IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No. 73/2016

In the matter between:

THE PRIME MINISTER OF SWAZILAND Applicants

and Three Others

And

THULANI MASEKO Respondents

and Others

Neutral Citation : *Prime Minister of Swaziland and 3 Others v Thulani Maseko and Others* (73/2016) [2018] *SZSC 01* (05/03/ 2018)

Coram **:** SP Dlamini JA

Heard **:** 13 February 2018

Delivered **:** 05 March 2018

Summary : *Application for condonation for non-appearance before Court and reinstatement of an appeal struck off the roll – the legal principles governing condonation and reinstatement considered and applied – Whether costs to follow or not to follow the cause – Held that notwithstanding that the Applicants' papers fall below the well-established legal threshold, the Court mero motu and in the interest of justice may grant the application – Held therefore that the non-appearance of the Applicants on*

23 October 2017 be and is hereby condoned and that the appeal hearing of this matter is accordingly reinstated. Held further - that even though costs generally follow the event, in this instance the Respondents are awarded costs in view of the manner the Applicants handled the application.

JUDGMENT

SP DLAMINI- JA

[1] Serving before this court is an application by the Applicants (incorrectly referred to as Appellants in this application) for the following relief:

[1.1] Condonation for their non-appearance before this Court on 23 October 2017;

[1.2] Reinstating the hearing of their appeal against the judgment of the Court *a quo:* and

[1.3] Costs of suit against the Respondents in the event the application is opposed.

[2] The brief background to the present application is set out herein below;

[2.1] The Applicants (also Applicants in the High Court), launched proceedings seeking to declare certain sections of the Sedition and Subversive Activities Act No. 46 of 1938 null and void;

[2.2] Upon the hearing of the matter, the High Court, in a majority judgment, upheld the application by the Applicants and declared the impugned sections of the said Act null and void;

[2.3] The Respondents (also Respondents in the High Court), being dissatisfied with the judgment of the Court *a quo*, sought to appeal against the said judgment;

[2.4] When the matter was called for hearing of the Applicants' appeal on 23 October 2017, only the Respondents' Counsel was in Court and there was no appearance for and on behalf of the Applicants;

[2.5] In view of the non-appearance of the Applicants, this Court proceeded to strike the appeal off the roll and further ordered that the appeal is not to be reinstated without the leave of Court having been sought and granted, hence the present application by the Applicants.

[3] The Applicants launched this application on 05 December 2017. The application is opposed by the Respondents.

[4] It is against the aforesaid background of the matter that I, sitting as a single Judge of the Supreme Court, as per Section 149 of the Constitution, have to consider the Applicants' application.

[5] The Applicants, in their application, rely on the Founding Affidavit deposed to by Mr Vikinduku Manana, who is a Senior Crown Counsel in the office of the Attorney-General and he also represents the Applicants before this Court.

[6] Mr Manana, in the Founding Affidavit, seeks the indulgence of this Court to condone the Applicants' non-appearance before this Court on 23 October 2017 and to have the hearing of the Appeal reinstated. Basically, the Applicants' position is that there was confusion regarding the date of hearing of the Appeal. According to Mr Manana, based on correspondence issued by the office of the Registrar of this Court, the hearing of the Appeal was on 21 November 2017 and not on 23 October 2017.

[7] Mr Manana further stated that the Attorney-General was in the Bahamas on official duties and the latter thought the matter was due for hearing on 21 November 2017, since he was the one handling the

matter. The point being made by the Applicants here is that the non-appearance was neither wilful nor deliberate on their part.

[8] It was Mr Manana's further deposition that it was a surprise for his office to receive a call on 23 October 2017 that the matter was proceeding for hearing before this Court. I am of the considered view that whether the Attorney-General was in or outside the country when the matter was called for hearing, is completely irrelevant and such an argument is bad at law. The office of the Attorney-General must function even when the incumbent is outside the country. The real issue for determination, is whether the office of the Attorney-General was or was not aware that the matter was due to proceed on 23 October 2017 and if it was not was so not aware, whether or not there were valid reasons for the non-appearance.

