**IN THE SUPREME COURT OF SWAZILAND**

**JUDGMENT**

HELD AT MBABANE Appeal Case No. 69/2015

In the matter between:

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| **THEMBA NZUZA** | **1st Applicant** |
| **JABU ZWANE (Born Nzuza)** | **2nd Applicant** |
| **JOYCE DUBE (Born Nzuza)** | **3rd Applicant** |
| **NOMSA MKHOMBE (Born Nzuza)** | **4th Applicant** |
| **NELILE MOTSA (Born Nzuza)** | **5th Applicant** |

And

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| **ENOCK MANDLA NZUZA** | **1st Respondent** |
| **VUSI NXUMALO** | **2nd Respondent** |
| **THE REGISTRAR OF DEEDS** | **3rd Respondent** |
| **C. J. LITTLER & COMPANY** | **4th Respondent** |
| **THE MASTER OF THE HIGH COURT** | **5th Respondent** |

*In Re:*

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| **THEMBA NZUZA** | **1st Appellant** |
| **JABU ZWANE (Born Nzuza)** | **2nd Appellant** |

**JOYCE DUBE (Born Nzuza)** **3rd Appellant**

**NOMSA MKHOMBE (Born Nzuza)** **4th Appellant**

**ALZIMA DLAMINI (Born Nzuza)** **5th Appellant**

**NELILE MOTSA (Born Nzuza)** **6th Appellant**

And

**ENOCK MANDLA NZUZA** **1st Respondent**

**Neutral Citation:** Themba Nzuza and 4 Others v Enock Mandla Nzuza and 4 Others (69/2015) [2017] SZSC 30 *(03 August 2017)*

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| **Coram** | **:** | M.C.B MAPHALALA CJ, S. P. DLAMINI JA, M. J. DLAMINI JA, R. J. CLOETE JA and J. P. ANNANDALE JA |
| **For the Applicants** | **:** | ADVOCATE M. MABILA |
| **For the 1st Respondent** | **:** | MR S. HLOPHE |
| **Heard** | **:** | 18 July 2017 |
| **Delivered** | **:** | 03 August 2017 |

**Summary:** *Review application in terms of S148(2) – requirement that exceptional circumstances be proved – requirements for applications for condonation – applicants failed to prove such circumstances – review applications dismissed*.

**JUDGMENT**

**CLOETE - JA**

**PROCEDURAL MATTERS**

[1] The citing of any judges who are not litigants in any proceedings before any court is irregular and as such the citing of the Judges who delivered the Judgment in this Court sitting in its Appeal Jurisdiction (for the purposes of this Judgment that Court will be referred as "the Appeal Court") is not acceptable and is not to be repeated in future. The Judges were not litigants.

[2] Accordingly the citing of such Judges is removed from the papers and the identity of the Respondents is renumbered from 1 to 5 with Enock Mandla Nzuza being the 1st Respondent and the Master of the High Court accordingly being the 5th Respondent. (For the purposes of this Judgment it is apparent that the only Respondent referred to in the Pleadings is Enock Nzuza and he will be referred to as "the 1st Respondent" and the Applicants will be referred to as such).

**BACKGROUND**

[3] Applicants and the 1st Respondent were locked in a family fued relating to the assets of an estate culminating in an action in the High Court of Swaziland ("the Court *a quo*").

[4] Being dissatisfied with a Judgment of Her Ladyship M. Dlamini, the Applicants noted an Appeal against the Judgment on 10 November 2015 and as such the record should have been filed on or before 09 January 2016.

[5] It is common cause that the Appellants filed the Record of Proceedings on 11 April 2016 which was significantly out of time. It is further common cause that neither before nor at the time of the filing of the Record did the Applicants bring an Application in terms of Rule 16 of this Court for an extension of time to do so nor for condonation for the late filing in terms of Rule 17.

[6] Immediately upon receipt of the Record, the 1st Respondent served a Notice on the Applicant's Attorneys objecting to the late filing and clearly as a consequence thereof the Applicants belatedly filed a Notice of Application for Condonation in terms of Rule 17 of the Rules of this Court for the late filing of 1st Respondent and that was the Application

which was before the Appeal Court and which was heard by the Appeal Court on the papers before it.

