IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 13/2018

In the matter between:

THE SWAZI OBSERVER NEWSPAPER (PTY) LTD

t/a OBSERVER ON SATURDAY First Appellant

ALEC LUSHABA Second Appellant

BODVWA MBINGO Third Appellant

and

DR. JOHANNES FUTHI DLAMINI Respondent

Neutral Citation : *The Swazi Observer Newspaper (Pty) Ltd t/a Observer on Saturday and 2 Others vs Dr. Johannes Futhi Dlamini* (13/2018) [2018] *SZSC* 26 (19/09/2018)

Coram: **DR. B. J. ODOKI JA, S. P. DLAMINI JA AND R. J. CLOETE JA**

Heard : 20 August 2018

Delivered : 19 September 2018

Summary : *Application for Condonation for late filing of Heads of Argument – Two of absolute requirements being a full explanation for delay and prospects of success - Attorney filing founding affidavit not dealing with or even mentioning prospects of success despite prior warning by opposing Counsel – Application fatally defective – Flagrant disregard for rules of this Court – Application dismissed with costs.*

JUDGMENT

CLOETE - JA

BACKGROUND

[1] This is an Application for Condonation for the late filing of their Heads of Argument by the Appellants who shall be referred to as the Applicants in this Judgment.

[2] Counsel for the Applicants, Mr Mangaliso Magagula, alleged that there was also an Application for Condonation for the late filing of the Bundle of Authorities of the Applicants which had purportedly been filed with the Registrar of this Court on Friday 17 August 2018 but such Application

could not be found in the file of the Registrar present in Court, nor in the files of any of the Judges and Counsel for the Respondent stated that the alleged Application had not been served on him. Accordingly there is no such additional Application before us.

[3] For the sake of the record I believe that it is necessary to set out *verbatim* the Affidavit filed in support of the Application for Condonation which was attested to by the said Mr Mangaliso Magagula on behalf of the Applicants and it reads as follows;

"1. I am an Attorney of the High Court of Swaziland, practicing as such with the firm of Attorneys, Messrs Magagula and Hlophe Attorneys, at 7th Floor, Corporate Place Building, Swazi Plaza, Mbabane, in the Hhohho District. We are the Attorneys of Record for the Respondent in the matter.

2. The facts deposed to herein are within my personal knowledge and belief, both true and correct.

3. The roll for this session came out in 29 June 2018. At the time, I was handling two matters before the Swaziland Communications Commission, one was scheduled for hearing

on 5 July 2018 and the other to file submissions on 13 July 2018. I started working on the Appeal beginning of the week of 2 July 2018, simultaneously with the matters before the Swaziland Communications Commission.

4. **The Heads were due for filing on 10 July 2018. The Appeal involved a matter of constitutional importance. It concerns the issue of the parameters of freedom of expression. It required a lot of research which could not be undertaken within the limited time between the 29 June 2018 being the date in which the roll was issued and 10 July 2018 being the date in which the Heads were due.**

5. **On 9 July 2018, whilst working on the Heads, a senior member of the firm passed away tragically whilst at work. From that day, up until early in the following week I was unable to do any work because I had to be involved in arrangements to lay her to rest.**

6. **I only was able to continue with the Heads on Wednesday 18 July 2018. I finalized them on Friday 20 July 2018. I sent my messenger to serve and file them. She was only able to serve**

them. She could not file them because the Assistant Registrar refused to take them stating that they were already out of time.

7. I humbly apologize for not filling the heads out of time (sic!)**. It was not wilful but was caused by circumstances beyond my control."**

[4] Mr D.J. Jele acting for the Respondent, filed an opposing Affidavit on 14 August 2018 and again for the sake of the record I set out *verbatim* the relevant contents of his Affidavit;

"1. …

2. …

3. I have read the founding affidavit of my learned friend Mr Mangaliso B. Magagula ("the deponent") in support of this application and I submit that on the facts pleaded the applicant is not entitled to be condoned. This is so because the applicant has not complied with the basic and necessary allegations to be granted condonation.

4. It is trite law that, there are two basic and necessary allegations that have to appear in the founding affidavit in support of condonation application. First, the applicant must present reasonable explanation for default. Second, the applicant must outline the applicant's prospects of success on appeal. The applicant has not complied with those basic and necessary requirements.

