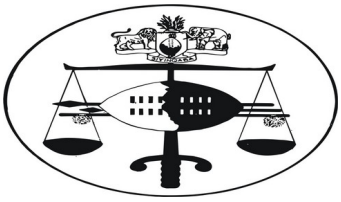

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No: 16/2017

In the matter between:

PHAKAMA MAFUCULA **APPELLANT**

And

THEMBI KHANYISILE MAZIYA (BORN BHIYA) **RESPONDENT**

Neutral citation: *Phakama Mafucula vs Thembi Khanyisile Maziya (born Bhiya) (16/2017) [2017] SZHC 50 (2017)*

Coram: **M.C.B. MAPHALALA, CJ**
DR. B. J. ODOKI, JA
S. P. DLAMINI, JA

Heard : 18 SEPTEMBER, 2017

Delivered : 20 NOVEMBER, 2017

SUMMARY

Civil Appeal: Application for condonation for the late filing of an appeal – requirements for condonation considered;

Held that the failure to lodge the appeal timeously was caused by the ineptitude of the Appellant's Attorneys, and, that this does not constitute a reasonable explanation for the delay in filing the appeal timeously;

Held further that the evidence establishes that there are no prospects of success on appeal;

Accordingly, the application for condonation is dismissed with costs, and

The appeal is deemed abandoned and it is accordingly dismissed.

JUDGMENT

JUSTICE MCB MAPHALALA, CJ:

[1] It is common cause between the parties that the respondent instituted action proceedings against the appellant on the 27th February, 2015 before the court a quo. The respondent sought an order for payment of an amount of E36, 400.00 (Thirty-six Thousand four Hundred Emalangeni) from the appellant together with interest at the rate of 9 % per annum a tempore morae as well as costs of suit. The amount claimed is in respect of dividends for 2013 and 2014 amounting to E24, 000.00 (Twenty-four Thousand Emalangeni) and E12, 400.00 (Twelve Thousand Four Hundred Emalangeni) respectively.

[2] It is not disputed that in March 2009, the respondent acquired membership of the appellant after the respondent's mother had nominated her to take her place as a shareholder in the appellant company. This was made possible in terms of clause 24 of the

appellant's Memorandum And Articles of Association read with clause 6 (h) and (l) of the appellant's Policy and Constitution.

[3] The appellant is a company duly registered and incorporated in terms of the Company laws of Swaziland and carrying on business at Mafucula area in the Lubombo region. The core business of the company is the cultivation of sugar cane. Membership of the company is open to residents of Mafucula area who agree to surrender their fields to the company for the cultivation of sugar cane. Dividends are shared between the shareholders on an annual basis.

[4] Upon becoming a shareholder, the appellant was made to sign a form for the nomination of a beneficiary on the 6th December, 2009; this form is typically completed and executed by shareholders of the appellant company. The Memorandum and Articles of Association of the Appellant Company[1] allows members to transfer all or any of their shares by instrument in writing or in any other form which the directors may approve.

[1] Clause 24

[5] It is common cause that the respondent upon becoming a member of the appellant company enjoyed all the benefits which are usually accorded to shareholders of the appellant company including receiving annual dividends from 2009 until 2012. However, sometime in 2013, the appellant unilaterally stopped remitting dividends to the respondent without any notice or written communication; she was not paid any dividends in 2013 and 2014 when the other shareholders were paid. However, she was not removed as a member prior to the cessation of the dividends.

[6] The appellant had filed the defendant's plea as well as a counterclaim contending that the respondent was not entitled to be a shareholder in the company on the basis that she was not a resident of Mafucula area as required by the Memorandum and Articles of Association of the company as well as their Constitution. To that extent the respondent was accused of acquiring membership of the company by misrepresentation that she was a resident of the chiefdom. The appellant contended that she was not entitled to the dividends she had received during the period 2009 until 2012. The appellant by means of the counterclaim sought an order for repayment of the amount of

dividends paid to the respondent totalling a sum of E15, 000.00 (Fifteen Thousand Emalangeni) together with interest at the rate of 9% per annum a tempore morae.