[7] It needs to be recorded that neither the Applicants nor the 1st Respondent filed any Heads of Argument as is required in terms of Rule 31 of the Rules of this Court relating to the Application for Condonation in terms of Rule 17, and neither party filed any papers seeking condonation of their failure to do so.

[8] The Application for Condonation was then heard by the Appeal Court on the papers before it and both parties were accorded the right to address that Court on the Application on the papers before it.

[9] After hearing argument from both sides the Court found in its Judgment that the Applicants had failed to comply with;

1. Rule 30 in that the Record of Proceedings Appeal was filed four (4) months out of time.

2. Rule 16 (2) in that instead of writing letters to the Registrar, none of which were apparently copied to the 1st Respondent, the Applicants totally ignored the Rules of Court and failed to bring an

Application for an extension of time within which to file the Record.

3. Rule 17 in that neither before nor at the filing of the Record did the Applicants bring an Application for Condonation for the said late filing and only filed such Application after the objection which had been filed by the 1st Respondent.

4. Rule 31 (1) and (2) in that no Heads of Argument nor a Bundle of Authorities had been filed with regard to the Condonation Application by either party.

5. As no Heads of Argument were filed by the Applicants, the Applicants only submitted, at the Order of the Appeal Court, a list of authorities relating to the submissions made from the Bar.

6. That the Applicants failed to comply with the requirements of Applications for Condonation in that the Application failed to make out good cause for it to be excused from non-compliance and most importantly that the Applicants did not show any prospects of success on Appeal in the documents before the Appeal Court.

(All of these will be dealt with in detail below)

[10] The Appeal Court accordingly dismissed the Application for Condonation with costs and held that the Appeal was deemed to be abandoned in terms of Rule 30 (4) and accordingly dismissed the Appeal.

[11] Being dissatisfied with that Judgment, the Applicants have brought an Application in terms of Section 148 (2) of the Constitution of Swaziland to this Court, sitting in its review capacity, to seek the review and setting aside of the Judgment of the Appeal Court and allied relief. It should be mentioned that both parties initially consented to an Order in terms of Prayer 7 of the Notice of Motion and such Order was made accordingly.

[12] Accordingly, this Court is duly constituted in terms of Section 148 (2) of the Constitution in its review capacity and as such only has the jurisdiction to hear the matter based on the Judgment of the Supreme Court so as to decide whether to in anyway interfere with that Judgment.

**SUBMISSIONS BY THE APPLICANTS**

[13] It is to be recorded that in the course of the address of Counsel for the Applicants, he made the following specific concessions;

1. This Court was sitting in its review jurisdiction and that all this Court could as such consider was the Judgment and findings of the Appeal Court relating to the matters, papers and arguments which were actually before them at the hearing of the matter;

2. That the Applicants had not brought an application for extension of time for the late filing of the Record in terms of Rule 16 and conceded that the filing of the record was indeed out of time;

3. That there was substantial non-compliance with the Rules of Court and that the required averments relating to the prospects of success in the Application for Condonation were not dealt with in the papers before the Appeal Court;

4. That the Attorneys of the Applicants had acted in a manner which was grossly negligent, that the matter had been badly prosecuted and as such that the Applicants had an alternative remedy in that they would be able to recover damages from the said Attorneys.

5. That he could not fault the reasoning of the Judges in their Judgment in the Appeal Court save and except that his contention was that there had been a gross injustice as a result of the Appeal Court not looking into the merits of the matter themselves, despite the papers before that court relating to the condonation application not dealing with the subject.

[14] The Appeal Court should not have decided the matter on technical issues and that it had a duty to itself, in the absence of any averment in the papers relating to prospects of success, have interrogated the merits of the matter in the papers not forming part of the Application for Condonation and come to its own conclusion whether the Applicants prospects of success were good or not and this in his view constituted a grave injustice and as such an exceptional circumstance giving rise to this Court being directed to review the Judgment of the Appeal Court.

