THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CASE NO. No. 491/2017

In the matter between

SBT GLOBAL EXPORTER –SWAZILAND

Applicant

(PTY) LIMITED

and

TANI LOUISE GAMA	1st	Respondent
NONHLANHLA HLATJWAYO	2nd	Respondent
DON BOSCO GININDZA	3rd	Respondent

In re:

SBT GLOBAL EXPORTER – SWAZILAND (PTY) LIMITED Appellant

and

TANI LOUISE GAMA	1st	Respondent
NONHLANHLA HLATJWAYO	2nd	Respondent
DON BOSCO GININDZA	3rd	Respondent

CORAM: MASEKO J.

FOR THE APPLICANT: Ms. H. Mkhabela

FOR THE RESPONDENTS: Mr. V. Thomo

Hearing Date: 12th October 2017

Date of Judgment: 12th December 2017

JUDGMENT

PREAMBLE: *Civil Procedure – Interlocutory Application for condonation for late filing of record from Magistrates Court – Procedure in terms of Rule 50 whether complied with – procedure in terms of Rule 27 whether complied with – what constitutes a Court Record in civil proceedings where no evidence led. Held that Applicant failed to file timeously within provision of the Rules – application therefore dismissed with costs.*

INTRODUCTION

[1] On the 9th October 2017 an interlocutory application was moved before this Court for the following Orders:

1) Condoning the Applicant's late filing of the Record from the Magistrates Court in this matter;

2) Granting the Applicant leave and the extension of time in prosecuting the appeal in this matter and extending to a period which the above Honourable Court may deem appropriate.

3) Such further and/or alernative relief.

[2] In support of this application Attorney H. Mkhabela filed a Founding Affidavit and Mr. Mxolisi Simelane the General Manager of the Applicant file a confirmatory affidavit.

[3] This Application is brought as a result of the failure by the Applicant to prosecute an appeal from the Magistrate's Court as stipulated in terms of ORDER NO. XXXX(4) OF THE MAGISTRATE'S COURT RULES which provides as follows:-

> 'The party noting an appeal or cross-appeal shall prosecute it within such time as may be prescribed by the rule of the Court of Appeal and, in default of such prosecution, the appeal or cross-appeal shall be deemed to have been lapsed unless the High Court shall see fit to make an Order to the contrary.'

[4] The procedure is that all appeals from the Magistrate's Court come before this Court. The corresponding rule in the High Court Rules dealing with appeals from the Subordinate Courts is Rule 50 (1) of the High Court Rules which provides as follows:-

‘50 (1) An appeal to the Court against the decision of a Subordinate Court in a civil matter shall be prosecuted within six weeks, or within such extended period as the Court on due application by any of the parties may allow, after noting of such appeal, and unless so prosecuted it shall be deemed to have lapsed.’

It is necessary to understand the whole background of this matter in order to understand the issues giving rise to this matter going forward. The history is as outlined hereunder.

APPLICATION BEFORE PRINCIPAL MAGISTRATE F. NHLABATSI

[5] On the 11th November 2016, the Respondents launched an application under a Certificate of Urgency before the Mbabane Magistrates Court against the Applicant for the following orders:-

1) Condoning the non-service of this application and the non - observance of the rules of Court as far as they relate to forms, service and time limits and the matter be heard as one of urgency;

2) Directing the 1st Respondent to furnish Applicant with the Bill of Lading and Freight Bill from the Shipping Company;

3) Directing the Respondent to release the motor vehicle being two Honda Fit, Chassis No. GD1-1566221, Yellow in colour and Model LA-GD1;

4) Costs of suit;

5) Further and/or alternative relief.

[6] In support of this application the 1st Respondent filed a Founding Affidavit supported by the Confirmatory Affidavits of the 2nd and 3rd Respondents respectively.

[7] The facts which are common cause in this matter are that during the month of July 2016 the 1st, 2nd and 3rd Respondents purchased two Honda Fit motor vehicles from the Applicant, a motor vehicle dealer, importing such vehicles from its principal company in Japan.