[9] The Applicants challenged the authenticity of the Court Roll attached to the Respondents' papers reflecting 23 October 2017 as the date for the hearing of the matter. However, the assertions by the Applicants challenging the authenticity of Court Roll are lame and cannot be

sustained for the simple reason that the Respondents were not the only ones holding the view that the matter was scheduled to be heard on 23 October 2017. This Court had the same date as well hence the sitting.

[10] The said Court Roll bore the usual hallmarks as other rolls of this Court, including the date stamp of the Registrar of the Court. In their challenge of the authenticity of the Roll, which on the face of it appeared legitimate, the Applicants bore the onus to prove that it was not authentic. They, however, failed to tender sufficient evidence before the Court in this regard.

[11] The issue of the manner as to how correspondence is to be served by the Registrar upon the office of Attorney-General, is not fundamental to the issues falling for consideration. The Applicants were the only parties missing in action on that date. That being said, the Attorney-General is an officer of the Court of good standing and I do not believe that he or his office would wilfully absent themselves from appearing before Court.

[12] Clearly, the reasonable inference to draw in the circumstances, is that someone within the office of the Attorney-General took his or her eyes off the ball and dropped it regarding the hearing date of the matter, resulting in the non-appearance of the Applicants before Court. As already stated above, due to the various inadequacies in the Applicants' application, the Court was not assisted at all with sufficient information in order to have a full sense of what really went wrong.

[13] In addition to explaining the non-appearance, Mr Manana attempted to deal with the issue of prospects of success. It is submitted by the Applicants that the appeal raises issues of significant national importance and that the Court is therefore requested not to shut the door against the Applicants in final fashion because of the non-appearance on the aforesaid date.

[14] As already stated, the application is opposed by the Respondents, and if I may say, strenuously and correctly so, as I will attempt to demonstrate below.

[15] Firstly, the Respondents attack the sustainability of the Application through points *in limine*, namely that the Application is defective in so far as it omits the particulars of the Respondents and that the application amounts to an abuse of the Court's process because it is shallow and contains omissions of critical information which ought to have been placed before Court by the Applicants if they were candid.

[16] Regarding the merits, the Respondents contend that the Court ought not to come to the Applicants' rescue in view of the shoddy and lackadaisical manner in which they have gone about prosecuting the appeal.

[17] The Respondents further state that the appeal was filed 4 months after the judgment of the Court *a quo*; the application for condonation of the late filing of the appeal was filed 6 months after the appeal was

noted and the present application was launched 2 months after the order of this Court to strike the appeal off the roll, which order was made on 23 October 2017. The Respondents contend that the above factors negate the Applicants' claim that they consider the matter to be of national interest. If it were otherwise, they further state, the appeal would have been handled differently and in a manner befitting its alleged importance.

[18] At the hearing of the appeal, the Respondents seemed not to seriously pursue the points in *limine.* Be that as it may, it is important to express the Court's views on the points in *limine* and I do so below;

[18.1] Regarding Applicants' failure to cite and give the particulars of the Respondents, the Court accepts the Respondents' challenge that it is trite law that parties

before Court must be properly cited and sufficient particulars of the litigants must be given. The Applicants failed to do so and there is absolutely no excuse for the failure on the part of the Applicants, considering that this is a matter that had previously served before the Court *a quo* and the particulars of the litigants are not unknown to the Applicants. The Court is of the view that, as contended by the Respondents, the Applicants adopted a care-free approach in this matter. However, at the hearing of the application the parties were all represented and the Respondents did not argue or show that any prejudice eventuated as a result of this failure and as such the technicality is condoned by the Court; and

[18.2] Regarding the Applicants' alleged abuse of the Court's process by the Respondents, the Court is of the view that the basis for such a stance goes to the merits of the matter, namely that the application was handled by the

Applicants in a shoddy manner and that it does not meet the legal benchmark for the Court to grant the Applicants the relief they sought. Accordingly, this point in *limine* is reserved and will be considered together with the other points on the merits raised by the Respondents in their opposition of the relief sought by the Applicants.

