



**IN THE SUPREME COURT OF ESWATINI**

**JUDGMENT**

HELD AT MBABANE

**CIVIL APPEAL CASE NO.94/2017**

In the matter between:

**NOKUTHULA MTHEMBU AND  
FOUR OTHERS**

**APPLICANTS**

**and**

**MINISTER OF HOUSING  
AND ANOTHER**

**RESPONDENTS**

Neutral Citation:

*Nokuthula Mthembu and Four others vs.  
Minister of Housing and Another (94/2017)  
[2018] SZSC 15 (30 May 2018)*

**Coram:**

**DR. B.J. ODOKI, JA**

**R.J. CLOETE, JA**

**J.P. ANNANDALE, JA**

**Date heard:**

**21 MAY 2018**

**Date delivered:**

**(30 May 2018)**

**Summary:** *Civil Procedure – Application for leave to file appeal against an order as to costs – Applications for condonation for late filing of heads of argument by both the Appellant and Respondent – Requirements for granting an application for condonation include reasonable explanation by the Applicant for the delay and statement of prospects of success of the main application/appeal – Requirements not complied with – Applications dismissed with no order as to costs.*

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## **JUDGMENT**

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**DR. B.J. ODOKI J.A**

Introduction

[1] The Applicants filed a notice for leave to appeal against an order as to costs only. Before hearing of the Application, the Applicants filed an Application for condonation for late filing of the heads of argument. The Respondents also filed a separate Application for condonation for late filing of their heads of argument.

Background

- [2] The brief background to these Applications is as follows. The Applicants sought an order for the review and setting aside of the 1<sup>st</sup> Respondent's decision to suspend the Applicants from exercising their duties as councilors and to declare the decision unlawful and unconstitutional.
- [3] The Applicants are elected councilors of Ezulwini Town Council. The basis of their dissatisfaction was that they were not given a hearing as envisaged in terms of Section 33 of the Constitution.
- [4] As Councilors the Applicants perform their duties and functions through meetings. They alleged that their purported suspension would relatively impact on their ability to carry out these functions and duties.
- [5] At the end of the matter, on 29 December 2016 the Court *a quo* (per M. Dlamini J) observed that the Respondents admitted in its Answering Affidavit that "The Councilors have not been suspended as Councilors from exercising their duties. Only council meetings are suspended as per annexure N M 1." The Court *a quo* then reserved the issue to costs for later determination.
- [6] The issue as to costs was argued before Fakudze J who on 17 October 2017 dismissed the Applicant's Application and ordered that each party shall bear its costs of the Application.

## Application for leave to appeal

[7] On 17 November 2017, the Applicants filed a notice of motion for leave to appeal against the judgment of Fakudze J, as to costs only, that each party shall bear its own costs.

[8] The grounds of the Application for leave to appeal were stated as follows;

“ 1. *The Learned Judge in the Court a quo did not exercise a judicial discretion and invoked wrong principles which influenced his decision not to award the Applicant costs of the High Court proceedings at attorney and client scale. The Learned Judge particularly misdirected himself by basing his decision on the following incorrect premises;*

1.1 *That the Appellants (as Applicants) were not substantially successful, when in effect the relief sought was to set aside the decision of the suspension to which the Respondents conceded to, as per the Appellant’s claim. The Appellants had in actual fact fully established their case at the time of the concession.*

1.2 *The Order that each party is to pay its own costs is prejudicial to the Appellants who incurred substantial legal costs to overturn the decision of suspension.*

1.3 *The Learned Judge in the Court a quo erred in distinguishing the action of the 1<sup>st</sup> Respondent as not constituting a suspension that the Appellant approached the Court a quo to remedy, particularly erred in failing to take into account that the ordinary business of the Appellants as municipal councilors is conducted through the aforesaid meetings.*

1.4 *The Learned Judge in the Court a quo erred in not treating the concession by the Respondents as one that should result in the success of the application in order for the principle that costs follow the event to apply.”*

#### Applications for condonation

[9] On 17 May 2018, the Applicants filed a notice of application for condonation in which they stated that at the hearing of the matter on 21 May 2018, the Applicants would make an Application for condonation of the late filing of their Heads of Argument. The application was accompanied by the Supporting Affidavit of Zwelakhe Bongani Hlophe, Attorney for the Applicants. The Applicants also attached their intended Heads of Argument.