[8] On or about the 18th July 2016 First Respondent, Tani Louise Gama, made payments for these motor vehicles at Respondent's principal place of business at The Gables, Ezulwini in the Hhohho Region.

[9] On the 20th September 2016 the Respondents obtained the import permits for the motor vehicles. Around the 10th October 2016 the Applicant verbally informed the Respondents that the motor vehicles had been shipped from Japan into Swaziland Dry Port Matsapha and were awaiting customs clearances before they could be offloaded in the presence of the owners.

[10] It appears that ever since the vehicles were reported by the Applicant to be in Matsapha, the Respondents had on numerous occasions visited the Applicant's office at The Gables to obtain the relevant import documents to enable them to pay Swaziland Revenue Authority dues as well as other related importation documents, however these documents could not be provided by the Applicant.

[11] It is common cause that the failure by the Applicant to supply and/or provide the Respondents with these documents eventually led to the institution of the application proceedings on Certificate of Urgency on the 11th November 2016 as outlined above. These proceedings were at the Mbabane Principal Magistrate Fikile Nhlabatsi.

[12] This application came before **Her Worship Principal Magistrate Fikile Nhlabatsi** in November 2016 she delivered her judgement on the 22nd March 2017 and granted the following orders in favour of the Respondents:-

1) The Respondent is ordered to release and hand over the shipping documents with immediate effect;

2) The Respondent is directed to pay costs of suit.

It was on the basis of this judgement that the Applicant appealed to this Court by Notice of Appeal filed with the Registrar of the High Court and bearing stamp of the 3rd

April 2017. This appeal was allocated the High Court Case No. 491/1017.

[13] The said notice was also saved on the Clerk of Court (Civil) Mbabane Magistrate's Court and on the Respondent's Attorneys on the 3rd April 2017. For the sake of completeness it is important that I recite the Notice of Appeal as filed before this Court, it reads thus:-

> 'BE PLEASED TO TAKE NOTICE that the Appellant hereby note an appeal to the above Honourable Court against the decision and/or judgement and/or ruling of the Magistrate's Court with the Clerk stamp dated the 22nd March 2017 under Case Number 2476/2016 on the following grounds:-
>
> 1) The Court a quo erred in law and in fact in ordering the Appellant to release and hand over shipping documents with immediate effect.
>
> The Court failed to put into consideration the submissions by the Appellant that it was not a

shipping company and had not shipped any goods.

2) The Court a quo erred in law and in fact in capturing the background of the matter in its paragraph 2 (two) wrongly as it is misleading, by stating that the Respondents paid the costs and charges of importing the said motor vehicles.

The Court failed to put into consideration the evidence of Appellant where it stated that the costs of importing the vehicles are outstanding to the shipping company and the Respondents failed to join it in the proceedings.

3) The Court a quo erred in law and in fact in capturing the background of the matter in its paragraphs 5 (five) that one vehicle was released to the 3rd Respondent and that the Appellant failed to state the terms at which it was released to him. The Court failed to put into consideration Appellant's Answering

Affidavit paragraph 16 at Page 24 of the Book of Pleadings.

4) The Court a quo erred in law and in fact in directing the Respondent to pay cost of suit. There was no substantive arguments on the issue of costs at the hearing of this matter. Even on their heads of argument they are silent on the issue of costs. There is no justification for the granting of costs in this matter.'

[14] On the 18th April 2017, the Respondents filed their Notice of Intention to Oppose the Appeal. This notice was served on the Applicant on the 27th April 2017.

I must point out this very important factor of this case. From the 3rd April 2017 until they filed the Record of proceeding of the Court *a quo* on the 11th August 2017, the Applicant did absolutely nothing to prosecute the appeal. This was a period of at least four (4) full months from the time of the filing of the Notice of Appeal and the filing of the Book of Pleadings containing the Record of

Proceedings of Principal Magistrate Fikile Nhlabatsi. The period of six (6) weeks as stipulated in terms of Rule 50 (1) of the Rules of this Court has long lapsed by the time the Applicant filed the Book of Pleadings. To be precise the period of six weeks lapsed on the 25th May 2017. In fact these weeks are calculated on the basis of Court days excluding weekends and public holidays.