[19] I now turn to the merits and/or demerits of the application. The law regarding condonation is now settled in our Courts.

[20] An applicant, seeking condonation, in order to succeed, must meet the following requirements that;

(a) As soon as the applicant becomes aware of the issue requiring condonation, the applicant files the application for condonation;

(b) In the application for condonation, the applicant must give a reasonable explanation giving rise to the omission or commission to be condoned, and

(c) In the application for condonation, an applicant must lay a foundation for his or her case having prospects of success.

[21] In considering the principles relating to an application for condonation and relevant case law, this Court, in the case of **De Barry Anita Belinda and AG Thomas (PTY) Ltd ,** cited with approval the *dictum* in the case wherein it is stated at paragraph [6.3] at pages 27; "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."** See also **Celiwe Rejoice Nkhambule and**

African Echo T/A The Times of Swaziland and another Civil Appeal Case No. 86/2016; Nhlavana Maseko and two others and George Mbatha and another Civil Appeal No. 7/2005; Allon Ngcamphalala and three others and the King Civil Appeal Case No. 20/2005; Director of Public Prosecution and Mduduzi Eliot Nkambule Appeal Case No. 08/2016; Uitenhage Transitional Local Council and The South African Revenue Service Supreme Court of Appeal of South Africa Case No. 11/2003; Pieter Johannes Muller and Sanlam Life Insurance Limited (1162/2015) [2016] ZASCLA 149; Ronald Mosementla SOMAEB and Standard Bank Namibia Ltd. The Supreme Court of Namibia Case: SA 26/2014; and Maria Ntombi Simelane and Nompumelelo Prudence Dlamini and Three Others in the Supreme Court Civil Appeal 42/2015.

[22] This Court agrees with the Respondents that the Applicants' application falls far below the legal benchmark as reflected in the case of **De Barry Anita Belinda and AG Thomas (Pty) Ltd** and the other cases referred to above.

[23] The Court further agrees with the Respondents that the Applicants were not helpful to the Court regarding the alleged confusion about the dates. There is no explanation as to why Applicants did not approach the Registrar of the Supreme Court immediately after the matter was called on 23 October 2017 for clarification. Such attempt to seek clarification ought to have been placed before this Court by the Applicants. Furthermore, there is no explanation whether the alleged confusion related only to this matter or others as well. If it is only related to this matter, the 3rd Respondent ought to have explained which roll was being followed in the other matters that his office was handling during the Session in question.

[24] There are factual disputes between the Applicants and the Respondents regarding the correct date of the hearing of the matter. The Respondents rely on the "Final Final Draft Roll", which bears the Registrar's date stamp and indicated that the matter was to be heard on 23 October 2017. As already stated, the Applicants bore the onus to address this issue squarely but they failed to do so,

leaving the Court none the wiser about the true and factual position regarding the date of hearing. The failure is wholly attributable to the Applicants and not the Respondents.

[25] In the case of **Okahao Town Council and Marilyn Dawn Campbell No (3519/2015) [2017] NAHCMD 160 (9 June 2017),** the Court as per the summary at page 2, held that; "… an application for condonation is not a mere formality. The trigger for it is the non-compliance with the Rules of Court. Accordingly, once there has been non-compliance, the Applicant should, without delay, apply for condonation and comply with Rules. In seeking condonation, the Applicant has to make out its case on the papers submitted to explain the delay and the failure to comply with the Rules. **The explanation must be full, detailed and accurate in order to enable the Court to understand clearly the reasons for it.** Held further – **that the Applicant failed to give a full, detailed and accurate explanation that meets the standard as set out above, which would allow the Court to exercise it discretion in the Applicant's favour.** In these premises, the

Court ordered the Applicant's legal practitioner to pay the costs of this application *de bonis propils* in terms of Rule 53 (2) (d)." (My own underlining). **See also De Barny Anita Belinda Case Supra paragraphs 6.7 and 6.8 at pages 30 – 31).**

[26] The Applicants did not even attempt to explain why it took them 2 months to launch the present application when by Mr Manana's own admission, the Applicants became aware on 23 October 2017 that the matter was to be heard on the same date and on which date it was eventually struck off the roll by this Court. In the **De Barny Anita Belinda case** (Supra) on paragraph at pages 26 – 27 stated that:

6.1 **In Dr Sifiso Barrow v. Dr Priscilla Dlamini and the University of Swaziland (09/2014) [2015] SZSC 09 (09/12/2015)** the Court at 16 stated that "**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."** (See also **Arthur Layan Khosi and ABSA Bank Limited Case No. JS 8/2/2012 paragraph 2** at page 2)

[27] Finally, the Applicants only dealt with the issue of the prospects of success in a perfunctory manner, which really did not help this

Court. They merely alleged that a judgment in favour of the Respondents would make the country fall foul of its international obligations and that therefore it is in the interest of justice that the matter is not dismissed on a mere technicality.

[28] The Applicants did not, however, state what guarantee they have that they will succeed on the merits of the case. Naturally, no guarantee can ever exist legally and lawfully regarding the success or failure of a litigant in legal proceedings. The final say lies with the Court to make a free, fair and legally sound judgment upon the hearing of the matter.

[29] That notwithstanding, an applicant for condonation must, of necessity, persuade the Court that they at least have an arguable case. This is starkly absent in this case as there are no grounds advanced in respect of the prospects of success by the Applicants regarding the impugned majority judgment of the Court *a quo* at all. One is left wondering as how a litigant can allege prospects of success without explaining how the impugned judgment constitutes

an error of fact or law or both as is alleged to be the case in this matter.

[30] The Applicants' application is nothing but a text book case of failure to comply with requirements of an application for condonation. This Court has pronounced itself that there comes a time in litigation whereby the sins of legal representative may be lawfully visited upon a litigant.

[31] In the **Ronald Mosementla SOMAER** case (Supra), the Court enumerated the principles relating to condonation in paragraph [24] at pages 9 – 10 and stated that;

"[24] In considering non-compliance with rules of Court a discretion is exercised. In *Namib Plains Farming and Tourism CC V. Valencia Uranium (Pty) Ltd & others* 2011 (2) NR 469 (SC) the following was stated by this Court at

paragraph 19: "The principles relating to the consideration of an application for condonation are well-known. In considering whether to grant such, a Court essentially exercises a discretion, which discretion has to be exercised judicially upon consideration of all the facts in order to achieve a result that is fair to both sides. Furthermore, relevant factors to consider in the condonation application include the extent of non-compliance and the explanation for it; the prospects of success on the merits; the importance of the case; the respondent's interest in the finality of the judgment; the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice." (My underlining).

[32] His Lordship Steyn CJ in the case of **Saloojee and Another, NNO V. Minister of Community Development, 1956 (2) SA 135 (A)** at 141 C – E stated that; **"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 *misericordiam* should not be allowed to become an invitation to laxity… The Attorney, after all, is the representative whom a litigant has chosen for himself, and there is little reason why, in regard to condonation of the failure to comply with the Rule of Court, a litigant should be absolved from the normal consequences of such relationship, no matter what the circumstances of the failure are."

[33] However, that said, it is my view that in the interest of justice, the appeal against the majority decision of the Court *a quo* should be disposed of in one way or the other in a fully blown hearing.

[34] Whether there is a lawful appeal or not and the final determination of matters on all the issues antecedent therefore must be the decision of a Bench of this Court and not for me sitting as a single Judge of this Court.

[35] In line with the above, I am further of the view that this matter ought to come urgently for the consideration before the Bench of the Supreme Court.

[36] In view of the aforegoing, I consider the importance of the matters arising from the appeal and form the view that it would leave a bitter after taste in the Court's palate for such serious matters to be decided by default as it were, due to the confusion that seems to have reigned at the office of the Attorney-General.