[10] On 14 May 2018, the Respondent filed their notice of Application for condonation for late filing of their Heads of Argument. The Application was accompanied by a Supporting Affidavit of Ndabenhle Goodnews Dlamini,

the Attorney for the Respondents. The Applicants attached a copy of their intended Heads of Argument to their Application for condonation.

The Law Applicable

[11] Section 14 of the Court of Appeal Act 74/1954 which provides for the right of appeal in Civil Cases states that;-

*“(1) An appeal shall lie to the Court of Appeal –*

*(a).....*

*(b) by leave of the Court of Appeal from an interlocutory order, an order made ex parte or an order as to costs only”*

[12] Therefore, in the present case, since the Appeal was in respect of the order for costs only, the Appellant was obliged to obtain leave of the Court before filing the appeal. The Application was timely made on 17 October 2017, within six weeks of the date of the judgment against which it is sought to appeal, in accordance with Rule 9 (1) of the Rules of this Court.

[13] Rule 31 provides for the filling of the Heads of Argument by both parties as follows:

*“(1) In every Civil Appeal and in every criminal appeal the appellant shall not later than 28 days before the hearing of the appeal, file with the Registrar six copies of the main heads of argument to be presented on appeal together with a list of the main authorities to be quoted in support of each head.*

- (2) *A copy of the main heads of argument and list shall be served within the same period on the respondent.*
- (3) *The respondent shall not later than 18 days before the hearing of the appeal similarly file with the Registrar six copies of the main heads of his argument and supporting authorities to be presented on appeal and shall serve a copy thereof upon the appellant.”*

[14] Rule 17 of the Court of Appeal Rules 1971 provides for application for condonation in these terms;

*“17. The Court of Appeal may on application and for sufficient cause shown excuse any party from compliance with any of these rules and may give such directions in matters of practice and procedure as it considers just and expedient.”*

[15] The Rules also provide for applications for extension of prescribed times. Rule 16 (1) states;

*“ 16 (1) The Judge President or any judge of appeal designated by him may on application extend any time prescribed by these rules:*

.....

- (2) *An application for extension shall be supported by an 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.”*

In the present case, the Applicants did not make an application for extension of time in which to file their Heads of Argument, but filed an application for condonation.

[16] This Court has handed down numerous decisions explaining the purpose procedure, and principles concerning applications for condonation. These decisions include **Dr. Sifiso Barrow v. Dr. Priscilla Dlamini and the University of Swaziland** (09/2014) [2015] SZSC 09 (09/12/2015), **Maria Ntombi Simelane and Nompumelelo Prudence Dlamini and Three Others**, Supreme Court Civil Appeal No 42/2015, **Johannes Hlatshwayo v. Swaziland Development and Savings Bank** case No. 21/2016, **Simon Musa Matsebula v Swaziland Building Society** Civil Appeal No 11 of 1998, **Nhlavana Maseko and Others v George Mbatha and Another**, Civil Appeal No. 7/2005, and **De Barry Anita Belinda v A.G. Thomas (Pty) Ltd** (30/2015) [2016] SZSC 07 (30 June 2016) where most of these decisions were reviewed.

[17] In **Dr. Sifiso Barrow v. Dr. Priscilla Dlamini and The University of Swaziland**. (09/2014) [2015] SZSC 09 (09/12/2015) the Court stated at p. 16,

*“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 delay”*

[18] In **Unitrans Swaziland Limited v. Inyatsi Construction Limited** Civil Appeal Case No. 9 of 1996, the Court at paragraph 19 stated,

*“The courts have often held that whenever a prospective Appellant realizes 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 page 449 - G that;

*“Whenever an Appellant realised that he has not complied with the Rule of Court he should without delay, apply for condonation.”*

[19] In **Maria Ntombi Simelane and Nompumelelo Prudence Dlamini and Three Others**, Supreme Court Civil Appeal No. 42/2015, this court referred to the dictum of in the Supreme Court case of **Johannes Hlathwayo v. Swaziland Development and Savings Bank**, Case No. 21/06 where the Court stated,

*“It is required to be stressed that the whole purpose behind Rule 17 on 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 Respondents' interest in the finality of the matter.”*

[20] In **Melane v. Santam Insurance Co. Ltd** 1962 (4) SA 531 (A) at 532 C-F, the court held that without a reasonable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay may be an application for condonation should be refused.

