IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE

Appeal Case No. 76/2016

In the matter between:

MAJAWONKHE DLAMINI N. O.	**1st Appellant**
NOKUPHIWA DLAMINI N.O.	**2nd Appellant**
GCINA DLAMINI N.O.	**3rd Appellant**

(Estate Late Caiphas Zameya Dlamini ES 61/2008)

And

KYOPE REBECCA MOLOI N. O.	**1st Respondent**

(Estate Late Mogale Charlie Moloi – E18/1992)

LOIKI PETRUS MOLOI	**2nd Respondent**
AARON LEABA MOLOI	**3rd Respondent**
MATILDA MASESI MOLOI	**4th Respondent**
WETSI DERRICK MOLOI	**5th Respondent**
CHARLIE MOHALE MOLOI	**6th Respondent**
LANCELOT JOHN MOLOI	**7th Respondent**
MASOLONE JACQULINE MOLOI	**8th Respondent**
THE MASTER OF THE HIGH COURT	**9th Respondent**
THE REGISTRAR OF DEEDS	**10th Respondent**
THE ATTORNEY GENERAL	**11th Respondent**

Neutral Citation: *Majawonkhe Dlamini N.O & 2 Others v Kyope Rebecca Moloi and 10 Others Case No 76/2016* [2017] SZSC 06 (09 May 2017)

Coram: MCB MAPHALALA CJ, DR BJ ODOKI JA and R J CLOETE JA

For the Appellants: Mr M. Hlophe

For the Respondent: Mr S. Lukhele

Heard : 30 March 2017

Delivered : 09 May 2017

Summary: *Civil Procedure – Application for condonation for late filing of heads of argument – Requirements – Detailed explanation of reasons for delay in bringing the application and for the delay in the filing of the documents – Prospects of success – Standard of details to be set out in the papers in support of the application – Required to set out sufficient essential information that may enable the court to assess the appellant's prospects of success – Decisions of this court restated.*

JUDGMENT

CLOETE – JA

BRIEF BACKGROUND FACTS

[1] 1. The Appellants brought motion proceedings in the High Court of Swaziland against the Respondents during May 2016. For the purposes of this Judgment, it is not necessary to set out all the prayers and orders which were sought by the Appellants.

2. The matter was opposed by the 1st to 8th Respondents.

3. After the filing of Affidavits by all parties, the matter was heard in the High Court and Judgment handed down on 21 September 2016 in terms of which the Application of the Appellants was dismissed with costs by the Court *a quo*.

4. On 04 October 2016, Appellants noted an Appeal against the said Judgment and for the reasons which will follow below, I quote the grounds raised by the Appellants as follows;

4.1 the Court *a quo* erred in law and in fact in finding that the Appellants had not proved that they had complied with all material terms of the contract, especially payment of the full

purchase price and transfer costs notwithstanding the documentary evidence made available to the Court;

4.2 the Learned Judge *a quo* erred in law and in fact in failing to take into account the payments for the period 30th September 1990 to 1992;

4.3 the Court *a quo* erred in law and in fact in finding that the arrears for the year 1993 and 1994 did not represent the outstanding balance taking into consideration that the final instalment in terms of Clause 2 (c) of the contract of sale was payable on or before 30th September 1994;

4.4 the Learned Judge *a quo* erred in law and in fact by failing to find/hold that Annexure " L", being a letter written by 1st Respondent's Attorneys was an unequivocal admission that the purchase price had been paid in full.

5. The Record of Appeal was prepared and certified by the Registrar of the Supreme Court on 12 October 2016.

6. From that date until 29 March 2017 no documents of any nature were filed by either party.

7. On the afternoon of 29 March 2017, the Appellants filed and served an Application, to be heard on the date allocated for this trial namely, 30 March 2017, for an Order in the following terms;

7.1 In so far as it may be necessary, the late filing of this condonation Application by Applicants is hereby condoned.

7.2 that the late filing of the Heads of Arguments and Bundle of Authorities be and is hereby condoned.

Alternatively

7.3 that the hearing of the Appeal be and is hereby postponed to the second session of this Honourable Court.

7.4 that costs be costs in the Appeal.

7.5 further and alternative relief.

