the 1st Respondent that in the present case the Appellant failed to apply for extension of time and simply blames their attorney for apparently misleading them.

[16] In my assessment of these arguments it is without question that Appellant has failed to comply with Rules 16 and 17 of the High Court Rules.

[17] In this regard I am in agreement with the Respondents' contention in paragraph 12.2 of the Answering Affidavit that if the matter is not finalized soon, the two minor children who were fathered by the deceased, during his life time, stand to suffer irreparable prejudice.

[18] Further, what the Applicant has overlooked is that pension, unlike an estate, is distributed among dependants not blood kin only. Even if the Appeal is upheld, the D.N.A. results would be academic in as far as the pension distribution is concerned.

[19] The attorney for the 1st Respondent has cited the Appeal Court cases of **Unitrans Swaziland Limited vs Inyatsi Construction Limited Civil appeal Case No. 9/1996** and that of **Johannes Hlatshwako vs Swaziland Development and Savings Bank, Civil Appeal Case No. 21/20006** to buttress his arguments.

[20] In the result, for the foregoing reasons, the Application ought to be dismissed and the Appeal be deemed to have been abandoned with costs, and it so ordered.

S.B. MAPHALALA JA

I AGREE

DR. B.J. ODOKI JA

I ALSO AGREE

R. CLOETE JA

For the Appellants: In absentia

For the Respondent: Mr. J. Magagula
Zonke Magagula & Company