[21] Finally, courts have decried the practice of counsels' frequent and flagrant disregard of the Rules which undermines the speedy and efficient delivery of justice. In **Simon Musa Matsebula v. Swaziland Building Society** Civil Appeal Case No. 111 of 1998, Steyn JA observed,

*“It is with regret that I record that practioners 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 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 result in procedural orders being made – such as striking off the roll –*

*or in appropriate orders for costs including orders for de bonis propriis. As was pointed out in **Salojee vs. the Minister of Community Development** 1965 (2) SA 135 at 141, “there is a limit beyond which a litigant cannot escape the results of his Attorney’s lack of diligence”.*

Consideration of the Grounds for the Applications.

[22] The grounds upon which the Application for condonation by the Applicants was based were contained in the Affidavit sworn by Mr. Zwelakhe Buyani Hlophe, the Attorney for the Applicants. In the Affidavit the Attorney states that the circumstances leading to the late filing of the Heads of Arguments were beyond his control.

[23] In paragraph 4 of the Affidavit the Attorney states;

*4.1 The matter was previously handled at our offices by Ms. Nolwazi Kunene, who had prepared and filed the application for leave to Appeal currently serving before this Honourable Court. As of the 7<sup>th</sup> May 2018, Ms. Nolwazi Kunene departed from the offices of Magagula and Hlophe Attorneys to pursue exploits in the corporate enterprises sphere. Unfortunately, her departure was not preceded by an appropriate hand over of files and matters she was handling at the office at the time;*

4.2 *This had caused a chaotic and disorganised take-over of the said matters and files as in this particular matter, where I personally became aware of the hearing date of the matter only upon receipt of the Respondent's Heads of Argument, who themselves also seek condonation. We are not opposed to the application by the Respondents;*

4.4 *Upon realising the exigency of the matter, I hastily sought the relevant pleading and prepared the current application for condonation as well as the Heads of Argument. The issues obtaining are largely legal and I am currently abreast thereof."*

[24] The above averments do not explain why no necessary action was taken to file the Heads of Arguments by Ms. Kunene in time before she left, as she did not swear any affidavit in support of the Application. Secondly, no sound reason has been advanced to explain why after Ms. Kunene had left on 7 May 2018, the Attorneys in the firm so engaged did not take the appropriate steps in time to file the Heads of Argument on time or the Application for condonation, which was filed on 17 May 2018, a few days before the hearing of the main application on 21 May 2018. This Court cannot accept the explanation that the departure of Ms. Kunene "caused a chaotic and disorganised take over of the said matters and files" as sufficient ground to excuse the Applicants from complying with the Rules.

[25] The next ground was that the Application for leave to appeal has prospects of success. The Affidavit by Mr. Hlophe avers that having perused the record

and pleadings, and critically analysed the issue of obtaining in the application for leave to appeal, the prospects of success are weighed heavily in the Applicants' favour as indicated in paragraph 5 as follows;

“ 5.1 *Despite the Court a quo correctly finding that costs follow the event and a successful party is entitled to costs; the Court failed to grant costs to the Applicants therein;*

5.2 *The Applicants filed an application to Court to declare their suspension by the Respondents as unlawful. The application was opposed by the Respondents, and in their papers, justify the suspensions. It was only at the hearing of the matter where Respondents then made a round-about turn to then concede to the Applicants application after Applicant's Counsel established, through the legal submissions, the unlawfulness of the Respondent's conduct;*

5.3 *A careful consideration of the pleadings obtaining before the Honorable Court at the time and all things being equal, the Applicants succeeded in the matter, and the costs should have followed the event.”*

[26] In concluding his judgment, Fakudze J. in the Court *a quo* stated that

*“[18] This court is inclined to agree with the Respondent that none of the parties won or was substantially successful.*

*The Respondents continuously maintained that there had been no suspension of the Councilors and notwithstanding this assurance the Applicants rushed to court to have a non-existent suspension set aside.*

*The court that dealt with the initial issue observed that the Respondents are pointing out in their papers that there was no suspension of the Applicants, being satisfied by what the court observed, put the matter to rest.*

*[19] I am therefore inclined to exercise my discretion that the Applicant’s Application is hereby dismissed and the Applicant (sic) is not entitled to the costs prayed for. Each party shall bear its costs of this Application”*

[27] The averments contained in paragraph 5 of the Applicants’ supporting Affidavit falls short of convincing this court that the Application for leave to appeal has any prospects of success. In the first place, it is not true that the Applicants substantially succeeded in the Court *a quo* because the court held that their application had no merit since they were not actually suspended but only their meetings were suspended. As the Court *a quo* observed, despite the Respondents assuring the Applicants that they were not suspended, they instead “rushed to court to have a non existent suspension set aside.”