8. That was the matter heard by this Court and on which this Judgment is based.

THE APPLICATION

[2] 1. In an Affidavit attested to by the 1st Appellant he *inter alia* stated the following relating to the explanation for being out of time:

1.1 at Paragraph 17 he states

"On or about January 2017, the Applicants instructed the present Attorneys that they intend to seek the services of Counsel to handle the Appeal"

1.2 at Paragraph 18 he states:

“It is submitted that Applicant’s Attorneys had no objection on this instructions save to emphasise that there were time limits which had to be adhered to regard the filing of Heads of Arguments in readiness for hearing the Appeal”

1.3 at Paragraph 19 he states:

“ It is submitted that the Attorneys were instructed to make a copy of the file so that Applicants can personally take it to instruct an Advocate of their own choice”

1.4 at Paragraph 20 he states:

“It is submitted that, since the record of proceedings had already been filed by Applicant’s Attorneys on or about October 2016, Applicants instructed the Attorneys to

wait to hear from their Counsel and that they should not proceed with further filing of the Heads of Arguments as these were to be prepared by Counsel"

1.5 at Paragraph 21 he states:

"It is submitted that Applicants have not been able to raise sufficient funds to instruct Counsel and as such there has been long delay in filing the Heads of Arguments"

1.6 at Paragraph 23 he states:

"Applicants Attorneys have advised that the time for filing Heads of Arguments long elapsed and would have to first seek condonation and leave of Court to file the Heads of Arguments out of time. Hence the present Application"

1.7 at Paragraph 24 he states:

"It is submitted that the failure to file the Heads of Arguments was not wilful on the part of Applicants Attorneys but due to the fact that they had been instructed by Applicants not to proceed with any filing as they would engage the services of Counsel in the matter who was to prepare the Heads of Arguments"

2. As regards the issue of prospects of success, at Paragraph 26, the Deponent baldly regurgitates the exact grounds for appeal as referred to in [1] 4 above.

3. In Clause 27 he makes the following, clearly unsubstantiated statement that:

3.1 In particular, it is submitted that in computing the total payments made the Court *a quo* glaringly omitted to include the instalments made in 1990, 1991 and 1992 and as such found that there was a short fall.

4. No opposing Affidavit was filed but given the short notice of the Application, this is not surprising.

SUBMISSIONS BY COUNSEL FOR THE APPELLANT

[3] 1. Firstly, it needs to be recorded and placed on record that the Attorney for the Appellants conceded that his client's Application must stand or fall on the founding papers.

2. He submitted that the explanation by the Appellant relating to the late filing of the papers was reasonable.

3. He submitted that the Appellant had good prospects of success.

4. Despite the fact that his founding papers did not on the face of it set out any detail of any nature relating to such prospects of success, the Court nevertheless traversed various areas relating to this aspect with the Attorney concerned in the interest of justice, including:

4.1 at Page 106 of the Record and at 11.5 the Respondents stated under oath that:

“Proof of any payments made by the late Caiphas Zameya Dlamini are not attached and are requested”

4.2 at Page 112 of the Record at 27.1 the Respondent states that:

“I state that the late Caiphas Zameya Dlamini failed during his lifetime to fulfil the terms of the agreement, in particular, he failed to pay the balance of the purchase price and his estate is not entitled to the transfer of the said properties”

4.3 at Page 116 at Paragraph 2.2 and 3, Wetsi Derrick Moloi states that:

"On or about the year 2001 I accompanied my mother, the 1st Respondent to Mooihoek where we had gone to discuss the issue of the farm.

I state that the late Caiphas Zameya Dlamini confirmed that he had no money to pay the balance of the purchase price then outstanding and it was agreed that the sale agreement hitherto existing with him to cancelled and that he would have no further claim to the farm"

4.4 at Page 122 at Paragraph 6 of the Record the 1st Appellant merely states that the contents of all of the paragraphs concerned are denied and makes no effort to deal with any of the issues raised, especially that relating to any payments made by the late Caiphas Zameya Dlamini which prompted the Court *a quo* at Paragraph 26 of its Judgment at Page 139 of the Record to say **"…but there is still no tangible proof that any other amount was paid…"**, nor importantly, the allegations

made by Wetsi Derrick Moloi at Page 116 of the Record.

4.5 the Attorney conceded that the late Caiphas Zameya Dlamini had not strictly abided by the agreement relating to payments.

4.6 he requested the Application to be granted.

SUBMISSIONS BY COUNSEL FOR THE RESPONDENTS

[4] 1. The founding papers fell far short of the requirements of the law and the case law.

2. That no prospects of success had been adequately dealt with and the explanation for the delay was not of the standard required.