[15] I must point out that the Applicant filed the Book of pleadings containing the Record of Proceedings of the Court a quo on the 11th August 2017 as a reaction to the application that had already been filed by the Respondents on the 27th July 2017 and set down for hearing on the 18th August 2017. This application was for the declaratory order and the prayers reads as follows:-

1) Declaring the appeal noted by the Respondent to have been abandoned and/or lapsed for failure to prosecute per the Rules of Court;

2) Granting costs of this application;

3) Granting such further and/or alternative and/or competent relief.

[16] This application was served on the Applicant on the 28th July 2017 and a Notice of Intention to Oppose the Declaratory Order was served on the Respondent's Attorneys on the 8th August 2017. I must point out further that the Applicant filed the Book of Pleadings containing the Record of Proceedings of the Court a quo without seeking and obtaining condonation and/or extension of time in terms of Rule 27 of the Rules of this Court. This therefore was a gross violation of the rules of this Court an irregular step.

[17] It was only on the 25th September 2017 that this Court advised the Applicant leave to file an application for condonation for the late filing of the Record of Proceedings of the Court a quo extension of time for the non-prosecution of the appeal within the prescribed period. This Court advised Counsel for Applicant to file this

application because it is necessary and in accordance with Rule 27 that such is done. Otherwise Counsel for Applicant wanted to argue the Declaratory Order application as if all was well in terms of compliance with the Rules of Court yet this was not so.

[18 The issue before this Court is whether the Applicant has advanced substantial and compelling reasons for this Court to grant the condonation, extension of time and leave to prosecute the appeal which the Respondents believe has lapsed and/or abandoned after the lapse of the period of six (6) weeks as per Rule 50 (1) of the Rules of this Court.

[19] In its Founding Affidavit for the Condonation Application, deposed to by Attorney Ms. H. Mkhabela, the explanation and reasons for the delay in filing the Record of Proceedings of the Court a quo resulting in the non-prosecution of the appeal within six (6) weeks mandatory

period are stated in Paragraphs 3 – 12 of the Founding affidavit reads as follows:

‘3.

A notice of Appeal was registered in the above Honourable Court around the 3rd April 2017.

4.

The Respondents duly served their Notice of Intention to Oppose on or around the 26th April 2017.

5.

Thereafter, we had to access the record from the Court file, which was also a process and was eventually handed a copy of His Worship Nhlabatsi’s notes sometime in May 2017 by the Court Clerk identified as Magongo.

6.

After receiving the Notes we had to identify a professional transcriber to transcribe the Record of the Magistrate’s Court. The Transcriber Gugu Dlamini of Mbabane in the Hhohho District of Swaziland advised that the Record was going to be ready by mid June 2017 as she had a large working load.

7.

I duly advised the Applicant that the Transcriber did not deliver the Record by the promised time and upon approaching her during the end of June 2017 she indicated that she was still attending to the Record. As a result I lost confidence in her and I ended up seeking the services of another Transcriber, Kholiwe Nhlabatsi in the beginning of July 2017.

8.

She also complained that she had a lot of work but she was going to make it available within a reasonable time. Consequently, the Transcriber only made available to us the Record on the 7th August, 2017, which we took to the

Clerk of Court in the Magistrates Court Mr. Magongo and he approved to be correct. I requested that he stamp it but he said the stamp was not required.

9.

I respectfully submit that the delay in filing the Record not been in wilful default of the Rules and was sincerely caused by circumstances beyond my control. I could not transcribe the Record myself as I wanted to exercise transparency in the compilation.

10.

It is my respectful submission that the delay caused cannot be described as inordinate. It is only fair and just that the issues raised in the appeal are properly canvassed hence we had to work around the clock to ensure the filing of the Record.