5. I am aware that the deponent lost a member of his law firm. I therefore do not take an issue with the late filing of the heads on my own. However, the deponent should have gone further in his affidavit and explain why he did not give the matter to another competent Attorney in his office or another Attorney outside his office. I will leave that to this Court. In any event, the book of authorities have also been filed late. There is no condonation for its late filing.

6. I am concerned that the deponent has not outlined the prospects of success in his founding affidavit. I pointed out this anormally (sic) **to the deponent through a letter dated the 3rd August 2018 which was faxed to him on the same date. Up to date the**

application has not been corrected. The letter is attached marked "DJ1". There was not even a response to it.

7. The principle on which this Court can determine a condonation application has been established in a number of decisions of this Court. They are well settled now.

8. The applicant has not complied with same and this Court should refuse the condonation application. A condonation application should not be given by mere asking."

[5] The relevant portion of the letter referred to in paragraph 6 of Attorney Jele's letter to Mr Magagula dated 03 August 2018 reads as follows;

"1. Your condonation application refers.

2. With respect, it does not contain the basic and necessary allegation on prospects of success. Please attend to it quickly otherwise you will have a difficulty in making same in due course.

3. We reserved our client's rights to file answering affidavit if you do not withdraw it and file a fresh one."

[6] Counsel for the Applicants chose to ignore the contents of the said letter and as such remains bound by his Founding Affidavit which is before us.

ARGUMENT ON BEHALF OF THE APPLICANTS

[7] Mr Magagula referred the Court to the contents of his Affidavit which he believed to be self-explanatory. In addition he pointed out that the matter was of some importance and that his clients were entitled to their day in Court.

[8] He further pointed out that the whole debacle was his fault and pointed out that he had apologised in his Affidavit.

[9] He attributed the non-compliance to him being involved in other matters at the time and the untimely death of a senior member of his staff resulting in him having to arrange the funeral of that staff member.

[10] He also argued that this Court had a discretion in granting Applications of this nature but placed no authorities before us to bolster his argument before this Court. He further argued that it was not appropriate to deem the Appeal to be abandoned in terms of Rule 30 (4) as suggested by Mr Jele as

this Rule only was in respect of issues relating to the filing of a Record of Proceedings.

ARGUMENT ON BEHALF OF THE RESPONDENT

[11] Mr Jele referred the Court to his Affidavit which was self-explanatory. In addition he referred the Court to the letter which he had written to Mr Magagula on 03 August 2018 which apparently had simply been ignored.

[12] He further pointed out that in terms of the numerous Judgments of this Court, the failure to deal with the prospects of success in Condonation Applications rendered such Applications fatally defective and as such this Court should not grant the Application but should find that the Appeal had been abandoned by the Applicants in terms of Rule 30 (4) of the Rules of this Court.

THE LAW

[13] Rule 31 (1) of the Rules of this Court provide as follows:

> "**31 (1) In every Civil Appeal and in every Criminal Appeal the Appellant shall, not later than twenty eight 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."

[14] Rule 16 of the Rules of this Court provides as follows:

"**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."**

[17] 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)

[18] All of these Rules are clear and unambiguous and set out the obligations of a party who is obliged to file Heads of Argument as provided for in Rule 31 and failing that, as provided for in the case Law referred to below, to bring Applications as set out in Rules 16 and/or 17 above.

[19] 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, <u>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</u>."** (my underlining)

[20] 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, <u>he should, apart from remedying his fault, immediately, also apply for condonation without delay</u>.** 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: **"…<u>whenever an Appellant realises that he has not complied with the Rule of Court he should, without delay, apply for condonation.</u>"**
(my underlining)

[21] 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: **"<u>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</u> (1) the degree of delay involved in the matter, (2) <u>the adequacy of the reasons given for the delay</u>, (3<u>) the prospects of success on Appeal and</u> (4) the Respondent's interest in the finality of the matter."** (my underlining)

[22] 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: **"<u>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 propris.</u> As was pointed out in <u>Salojee vs The</u>**

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." (my underlining)

[23] 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."** (my underlining)

[24] As was said in **Kombayi v Berkhout 1988 (1) ZLR 53 (S)** at 56 by **Korsah JA:**

"Although this Court is reluctant to visit the errors of a legal practitioner on his client, to whom no blame attaches, so as to deprive him of a re-hearing, error on the part of a legal practitioner is not by

itself a sufficient reason for condonation of a delay in all cases. As Steyn CJ observed in Saloojee & Anor NNO v Minister of Community Development 1952 (2) SA 135 (A) at 141C: (my underlining)

A duty is cast upon a legal practitioner, who is instructed to prosecute an Appeal, to acquaint himself with the procedure prescribed by the Rules of the Court to which a matter is being taken on Appeal."