[7] Notwithstanding the contentions by the appellant it is apparent from the evidence that the respondent's parental homestead is within the chiefdom of Mafucula, and, that she was residing there prior to her marriage. It is further apparent that her family has fields which are used for the cultivation of the sugar cane by the appellant contributed by her mother. The respondent is well known in the area by the shareholders and when she became a member, the other members of the appellant company knew that she was married to a resident of Siteki. The appellant further allowed the respondent's mother to nominate her as a shareholder to take her place in the company.

[8] On the 22nd June, 2016 the appellant's attorneys withdrew their services as its legal representative, and, the Notice of Withdrawal was posted by registered mail to the postal address of the appellant. It is not in dispute that this postal address appears on the Memorandum And Articles of Association of the appellant as their postal address,

being P. O. Box 69, Vuvulane; accordingly, this constitutes proper service of the Notice of Withdrawal.

[9] The postal stamp on the registered certificate of posting is dated 22nd June, 2016. The Notice of Withdrawal did not only inform the appellant of the withdrawal of their legal representatives Motsa Mavuso Attorneys but it further informed them that they had to instruct new attorneys within ten days of receipt of the notice failing which judgment by default would be entered against them.

[10] The calculation of the ten day period within which the appellant had to instruct new attorneys commenced on the 22nd June 2016 when the certificate of posting was registered. The appellant only filed a Notice of Appointment of new attorneys on the 20th July 2016; the notice was served upon the respondent's attorneys on the 26th July 2016. Apparently, the appellant had failed to appoint the new attorneys within ten days of receipt of the Notice of Withdrawal. Accordingly, on the 15th July, 2016, the respondent applied and obtained judgment by default against the appellant for the payment of the sum of E36, 400.00 (Thirty-six Thousand Four Hundred Emalangeni), interest

thereon at the rate of 9% per annum a tempore morae as well as costs of suit.

[11] Notwithstanding the filing of the Notice of Appointment, the appellant's attorneys did not challenge the judgment timeously until the respondent issued a writ of execution of the judgment on the 28th July 2016. Again the Appellant waited until the 11th August, 2016 before lodging an application for rescission of the judgment which was granted on the 15th July 2016. The appellant further sought an order staying execution of the application for the rescission of the judgment.

[12] The application for rescission of judgment was brought in terms of Rule 42 (1) (a) of the High Court Rules which provides the following:

> **"42. (1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected rescind or vary:**

(a) An order or judgment erroneously granted in the absence of any party affected thereby."

[13] In the application for rescission the appellant contends that the judgment by default was granted erroneously in the absence of any party affected. The appellant makes two further contentions: Firstly, that it was never served with the Notice of Withdrawal otherwise it could have appointed new attorneys timeously to defend the proceedings. As stated in the preceding paragraphs, there was proper and lawful service of the Notice of Withdrawal upon the appellant. The second contention advanced by the appellant is that it has a bona fide defence to the claim on the basis that the respondent is not a shareholder of the appellant and, accordingly, she is not entitled to receive dividends from the company.

[14] His lordship Justice S.B. Maphalala J, as he then was, presided over the application for rescission lodged by the appellant before the court a quo. His lordship was correct in dismissing the application for rescission of judgment on the basis that the appellant had failed to

establish an error committed by the court as required by Rule 42 of the High Court Rules. His lordship had this to say:[2]

27. "In my assessment of the papers and the arguments of the attorneys of the parties rescission Application under Rule 42 stands to be set aside for failure to establish an error committed by the court. In present case this purported error, if it is one, was committed by the applicant's erstwhile attorneys and the applicant has itself complicit in its commission. In this regard I agree with the arguments of the attorney of the respondent that applicant cannot reasonably rely on the omission of its lawyers to found an error under Rule 42. The error in terms of this Rule must have been committed by the court.

28. In this regard I find the dictum in the case of Mario Masuku vs Bani Ernest Masuku and Two Others High Court Case No. 830/2010 apposite where the court in that case cited the South African case of

[2] At para 27 and 28 of the judgment

Bakoven Ltd vs G. J. Howe (Pty) Ltd 1992 (2) SA 446 at 471 (EC) per Erasmus J to the following:

> **"Rule 42 (1) (a) …. As a procedural step designed to correct expeditiously an obviously wrong judgment or order. An order or judgment is erroneously granted when the court commits an error in the sense of a mistake in a matter of law appearing on the proceedings of a court record. It follows that a court is deciding whether a judgment was erroneously granted is, like a court of appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31 (2) (b) or under the Common Law, the applicant need not show 'good cause' in the sense of an explanation for default and a *bona fide* defence. Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission. It is only when he cannot rely on an error that he has to**

fall back on Rule 31 (92) (b) (where he was in default of delivery of a notice of intention to defend or of a plea) or on the Common Law (in all other cases). In both latter instances he must show good cause." (emphasis my own)

[15] On the 30th November, 2016 the appellant lodged a review application before this Court challenging the judgment of the High Court delivered on the 15th July, 2016. In particular the orders sought were as follows:

Firstly, reviewing, correcting and/or setting aside the judgment of the 15th July, 2016. Secondly, directing that the matter be transmitted back to the High Court for trial in the main action. Thirdly, awarding costs to the applicant in the event of opposition of review proceedings.

[16] The respondent in turn filed a Notice to Raise Points of Law to the Review proceedings on the basis that the Supreme Court does not have jurisdiction to review decisions of the High Court. Indeed the Supreme Court is a creature of statute and its jurisdiction is governed

by the Court of Appeal Act as well as the Constitution of 2005; hence, the Supreme Court does not have inherent jurisdiction, and it cannot exercise jurisdiction outside the ambit of the law. Seeing that the point of law raised by the respondent was unassailable, the appellant abandoned the review proceedings and opted to file the Notice of Appeal out of time. However, the appellant did not apply for an extension of time as required by Rule 16 of the Court of Appeal Rules.

[17] The Court of Appeal Rules, 1971[3] provide for the extension of time to lodge an appeal.

> **"16. (1) The Judge President or any Judge of the appeal designated by him may on application extend any time prescribed by these rules:**
>
> **Provided that the Judge President or such Judge of Appeal may if he thinks fit refer the application to the Court of Appeal for decision.**

[3] Rule 16

(2) An application for extension shall be supported by affidavit setting forth good and substantial reasons for the application and where the application is for leave to appeal, the affidavit shall contain grounds of appeal which prima facie show good cause for leave to be granted."

[18] His lordship delivered the judgment on the 4th November, 2016; however, the appellant filed the Notice of Appeal in respect of the judgment on the 17th February, 2017. The Court of Appeal Act[4] makes provision for civil appeals from the High Court to the Supreme Court as follows:

"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.

[4] No. 74 of 1954 Sections 14 and 15

(2) The rights of appeal given by Sub-section (1) shall apply only to judgments given in the exercise of the original jurisdiction of the High Court.

15. A person aggrieved by a judgment of the High Court in its civil appellate jurisdiction may appeal to the Court of Appeal with the leave of the Court of Appeal or upon the certificate of the judge who heard the appeal, on any ground of appeal which involves a question of law but not on a question of fact."

[19] The Court of Appeal Rules of 1971 make provision for the period within which the appeal should be lodged, and, it provides the following:

8. (1) The Notice of Appeal shall be filed within four weeks of the date of the judgment appealed against:

Provided that if there is a written judgment such period shall run from the date of delivery of such written judgment:

And provided further that if the appellant is in gaol, he may deliver his Notice of Appeal and a copy thereof within the prescribed time to the officer in-charge of the gaol, who shall thereupon endorse it and the copy with the date of receipt and forward them to the Registrar who shall file the original and forward the copy to the respondent.

(2) The Registrar shall not file any Notice of Appeal which is presented after the expiry of the period referred to in paragraph (1) unless leave to appeal out time has previously been obtained."

[20] It is a trite principle of our law that whenever an appellant realises that he has not complied with a Rule of Court, he should, apart from remedying his default immediately, also apply for condonation without delay.[5] The appellant contends that the reason for the delay in lodging the appeal timeously was the filing of review proceedings in

[5] Centlivres, CJ in Commissioner For Inland Revenue v Burger 1956 (4) SA 446 (A) at 449; Grosskopf JA in Moraliswani v Mamili 1989 (4) SA (A) at 9

the Supreme Court which he subsequently withdrew. This Court was faced with a similar situation in the case of Kenneth B. Ngcamphalala v. Swaziland Development and Savings Bank and Eight Others[6]. In that case Justice M. C. B. Maphalala JA, as he then was, had this to say:

> **"10. In the condonation application, the appellant contends that the reason for the delay in noting the appeal is the initial filing of a review application . . . .**
>
> **11. It is apparent from the application for condonation that the decision by the appellant and his attorneys to pursue the review proceedings was a conscious and deliberate decision taken in disregard of the law. Sections 146 and 148 of the Constitution as well as several decisions of this Court make it clear that it is not competent for this Court to review decisions of the High Court because it is not an inferior court or tribunal. The High Court is a Superior Court as reflected in Section 139 (1) of the Constitution . . . ."**

[6] Appeal Civil Case No. 88/2012

[21] His lordship then continued to deal with the requirements for condonation:[7]

> **"12. Furthermore, the condonation application does not satisfy the requirements for such an application. It is well-settled that an application for condonation for the filing of an appeal must give a reasonable explanation for the delay in complying with the Rules of Court; in addition, there must be reasonable prospects of success on appeal. The appellant is bound to fail on both requirements: Firstly, negligence on the part of the litigant's Attorney does not constitute a reasonable explanation for the delay. Secondly, there are no reasonable prospects of success on appeal in this matter . . . ."**

[7] At para 12 of the judgment

[22] Steyn CJ in Saloojee v. Minister of Community Development[8] emphasized that the failure by an Attorney to comply with the Rules of Court does not constitute a reasonable explanation for the delay in complying with the Rules of Court. His lordship had this to say:[9]

> **" . . . it has not 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 tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations ad misericordam 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**

[8] 1965 (2) SA 135 (A) at 141

[9] Para 10 and 11

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 . . . . A litigant, moreover, who knows, as the applicant did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled, to hand over the matter to his Attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his Attorney . . . and expect to be exonerated of all blame, and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his Attorney. If he relies upon the ineptitude or remissness of his own

Attorney, he should at least explain that none of it is to be imputed to himself.''

[23] The decision in the Saloojee case has been followed and applied by this Court in many cases including Kenneth Ngcamphalala v. Swaziland Development and Savings Bank[10] as well as in the case of Johannes Hlatshwayo v Swaziland Development and Savings Bank and Others[11] as well as in Simon Musa Matsebula v Swaziland Building Society.[12]

[24] Steyn JA in the Simon Musa Matsebula case, had this to say:

"It is with regret that I record that practitioners in the Kingdom only too frequently fragrantly 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

[10] Supra footnote 6

[11] Civil Appeal Case No. 21/20016 at para 14

[12] Civil Appeal Case No. 11/1998

have been directly formulated to facilitate the delivery of speedy and efficient justice. The disregard of the Rules of Court and a good practice have so often and so clearly been disapproved by this Court that non-compliance of a serious kind will henceforth result in appropriate cases either in the appropriate procedural orders being made such as striking matters off the roll or in appropriate orders for costs, including orders for costs de bonis propriis."

[25] It is well-settled in our law that a party seeking condonation should give a reasonable explanation for the delay, and, in addition he must show that there are reasonable prospects of success on appeal.[13] It is apparent from the evidence in this matter that the failure to note the appeal timeously was caused by the appellant's Attorneys, and, this does not constitute a reasonable explanation for the purpose of an application for condonation. In addition and as discussed in the preceding paragraphs, the appellant has not shown that it has good or

[13] Jabulani Patrick Tibane v. Alfred Sipho Dlamini Civil Appeal Case No. 17/2013 at para 17; Johannes Hlatshwayo v. Swaziland Development and Savings Bank Civil Appeal No. 17/2006 at para 17 as well as OKH Farm (Pty) Ltd v. Cecil John Littler NO and Four Others Civil Appeal Case No. 56/2008 at page 15

reasonable prospects of success on appeal on the merits. In the circumstances this Court is entitled to invoke Rule 30 (4) of the Court of Appeal Rules and make a finding that the appeal is deemed to have been abandoned.

[26] Accordingly, the following order is made:

(a) The application for condonation seeking leave to appeal is dismissed.

(b) The appeal is deemed to have been abandoned in terms of Rule 30 (4) of the Court of Appeal Rules, and, it is hereby dismissed.

(c) The appellant is ordered to pay costs of suit.

M.C.B. MAPHALALA

CHIEF JUSTICE

I agree

DR. B. J. ODOKI, JA

I agree

S. P. DLAMINI, JA

For Appellant : Attorney M. S. Dlamini

For Respondent : Attorney M. Tsambokhulu