[15] That the gross negligence on the part of the Attorney should have been cured by mulcting the Applicants with costs.

[16] As his authority he referred the Court to the matter of **Samuel Zambia Maphanga v Sikelela Dlamini N. O and Two Others, Civil Appeal No. 26/2006**. This Judgment was fully dealt with in the Judgment of the Appeal Court but will be referred to again below. See also the Shell Oil case referred to in [35] below.

[17] He accordingly prayed for an Order in terms of the Notice of Motion.

**SUBMISSIONS BY THE 1ST RESPONDENT**

[18] Mr Hlophe indicated that he had raised a point in *limine* in his opposing papers relating to the very point that the Applicants were seeking to canvas and argue matters which were not in the papers before the Appeal Court relating to the Application for Condonation by the Applicants.

[19] That there had been no compliance with the Rules of this Court as found by the Appeal Court and that the current Application for review was an abuse of the Court process.

[20] That there were no exceptional circumstances proven by the Applicants which would militate for this Court to in anyway review or tamper with the Judgment of the Appeal Court.

**THE LAW AND THE CASE LAW**

[21] This matter falls to be dealt with in terms of the provisions of Section 148 (2) of the Constitution and Rules 16, 17, 30 and 31 of the Rules of this Court as set out in the Judgment of Appeal Court.

[22] 1. As regards Sections 148 (2) of the Constitution, and as conceded by the Applicants, this Court was sitting in its review jurisdiction in terms of the Section which states that;

> ***"The Supreme Court <u>may review any decision made or given by it</u> on such grounds and subject to such conditions as may be prescribed an act of Parliament or Rules of Court"*** (my underlining)

2. It is trite that there is neither an Act of Parliament nor Rules of Court as referred to in the Section but the concept has been fully conceptionalised and expanded upon through the jurisprudence of this Court and a number of well documented Judgments have been handed down in that regard, sufficient to say that any Application for review before this Court must show "exceptional circumstances" and by reference to the landmark case of **President Street Properties (Pty) Limited v Maxwell Uchechukwu and Others, Appeal Case No. 11/2004** where it was stated that;

> ***"[15] From the above authorities some of the situations already identified as calling for judicial intervention are exceptional circumstances, fraud,***

***patent error, bias, presence of some unusual element, new facts, significant injustice or absence of effective remedy"***

3. This has been adopted and approved by this Court over and over again and in that regard see **Swaziland Revenue Authority v Impunzi Wholesalers (Pty) Limited, Appeal Case No. 06/2015, The Commissioner of Police and Another v Dallas Busani Dlamini and Others, Appeal Case No. 39/2014, Mntjintjwa Mamba and Others v Madlenya Irrigation Scheme, Appeal Case No. 37/2014.**

[23] As regards the provisions of Rule 16, it is trite that an Application for an extension of time within which to file any documentation referred to in the Rules or to undertake any act in terms of the Rules should be brought as soon as it comes to the attention of the relevant party that it is out of time and must be supported by an Affidavit setting forth good and substantial reasons for the delay. It is further trite that this Court has and will grant such extensions as may be necessary to afford the completion of the filing of the relevant documents or completion of the act required on good cause shown.

[24] As regards the provisions of Rule 17, there are a plethora of Judgments of this Court which provide what the absolutely minimum requirements are for an Applicant to place before the Court hearing the matter and in that regard;

***1.*** In **Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA)**, adopted with approval by this Court in various Judgments including **Jabulani A. Soko v Ngwane Mills (Pty) Limited, Appeal Case No. 34/14** it was stated that:

> ***"It is generally accepted that condonation is not to be had merely for the asking. …***

***2.*** In the matter of **Johannes Hlatshwayo v Swaziland Development and Savings Bank, Civil Case No. 17/2016,** adopted with approval by many Judgments of this Court including the **De Barry** matter referred to below, it was stated that:

> ***"It requires to be stressed that the whole purpose behind Rule 17 of the Rules of this Court on condonation is to enable the Court to gauge such factors as (1) the degree of delay involved in the matter, (2) the adequacy of the reasons given for the delay, (3)***