[25] In **Darries v Sheriff, Magistrate's Court Wynberg and Another, 1998 (3) SA 34 (SCA) Plewman JA (with whom Hefer HA, Eksteen JA, Olivier JA and Melunsky AJA concurred)** stated as follows;

"Condonation of the non-observance of the Rules of this Court is not a mere formality."

[26] In **Commissioner for Inland Revenue v Burger 1956 (4) SA 446 (A)** it was stated that;

"Nor should it simply be assumed that, where non compliance was due entirely to the neglect of the Appellants Attorney, condonation will be granted". (my underlining)

[27] In **Melane v Santam Insurance Co Ltd, 1962 (4) SA 531 (A),** 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.

[28] In **Novo Nordisk v CCMA & Others**, the Court gave helpful guidelines of the principles governing Condonation Applications which include the necessity of setting out prospects of success or a *bona fide* defence in the main case and referred specifically to the **Melane** case referred to above. As regards prospects of success the Court specifically explained what must be addressed when dealing with the prospects of success;

> **"[45] <u>In my view whilst the standard required in showing prospects of success is lower than that applied when the main case is considered. The application for condonation needs to show more than just listing factors related to prospects of success</u>. <u>The applicant needs to persuade the Court that there is a chance of the arbitration award being found when the review is considered in the main case to be irregular or unreasonable</u>"** (my underlining)

<u>FINDINGS</u>

[29] It is trite that an Application stands or falls on the Founding Affidavit and that is absolutely true in this case.

[30] Despite all the case law referred to above and in the **AG Thomas** judgment *supra*, which his firm was involved in, Mr Magagula simply did not bother to deal with or even mention the absolute requirement of addressing the issue of the prospects of success of the Applicants.

[31] This is even further compounded by the fact that the opposing Counsel, very magnanimously in my view, firstly addressed a letter to him on 03 August 2018 pointing out that the Application was defective and then followed this up with an opposing Affidavit in which it was again pointed out that the

Application was fatally defective. Mr Magagula simply chose to ignore both the letter and the opposing Affidavit.

[32] As such the well-established law in Eswatini was simply ignored and the Application was brought in defiance of the relevant Rules of Court at the peril of the Applicants.

[33] Accordingly on that ground alone, the Application for Condonation must fail with the words in the **Melane** judgment *supra* echoing to the effect that without prospects of success, no matter how good the explanation for the delay, an Application for Condonation should be refused.

[34] However, it is also necessary to deal with the actual contents of the Affidavit of Mr Magagula as regards his grounds for being out of time.

[35] It is trite that the non-availability of Counsel due to other commitments is not a valid ground. Mr Jele pointed out in his opposing Affidavit that there is no explanation given why the matter was not referred to another practitioner.

[36] It further needs to be pointed out that a certain Attorney Z. Shabangu from his firm acted for the Applicants in the Court *a quo*, and as such one assumes that he was fully aware of the issues and there is no explanation why he could not have assisted in at least bringing a timeous Applications for Condonation and/or the drawing of the Heads of Argument.

[37] There is no explanation whether the deceased was an Attorney or what position this person held. A careful reading of Paragraph 5 of his Affidavit seems to imply that the deceased member appears to have been working on

the Heads but no particularity is given. At this point it needs to be stated that the Court has every sympathy with the firm and the family for the passing of the deceased person.

[38] By his own admission, Mr Magagula knew on at least 02 July 2018, on 9 July 2018 and again on 20 July 2018 that the Heads which were due for filing were out of time. He did not launch an application then but only launched the Application for Condonation on 26 July 2018 after his messenger had been told on Friday 20 July 2018 that they would not be accepted as they were already out of time.

[39] Accordingly, the Application failed even on that ground in that no Application was brought in terms of Rules 16 and/or 17, as soon as it became apparent that the Heads were out of time as clearly set out in the **BARROW** judgement *supra*.

[40] As pointed out in the **UITENHAGE** judgement *supra,* Condonation is not to be had merely for the asking and full, detailed and accurate account of causes of delay are required.

[41] In **Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A)** it was stated;

"<u>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</u>"

(my underlining)

[42] As was said in the **Kombayi** judgment *supra*, error on the part of a legal practitioner is not by itself a sufficient reason for Condonation of a delay in all cases.