[37] I accordingly, but reluctantly order that the non-appearance of the Applicants on 23 October 2017 is hereby condoned and that the appeal is hereby accordingly reinstated. This Court in the case of

Alton Ngcamphalala and 3 others and the King Appeal Case No. 20/2005 at page 3 held that;

"In its inherent jurisdiction this Court *mero motu* may excuse any party from strict compliance with any of its rules if there is no prejudice to any other party. (See **HERBSTEIN AND VAN WINSEN: The Civil Practice of the Superior Courts in South Africa 3rd Edition** page 19-20). That is clearly the position here. Each party knows full well what the other party's case is; each came prepared to meet the other's case and even though each one may have not strictly brought its case in the manner prescribed by the rules, this Court will condone that. The matter must be decided on the merits of the matter and the principles applicable to them and not on some inconsequential technical procedural defect."

[38] It is not only the interests of the present litigants that are relevant in this matter but future litigants and the Courts, particularly those subordinate to this Court, will be enlightened if the matter proceeds for determination by the Supreme Court on its merits. While great

displeasure is recorded by the Court over the quality of the Application, it is not prudent to dispose of the matter purely by default on and only on account of the non-appearance of the Applicants' legal representatives before Court.

[39] I have searched for authorities specifically dealing with non-appearance of litigants before Court *vis-à-vis* the condonation thereof without any success and the parties did not supply any, possibly because such conduct is a rarity and which ought never to happen in the first place. Be that as it may, I am of the view that the general principles of condonation apply equally to the matter.

[40] Regarding costs, it is generally accepted that costs pre-eminently lie within the discretion of the Court. Second, the ordinary rule is that costs should follow the event. However, I am of the view that in certain circumstances costs may, for reasons advanced by the Court, not be ordered by the Court to follow the event but, in its wisdom, may be awarded even against the successful party.

[41] In the case of **Keymeulen v. Van der Vijver (2016/02512) [2017] NAHCMD 159 (9 June 2017),** His Lordship Masuku J. awarded costs against the successful party. The Learned Judge in paragraphs [54] to [56] at pages 17-18 stated that;

"[54] It is a general rule that costs are in the discretion of the Court. (*sic*) To be exercised judicially in the light of the circumstances of the case. In summary judgment, the ordinary course followed by the Court is to order costs to be in the cause or to be decided by the trial Court.

[55] In the instant matter, I am of the view that although the 1st defendant has succeeded in staving off the plaintiff's application for summary judgment, the manner in which the defendant went about its defence of the summary judgment is inexcusable and placed the plaintiff in a precarious position, with new defences sprung upon it for the most part in the heads of argument.

[56] I should, in this regard, mention that Ms. Schimming-Chase did, in argument and as a conscientious officer of the Court, submit that in view of how the matter was handled by the defendant, this would be a proper case to order the defendant to bear the costs of the summary judgment. This is merited in this case and I order the defendant to pay the costs of the summary judgment."

[42] It would appear that in the above case, the Court considered that the successful party in the summary judgment application did a shoddy job in its affidavit resisting summary judgment. Although it was eventually successful in resisting summary judgment, and should ordinarily have been entitled to costs, if same were ordered to follow the event, the Court ordered that party to pay the costs of the summary judgment, using its discretion, on the issue of costs, to do so.

[43] It must also be recalled that ordinarily, a party seeking condonation from a Court, essentially craves that Court's indulgence. For that

reason, it should, *ceteris paribus,* pay the costs occasioned by its application. In the instant case, I have found that the opposition by the Respondents was not in any way unreasonable or obstructive.

[44] In view of what is said herein above regarding the inadequacies of the Applicants' application for condonation; the unprofessional approach exhibited in the Applicants' papers and the fact that the relief granted to the Applicants is as a result of the discretionary powers of the Court, the Court awards the costs against the Applicants as a sign of the its displeasure and admonition to the Applicants for their untoward handling of this important matter.

[45] Accordingly, the Court makes the following order;

1. That Applicants' non-appearance on 23 October 2017 be and is hereby condoned;
2. That the appeal herein be and is hereby reinstated;
3. That the Respondents are awarded costs; and

4. The matter is referred to the Registrar of this Court for allocation of dates of hearing.

S. P. DLAMINI JA
JUSTICE OF APPEAL

For the Applicants : Mr V. Manana (Senior Crown Counsel)
For the Respondents : Mr M. Mkhwanazi and Mr L. Gama