***the prospects of success on appeal and (4) the Respondent's interest in the finality of the matter."***

***3.*** In the matter of **Simon Musa Matsebula v Swaziland Building Society, Civil Appeal No. 11 of 1998** in which Steyn JA stated the following: ***"It is with regret that I record that practitioners in the Kingdom only too frequently flagrantly disregard the Rules. Their failure to comply with the Rules conscientiously has become almost the Rule rather than the exception. They appear to fail to appreciate that the Rules have been deliberately formulated to facilitate the delivery of speedy and efficient justice. As was pointed out in Salojee vs The Minister of Community Development 1965 92) SA 135 at 141, "there is a limit beyond which a litigant cannot escape the results of his Attorney's lack of diligence". It follows therefore that if clients engage the services of practitioners who fail to observe the required standards associated with the sound practice of the law, they may find themselves non-suited. At the same time the practitioners concerned may be subjected to orders prohibiting them from recovering costs from the clients and having to disburse these themselves."***

***4.*** In the matter of **Arthur Layani Khoza v ABSA Bank Limited, LC Case No. JS812/2012** which was approved in the review proceedings in the **De Barry** matter, referred to below, the following was found and approved;

***4.1*** In **Melane v Santam Insurance Co. Ltd 1962 (4) SA 531 (A) at 532C-F, the Court held that "*without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay an Application for Condonation should be refused"***;

***4.2*** ***"However, even if this Court is inclined to consider the merits of the matter, it is clear from the Application for Condonation that the Applicant makes out no case in respect of the prospects of success, except for a bold statement that he has good prospects of success. <u>That case must be made out in the Condonation Application and the papers filed in support thereof</u>".*** (My underlining) See **Rustenburg Gearbox Centre v Geldmaak Motors CC 2003 (5) SA 468.**

***5.*** All of the above were adopted and approved in the matter of **Anita Belinda De Barry v A. G. Thomas (Pty) Limited, Appeal Case No. 30/2015** in the original Judgment of this Court and which was the subject of review by this Court in terms of Section 148 (2) of the Constitution and which Judgment was unanimously approved by a full bench of this Court in the said review proceedings.

[25] As regards Rule 30 (1), which is peremptory, unequivocal and unambiguous, it orders the Appellant to prepare the Record of Appeal within two (2) months of the date of noting the Appeal and to lodge a copy thereof with the Registrar of the High Court for verification as correct.

[26] As regards Rule 30 (4), it reads as follows:

> ***"Subject to Rule 16 (1), if an Appellant fails to note an Appeal or to submit or resubmit the record for certification within the time provided by this Rule, the Appeal shall be deemed to have been abandoned."***

[27] The issue relating to the consequences of the deemed abandonment have been discussed, without any final Judgment having been based on the arguments in the matters of **Dr. Sifiso Barrow v Dr. Priscilla Dlamini, Appeal Case No. 09/2014** and **Thandi Mkhwatshwa v Nomsa Stewart and Others, Appeal Case No. 3/2016**. In my humble view the ordinary literal meaning of the words must be applied to this section in which event the consequences are simply that;

1. An Applicant is entitled to bring an Application for an extension of time within which to file the record in terms of Rule 16 (1), as a matter of absolute right; and

2. If he fails to follow his rights in terms of Rule 16 (1), the Appeal is then considered to be abandoned which has the effect of actual abandonment and of reducing the matter to a state of final *res judicata*.

[28] The provisions relating to Rule 31 need not be canvased in any detail, sufficient to say that it was conceded by both parties that neither of them complied with the Rule relating to the filing of Heads of Argument and Bundles of Authority relating to the Application for Condonation.

**FINDINGS OF THIS COURT**

[29] The notion that this Court (and the Appeal Court) should simply ignore the Rules of this Court, the flagrant and contemptuous disregard of the Rules and an apparent total disregard for the plethora of decisions of this Court and practice devolved over many years, is simply unthinkable.