[28] Although costs normally follow the event, the court retains its discretion to award or not to award costs. The Court *a quo* exercised its discretion to order that each party bears its own costs. The Applicants have not demonstrated how the Court *a quo* erred in exercising its discretion in this respect.

[29] It follows that the Application for condonation by the Applicants has not merit and is dismissed forthwith.

[30] The grounds upon which the Respondents base their Application for condonation are contained in Supporting Affidavit sworn by Ndabenhle Goodnews Dlamini, their Attorney.

[31] In his Affidavit the Attorney explains the reasons for the delay in filing Heads of Arguments as follows:

“2. *There has been an inexplicable lull after the filing of the Application for leave to appeal on 17 November 2017. Respondent’s file got misplaced in that lull and lost track of. It only emerged from the rubble of closed files after the relocation, renovations and relocations again of the Attorney General’s Chambers on the first week of May 2018.*

3. *Respondents have not have not filed a Replying Affidavit in response to the one supporting the Application for leave of Court. The issue of costs is a purely legal one concerning the*

*exercise of judicial discretion as conferred by law. There is no material factual contestation in such cases as the present.*

4. *Respondents waited upon the Applicants to serve and file their Heads of Arguments in favor of the granting of leave as sought. Apparently, the long wait has been in vain as Applicants have not filed such Heads as late as now.*

*Respondents have therefore decided to file their own Heads of Argument without the benefit of a written brief of Applicants' own argument."*

[32] The Respondents seem to present the relocation of their chambers leading to loss of the file as an excuse for late filing of Heads of Argument. The relocation took place in the first week of May 2018. Why then did the Respondents file their Application for condonation only on 14 May 2018? Secondly, the Respondents did not have to wait to receive Heads of Argument from the Applicants before filing their own, as time was running against them. Clearly no sufficient ground has been advanced for the delay in filing their Heads of Argument. This ground is sufficient to reject the late filing to the Application for condonation even if the Application has no chance of success.

[[33] In paragraphs 5 and 6 of the Supporting Affidavit the Respondents' Attorney avers;



*“5. Applicants’ application barely has a chance of success. The reason for the Court a quo’s decision not to award costs remains unchallenged b the Applicants as the same has not been appealed against. The Court a quo has made a factual finding that Applicants’ application a quo was not successful hence the Order for each party to pay its own costs.*

*This finding remains unchallenged on any appeal. There is therefore no basis for an award of costs to the applicants.*

*6. On the other hand, the converse holds true of the Respondents’ case that their opposition to the application stands a good chance of success on the same reasons in (5) above. By similar vein, the very appeal sought to be mounted (if leave be granted) is only too weak to succeed.”*

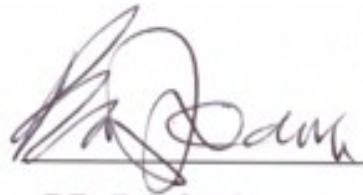
[34] In view of what I have stated in paragraph [32] of this judgment, the above averments cannot assist the Respondents in their Application for condonation since they failed to jump the first hurdle of giving a reasonable and sound reason for delay in filing their Application for condonation in good time.

### **Decision**

[35] For the foregoing reasons, I make the following order:

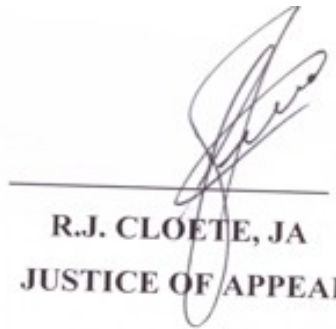
1. The Applicants’ Application for condonation is dismissed.
2. The Respondents’ Application for condonation is dismissed.

3. The Application for leave to appeal is deemed to be abandoned.
4. Each party shall bear its own costs.




**DR. B.J ODOKI, JA**  
**JUSTICE OF APPEAL**

I agree



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

I agree

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

For the Applicants:

**Z.B. HLOPHE**

For the Respondents:

**N. DLAMINI**