11.

The main reason for the current application before the above Honourable Court in which the Applicant prays for the extension of the period of prosecution of the appeal as it is deemed to have lapsed six weeks after the 3rd April, 2017, is that our office have engaged the office of the Registrar several times in May 2017. The main purpose of engaging the Registrar was to secure the hearing date in respect of this matter.

12.

Consequently sometime or about Friday the 15th September 2017 the Registrar Mrs. Mabila advised me that she was going to allocate the appeal matter a date this current session after the file returns from Court, as there was a judge now who had been allocated this matter.'

[20] Again this background as outlined above I must point out that the period taken by the Applicant to file the Record of

Proceedings is unreasonably long. The Notice of Appeal was filed on the 3rd April 2017 and the Record was filed on the 11th August 2017 and way out of time when considering the six (6) weeks mandatory period as per Rule 50 (1) of the Rules of this Court.

[21] It is common cause that in motion proceedings in the Subordinate Courts, High Court and the Supreme Court the Court Record consist of only the pleadings and the judgment of the Court which is being appealed against. There is no need for a transcript let alone to engage a Transcriber because no oral evidence was led before the Court *a quo*.

[22] It is surprising that the Applicant's Counsel states that she had to get a Transcriber to transcribe the notes from the Principal Magistrate. There is a very big difference between a transcript and handwritten notes. A transcript involves the transformation of an audio recording into a typed document called the transcript.

[23] It is common cause that in the Magistrate's Court there are no recording machines that would require the transcription of a record, instead the learned Magistrates record their proceedings in the long hand and if a record has to be transmitted to the High Court on Review or Appeal it is simply typed and not transcribed. It therefore defeats logic and reason why Applicant's Attorney sought to transcribe handwritten notes of the Learned Principal Magistrate because it's an impossible thing to do. Let alone that the handwritten notes of the Learned Principal Magistrate do not form part of the Record of Proceedings in civil matters. This is different to criminal proceedings where the oral evidence is recorded by hand, in civil proceedings, the evidence comes by way of affidavit. I reiterate that this case there was no oral evidence led before the Learned Principal Magistrate and therefore no need to even waist precious time and type the notes which ordinarily do not form part of the record.

[24] I point out that the Court *a quo* prepared a written and neatly typed judgement ready for transmission to this Court in case any of the parties wanted to appeal or lodge review proceedings. All that needed to be done was to prepare a Book of Pleadings, attach the Judgement and a Certificate from the Clerk of Court authenticating the Record. This could hardly take a day because the Learned Magistrate delivered her handwritten and neatly typed judgement on the 22nd March 2017. What makes matters worse for the Applicant is that the handwritten notes of the Learned Magistrate are only eight (8) typed pages. The question becomes how can it take four (4) months to type, **not transcribe** only eight (8) pages which are themselves not necessary for purpose of the Appeal.

[25] The question is whether this explanation as tendered by the Applicant's Counsel in paragraphs 3 – 12 as discussed above herein, adequate for purposes of granting condonation and the extension of time. I am not convinced that the reasons advanced by Applicant's Counsel are adequate to the extent that they demonstrate

or exhibit the good cause to justify this Court to grant the condonation and extension of time.

[26] Rule 27 (1) of the Rules of Court provides as follows:-

> "27 (1) In the absence of agreement between the parties, the Court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an Order of Court or fixed by an Order extending or abridging any time for doing any act or taking any steps in connection with any proceedings or any nature whatsoever upon such terms as to it seems fit.
>
> (2) Any such extension may be ordered although the application therefor is not made until after expiry of the time prescribed or fixed, and the Court ordering any such extension may make such Order as to it seems fit as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such

results flow from the terms of any order or from these rules."

(3) The Court may, on good cause shown, condone any non-compliance with those rules."

(4) After a rule nisi has been discharged by default of appearance by the Applicant, the Court or a Judge may revive the rule and direct that the rule so revived need not be served again.