[30] The Applicants' position that the Appeal Court should itself have delved into the merits of the matter outside of the papers before it relative to the Application for Condonation is preposterous to say the least and is clearly the last desperate attempt at a second bite of the cherry in a matter which

has been totally butchered by a legal practitioner. To find that a Court hearing such a matter should itself do research on the merits of the matter without having heard either side on the issue is simply wrong and would lead to absurd consequences.

[31] When it had the opportunity to do so to deal with the prospects of success in its founding papers in the Application for Condonation, as is required in terms of our established Law, this is what the Applicants told the Appeal Court;

> ***"18 Lastly, I am advised and verily believe that since this is not an Application for leave to Appeal out of time the Applicants are not enjoined to establish and/or demonstrate prospects of success on Appeal as in an Application of this nature an Applicant need only show sufficient cause for failure to comply."***

[32] Counsel for the Applicants referred this Court to the case of **Samuel Zambia Maphanga**, referred to *supra* as its authority for finding that the Appeal Court acted in such a manner which constituted an exceptional circumstance which would give this Court the right to interfere in the Judgment of the Appeal Court. With respect this very Judgment was canvassed before the Appeal Court and dealt with in the Judgment. The

rationale of this matter was clearly the warning of the Court that failure to observe the Rules of Court would result in adverse cost orders being granted against the Attorneys and was distinguishable from the current matter. As quoted at [19] on Page 17 of the Judgment by reference to **John Sipho Magagula v Standard Bank of Swaziland, Appeal Case No. 17/2001** where the Learned Judge 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 therefore 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."***

[33] The Appeal Court accordingly absolutely correctly found that the Applicants had not complied with either the Rules or the requirements for the granting of condonation.

[34] With respect, the gross negligence of the Attorney cannot remotely be said to be an irregularity perpetrated by the Appeal Court but purely was the

making of the Applicants and their legal advisors. It was in any event pointed out to Advocate Mabila who conceded that the Applicants had an alternative remedy in that they could claim any damages which they may have suffered from their legal advisor.

[35] The argument by the Applicants relating to the argument that the matter should not have been dismissed by the Court on technicalities alone as espoused in the matter of **Shell Oil Swaziland (Pty) Limited v Motor World (Pty) Limited, Appeal Case No. 23/2006,** holds no water as this matter is completely distinguishable from that matter as this matter revolved around a total disregard for the Rules, the case law and practice dictates and not what was found in that matter to relate to ***"…less than perfect procedural aspects…"***.

[36] The Applicants have not remotely established any exceptional circumstances as referred to in **President Street** and other decisions of this Court referred to *supra* and as indicated, the outlandish notion that the Appeal Court committed an irregularity by not interrogating the merits of the matter in the absence of any allegations in its founding papers, is unsustainable and rejected.

[37] In my view, the effect of the deeming provision in Rule 30 (4), as indicated *supra*, simply means actual abandonment in the absence of an Application in terms of Rule 16 (1) and as such the Order of the Appeal Court in dismissing the Appeal, in the light of the papers and submissions before it in this specific matter, is entirely consistent with the ordinary interpretation of the provisions of Rule 30 (4).

[38] All litigation matters need to reach the position of *res judicata* and with respect, that is where the current matter has found itself. The Applicants have dismally failed to convince this Court that it has the right or obligation

to interfere with the Judgment of the Appeal Court in its current review Jurisdiction, having failed to meet the stringent requirements of section 148(2) and the judgments of this Court flowing from that section. Accordingly the following Order is made:

**ORDER OF COURT**

1. The review Application of the Applicants is dismissed with costs.

2. The Judgment of the Appeal Court is upheld.

3. The Interim Order in terms of Prayer 7 of the Notice of Motion made by consent between the parties is hereby discharged with immediate effect.

**R. J. CLOETE**
**JUSTICE OF APPEAL**

I agree

**M.C.B. MAPHALALA**
**CHIEF JUSTICE**

I agree

**S. P. DLAMINI**
**JUSTICE OF APPEAL**

I agree

**M.J. DLAMINI**
**JUSTICE OF APPEAL**

I agree

**J.P. ANNANDALE**
**JUSTICE OF APPEAL**