[43] In **Saloojee** above, it was said by Steyn CJ 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."** (my underlining)

[44] Accordingly, having found that the Application for Condonation by the Applicants is fatally defective, having further found that it failed on both the grounds that it did not disclose any prospects of success or in fact any mention of prospects of success and that the explanation for the delay did not meet the requirements of our law, there is no valid appeal before us and as such stands to be struck off the Roll and not to be reinstated without the prior leave of this Court having been sought and obtained.

[45] There is a cross appeal before this Court. If the Respondent wishes to prosecute same, a hearing date should be obtained from the Registrar for the hearing of the Respondent's application for the late filing of its Heads of Argument and Bundle of Authorities and if granted, the cross appeal.

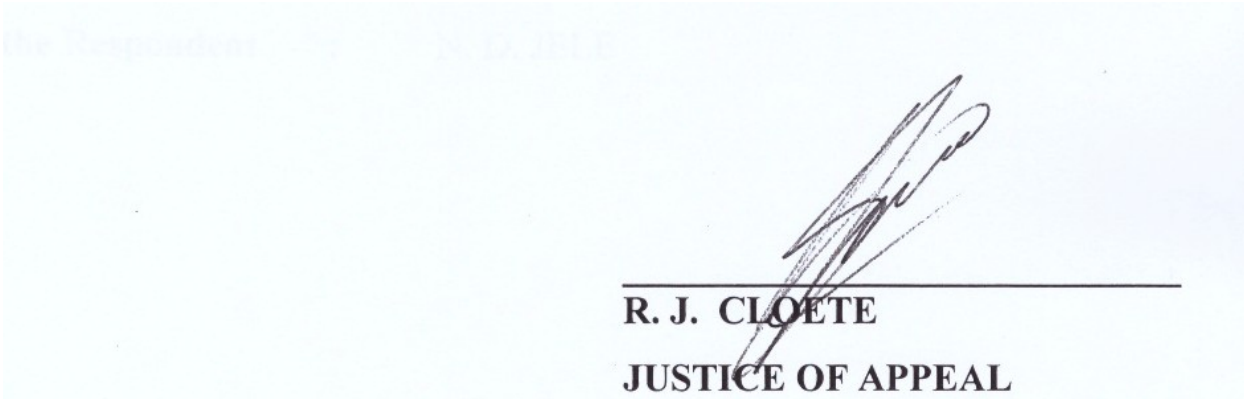
[46] As regards the issue of costs, to show its disapproval of the total disregard for the rules of this Court and the law as espoused in a plethora of case law, including in the **Simon Musa Matsebula** judgment *supra* and the **Saloojee** judgment, I seriously considered that this is an appropriate case for the award of punitive costs on the scale as between Attorney and his own Client but purely on the basis that Counsel did not have the opportunity to address this Court on that issue, I have reluctantly decided to award costs on the ordinary scale.

JUDGMENT

1. The Application for Condonation by the Applicants is hereby dismissed with costs.

2. The Appeal by the Applicants is hereby struck from the Roll and is not to be reinstated without the prior leave of this Court having been sought and obtained.

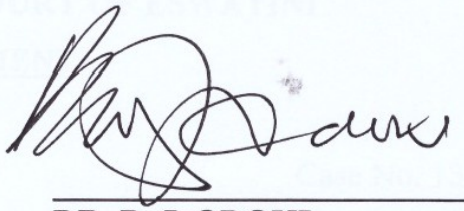
3. The Respondents' Application for Condonation of the late filing of its Heads of Argument and Bundle of Authorities and the cross appeal may be enrolled by arrangement with the Registrar.



R. J. CLOETE

JUSTICE OF APPEAL

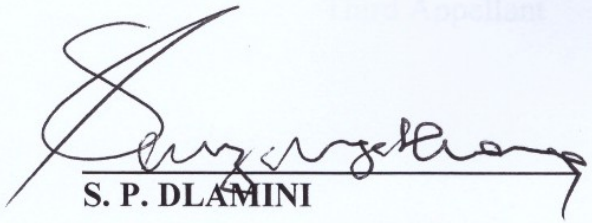
I agree



DR. B. J. ODOKI

JUSTICE OF APPEAL

I agree



S. P. DLAMINI

JUSTICE OF APPEAL

For the Applicants : M. B. MAGAGULA

For the Respondent : N. D. JELE