[27] At no stage during the period 3rd April 2017 and 11th August 2017 did it ever occur to the Applicant to invoke Rule 27 for condonation and/or extension of time in so far as the intended prosecution of the Appeal is concerned. In fact the failure to invoke Rule 27 during that period is an indication that the Appeal was noted simply to frustrate the execution of the judgement of the Learned Principal Magistrate F. Nhlabatsi.

[28] It is my observation that the most prudent thing in the circumstances would have been to apply for the extension of time and condonation for the late filing of the Record before it was even filed. And also there was no attempt whatsoever that was made to comply with Rule 50 (4) (5) (6) and (7) which provides as follows:-

‘Sub-rule (4) The Appellant may, within four weeks after noting the appeal, apply in writing to the Registrar on notice to all other parties for a date of hearing, and shall at the same time make available to the Registrar in writing his full residential and postal addresses and the address of his Attorney, if he is represented. If he fails to do so, the Respondent may at any time before the expiry of six weeks apply for a date of hearing in the like manner. Upon such application, an appeal or cross-appeal shall be deemed to have been prosecuted.

Sub-rule (5) “Upon receipt of such an application for a date of hearing, the Registrar shall allocate a date for hearing and thereafter it shall be down as provided in Rule 57.”

Sub-rule (6) “A notice of set down of a pending appeal shall ipso facto operate as a set down of any cross-appeal and vice versa.”

Sub-rule (7) “The party who has applied for a date of hearing shall prepare and lodge with the Registrar two copies of the record as soon as is reasonably possible after applying for a date but in any event not less than fourteen days prior to the date of the hearing except with the leave of a Judge.’

[29] I point out that the provisions of Rule 50 are mandatory and have to be observed by an Appellant within the period of six weeks unless of course an application for extension

of time and condonation for non-compliance is moved in terms of Rule 27. The importance of the observance and adherence to the Rules of Court was dealt with extensively by the Supreme Court in the case of *Tasty treats (Pty) Limited t/a Trusscin and Ks Disributors (Pty) Limited t/a Build Plus Hardware.*

[30] In that judgment of OTA JA as she then was sitting with RAMODIBEDI CJ (as he then was and Moore J. as he then was concurring) where she stated the following at Pages 3 – 4 paragraphs 6, 7 and 8.

> 'It is the paramount, that the Supreme Court, the highest Court in the land, regulates its proceedings to ensure proper administration of justice. This, it can realize by insistence on strict compliance with its Rules which are a handmaid to the effective, efficient, inexpensive and expeditions dispensation of justice.
>
> This Court has in the not too distant past reiterated that its Rules have been designed to ensure the smooth, orderly and most importantly, the timely and

expeditious conduct of litigation. The timelines set down in the rules represent realistic periods within which a given step in litigation must be taken. These periods of time were not plucked out from the air. They were based upon years of experience of what can in all probability be achieved with diligence and dispatch in the absence of unforeseen eventuality (per dictum of MOORE JA in Bani Ernest Masuku vs Maqbul & Brothers (Pty) Limited & Others (Civil Appeal Case No. 25/2011).

It follows form the above, that though the Rules of this Court are not sacrosanct, they are, however, meant to be obeyed. The Court thus has a duty to enforce strict compliance with its Rules. A stopgap measure with its concomitant instability and lack of continuity, will not suffice. It is only the outright denunciation of any non-compliance or disregard of the Rules that will annihilate this problem. This has been the posture of this Court over the years.'

[31] In the Case of – *Dr. D. I. Mtshali N.O. & 2 others vs. Buffalo Conservation 97 (Pty) Limited (Supreme Court of South Africa Judgment)* Plasket AJA (Cachalia, Bosielo JJA, Lamont and Rogers AJJA concurring) stated the following at Page 10 Paragraph 37 -

> 'The approach of this Court to condonation in circumstances such as the present is well known. In *Dengetenge Holdings (Pty) Limited vs Southern Sphere Mining and Development Company Limited & Others 2013 (2) ALL SA 251 (SCA)* PONNAN JA held:
>
> > "that factors relevant to the discretion to grant or refuse condonation include :
> >
> > - the degree of non compliance;
> > - the explanation therefor;
> > - the importance of the case;
> > - a Respondent's interest in the finality of the judgement of the court below;

- the convenience of this Court and avoidance of unnecessary delay in the administration of justice."