3. Accordingly, he requested that the Application be dismissed with costs.

JUDGEMENT

[5] 1. As regards, the Application of the Appellants relating to the requirement of giving a full explanation relating to the delay;

1.1 no explanation was given as to what steps were taken by either party between October 2016 and January 2017 when it is alleged that the Appellants indicated they were going to engage Counsel of their choice;

1.2 no explanation was given as to what steps were actually taken to engage Counsel, who the Counsel was and where he operated from;

1.3 no explanation was given why an Attorney would simply allow his client to seek out Counsel on their own even if it were possible for a man in the street to engage Counsel without going through an Attorney;

1.4 no explanation was given why the Attorney for the Appellant did nothing between October 2016 and 29 March 2017;

1.5 there was no compliance with any of the rules or the case law which will be referred to below and on that ground alone, the Application must fail.

2. As regards the issue of prospects of success:

2.1 as set out above the Appellants merely regurgitated their Heads of Appeal and made a solitary unsubstantiated allegation in Paragraph 27 without any reference to the Judgment or the Record;

2.2 as indicated above, the Court traversed the issue of prospect of success in some detail as indicated and the inescapable conclusion is that, as conceded by the Attorney, the founding papers of the Appellants failed to disclose any facts which

would point towards any prospect of success, let alone good prospects of success.

3. Rule 16 of the Rules of this Court state that:

"**Rule 16 (1) The Judge President or any Judge of Appeal designated by him <u>may on application extend any time prescribed by these</u> <u>rules</u>: 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.**

Rule 16 (2) <u>An Application for extension shall be supported by an Affidavit setting forth good and substantial reasons for the Application</u> 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."

4. Rule 17 of the Rules of this Court provides as follows:

"**Rule 17 The Court of Appeal may <u>on application and for sufficient cause shown, excuse any party from compliance with any of these Rules</u> and any give such directions in matters of practice**

and procedure as it considers just and expedient." (my underlining in all of the above)

5. All of these Rules are clear and unambiguous.

6. The relevant case law relating to the activities referred to in 5 above can be referred to as follows:

6.1 In **Dr Sifiso Barrow v. Dr Priscilla Dlamini and the University of Swaziland (09/2014) [2015] SZSC09 (09/12/2015)** the Court at 16 stated **"It has repeatedly been held by this Court, almost *ad nauseam*, that as soon as a litigant or his Counsel becomes aware that compliance with the Rules will not be possible, it requires to be dealt with forthwith, without any delay."**

6.2 In **Unitrans Swaziland Limited v Inyatsi Construction Limited, Civil Appeal Case 9 of 1996,** the Court held at paragraph 19 that:- **"The Courts have often held that whenever a prospective Appellant realises that he has not**

complied with a Rule of Court, he should, apart from remedying his fault, immediately, also apply for condonation without delay. The same Court also referred, with approval, **to Commissioner for Inland Revenue v Burger 1956 (A)** in which **Centlivres CJ** said **at 449-G** that: **"…whenever an Appellant realises that he has not complied with the Rule of Court he should, without delay, apply for condonation."**

6.3 In **Maria Ntombi Simelane and Nompumelelo Prudence Dlamini and Three Others in the Supreme Court Civil Appeal 42/2015**, the Court referred to the dictum in the Supreme Court case of **Johannes Hlatshwayo vs Swaziland Development and Savings Bank Case No. 21/06 at paragraph 7** to the following: **"It required 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."

6.4 In the said matter of **Hlatshwayo** referred to above, the Court at 4 stated as follows: **"The Appellant's Heads of Argument were filed on 25 October 2006 which was a period of only six days before the hearing of the matter. This was a flagrant disregard of Rule 31 (1) of the Court of Appeal Rules which provides as follows…** (the wording of the Rule followed)".

6.5 In the same matter, the Court referred to **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. The disregard of the Rules of Court and of good practice have so often and so clearly been disapproved of by this Court that non-compliance of a serious kind will henceforth procedural orders being made – such as striking matters off the roll – or in appropriate orders for costs, including orders for costs de bonis propriis. 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*". Accordingly matters may well be struck from the roll where there is a flagrant disregard of the Rules even though this may be due exclusively to the negligence of the legal practitioner concerned. 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."

6.6 In **Nhlavana Maseko and Others v George Mbatha and Another, Civil Appeal No. 7/2005**, the Court stated at 15 **"In a circular dated 21 April 2005 practitioners were again warned that failure to comply with the Rules in respect of the filing of Heads of Argument would be regarded with extreme disapproval by this Court and might be met with an order that the appeals be struck off the roll or with a punitive cost order. This warning is hereby repeated."**

6.7 In the matter of **Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA),** the summary of the matter is as follows: **"Appeal – Prosecution of – Proper**

prosecution of – Failure to comply with Rules of Supreme Court of Appeal – Condonation Applications – Condonation not to be had merely for the asking – Full, detailed and accurate account of causes of delay and effect thereof to be furnished so as to enable Court to understand clearly reasons and to assess responsibility – To be obvious that if non-compliance is time-related, then date, duration and extent of any obstacle on which reliance placed to be spelled out."

6.8 **Herbstein** and **van Winsen, The Fifth Edition** at page 723, is instructive on when a Court may grant condonation on good cause shown. It is stated therein:

"Condonation

The Court may on good cause shown condone any non-compliance with the Rules. The circumstances or 'cause' must be such that a valid and justifiable reason exists why

compliance did not occur and why non-compliance can be condoned."

6.9 **In Standard General Insurance Co Ltd v Eversafe (Pty) Ltd it was stated that:**

"It is well-established that an Application for any relief in terms of Rule 27 has the burden of actually proving, as opposed to merely alleging, the good cause that is stated in Rule 27 (1) as a jurisdictional prerequisite to the exercise of the Court's discretion. Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 325G. The Applicant for any such relief must, at least, furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about and to assess his conduct and motives (Silber v Ozen Wholesalers (supra at 353A)).

6.10 As was pointed out in **Kodzwa v Secretary for Health & Anor 1999 (1) ZLR 313 (S)** by

Sandura J (with whom McNally JA and I concurred):

"Whilst the presence of reasonable prospects of success on Appeal is an important consideration which is relevant to the granting of condonation, it is not necessarily decisive. Thus in the case of a flagrant breach of the Rules, particularly where there is no acceptable explanation for it, the indulgence of condonation may be refused, whatever the merits of the Appeal may be. This was made clear by Muller JA in P E Bosman Transport Works Committee & Ors v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A) at 799 D-E, where the learned Judge of Appeal said:

'In a case such as the present, where there has been a flagrant breach of the Rules of this Court in more than one respect, and where in addition there is no acceptable explanation for some periods of delay and, indeed, in respect of

other periods of delay, no explanation at all, the Application should, in my opinion, <u>not be granted whatever the prospects of success may be</u>." (my underlining)

6.11 See also **Rennie v Kamby Farms (Pty) Limited 1989 (2) SA 124 (A) at 129G where Hoexter JA** stated: **"Whenever an Appellant realises that he has not complied with the Rule of Court he should apply for condonation without delay"**;

6.12 In the unreported matter of **Arthur Layani Khosa v ABSA Bank Limited, Case No. JS 812/2012 Basson J** states **"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. That case must be made out in the Condonation Application and the papers filed in support thereof"** and refers to the matter of

Rustenburg Gearbox Centre v Geldmaak Motors CC t/a M E J Motors 2003 (5) SA 468 (T) where the full bench held as follows**:" In paragraph 14 at Page 419 the Appellant simply submits that it has good prospects of success on Appeal. (See also Paragraph 4 at Page 21 of the Notice of Motion of 21 February 2003.) That is not sufficient. What is required is that the Deponent should set forth briefly and succinctly the essential information that may enable the Court to assess the Appellant's prospects of success. A bald submission unsupported by any factual averments is not good enough to discern what the prospects of success are in this matter.**

6.13 in the light of the above, the Application by the Appellants falls far short of what is required in terms of the Rules and the Judgments of this Court and must fail on both grounds.

6.14 Despite numerous Judgments, circulars, warnings from Judges, practitioners in this Court

nevertheless continue to fail to abide by the Rules of this Court with seeming impunity and we hope that this Judgment will once again show that this Court will no longer tolerate non-compliance of the Rules of this Court nor the flagrant disabuse of such Rules. Having said that, this Court will always consider genuine, well documented Applications in terms of the Rules provided that full acceptable details are set out in Founding Affidavits, the Court taken into the confidence of the Applicant and such Applications brought in terms of the Rules of this Court immediately upon a problem arising and fully motivated and documented grounds are set out relating to prospect of success.

ORDER OF COURT

1. The Application for Condonation by the Appellants is dismissed.

2. The Appellants shall bear the costs of the Respondents on the ordinary scale.

R J CLOETE

JUSTICE OF APPEAL

I agree

MCB MAPHALALA

CHIEF JUSTICE

I agree

DR B J ODOKI

JUSTICE OF APPEAL