Ponnan JA went on to quote Plewman JA in Darries vs Sheriff, Magistrates Court, Wynberg & Another 1998 (3) SA 34 SCA at 40H -41E wherein he stated that -

> Condonation of the non-observance of the Rules of this Court is not a mere formality. In all cases, some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. An Appellant should whenever he realises that he has not complied with a Rule of Court apply for condonation as soon as possible. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the Appellant's Attorney, condonation will be granted. In Applications of this sort the Applicant's prospect of success are in general an important though not decisive consideration. When an application is made

for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to access the Appellant's prospects of success. But the Appellant's prospects of success is but one of the factors relevant to the exercise of the Court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules had been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be.'

[32] Plasket AJA went on to quote Steyn CJ at Pages 140 – 141 in the case of Salooje and Another NNO vs Minister of Community Development 1965 (2) SA 135 (A) where he stated as follows:-

'I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the

> Attorney. 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 needed. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations of *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the Attorney. The Attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.'

[33] In summary, I re-iterate therefore that I have not found reasonable and adequate explanation and/or reasons why

I should grant this application in the face of the flagrant disregard of the Rules of this Court by the Applicant and/or their Counsel.

I state that no good cause has been shown by the Applicant and/or their Counsel why this application for condonation and extension of time should be granted.

[34] There is no plausible explanation why the Record of Proceedings of Principal Magistrate Nhlabatsi was not filed timeously. Further there is no good cause shown by Applicant and/or their Counsel why this application (for condonation and extension of time) was not filed before the expiry of the six (6) weeks period so as to be afforded the condonation and extension of time to file the record at a later date if found to be justified and deserving.

There is no good cause shown by the Applicant and/or their Counsel why there was no strict adherence to the provisions of Rule 50 as extensively discussed above. No proof of communication with the Registrar in terms of Rule 50 was ever attached to these proceedings. Only bare

allegations are made and unsupported by a confirmatory affidavit of the Registrar. In any event even if the Registrar had filed a confimatory affidavit to Applicants allegations that they contacted her, same would still be inadmissible owing to the clear guidelines as laid down in Rule 50 on how you go about prosecuting a civil appeal from the Magistrates Court.

[35] These proceedings in terms of Rule 50 are mandatory and vary important and provide extensive guidance on how to prosecute the appeals from the Subordinate Court and they must be observed and adhered to at all material times by litigants.

[36] I point out that there is no good cause shown why there was a delay in filing a Book of Pleadings, which contains the Notice of Motion, Founding Affidavits, Notice of Intention to oppose, Answering Affidavits, Replying affidavits, Applicant’s Heads of Arguments (note that there is no Respondent’s Heads in the Book compiled by

Counsel H. Mkhabela for Appellant) the judgement and the eight (8) pages Principal Magistrates notes. All of this amounts to eighty-four (84) pages.

[37] Lastly, there is no good cause shown why typing eight (8) pages notes of the Court *a quo* was necessary in the circumstances and why typing these notes was disguised as a transcription. Even if it was a transcription of eight pages it could never take four months to transcribe such a very short record. According to Counsel for Applicant this was the sole and major cause of the delay in filing the record and possibly prosecuting the appeal timeously. I cannot accept this explanation, it is not adequate and consequently no good cause has been shown why this application should be granted.

[38] In the premises I accordingly make the following orders:-

1) The application in term of prayers 1 and 2 is hereby dismissed;

2) The Applicant is ordered to pay costs on the ordinary scale;

3) The Respondents are granted leave to set down the application for the Declaratory Order.

It is so ordered.

NKOSINATHI MASEKO
JUDGE OF THE HIGH COURT