



IN THE SUPREME COURT OF ESWATINI
JUDGMENT

HELD AT MBABANE

Civil Appeal No. 105/2017

In the matter between:

Mfanukhona Maduna

1st Appellant

The Attorney General

2nd Appellant

The Swaziland Government

3rd Appellant

And

Junior Achievement Swaziland

Respondent

Neutral Citation : *Mfanukhona Maduna and two others and Junior Achievement Swaziland (105/2017) [2018] SZSC 31(2018)*

Corum : **S.P. DLAMINI (JA), R.J. CLOETE (JA)
M. MANZINI (AJA)**

Heard : **17/09/2018**

Delivered : **19/09/2018**

SUMMARY

CIVIL APPEAL : Application for condonation for late filing of Heads of argument briefly discussed - Notwithstanding that the application for condonation does not meet the required threshold, the Court mero mutuo and in the interest of justice nevertheless reluctantly granted – Whether there is an appeal pending before court – Held that the appeal was filed after the expiry of the dies as per Rule 8 (1) – Held that in the circumstances, the Registrar of the Supreme Court ought not to have accepted and filed the Notice of Appeal in the absence of leave for the filing out of time being sought and granted by this Court as per Rule 8 (2) – Held that the matter is improperly before this Court – Held that there is no appeal pending before the Court – Held that the Respondent is awarded wasted costs at normal scale.

FACTS

- [1] This is a unanimous Judgment of the Court.
- [2] The High Court delivered a Judgment on the 3rd November 2017, per Her Ladyship Justice M. Dlamini. The learned Judge found that the Appellants were liable for damages in the sum of Emalangeneni 28,000 arising out a collision between a vehicle driven by the 1st Appellant (an employee of the Government at the time) and a vehicle belonging to the Respondent due to the negligence of the former.
- [3] The Appellant being dissatisfied with the Judgment of the High Court sought the appeal against the Judgment by way of Notice of Appeal which was filed on 12th December 2017.

ISSUES

- [4] Two issues fell for consideration by this court namely: the application for condonation of the late filing of the heads of argument by the Respondent and whether the appeal was filed after the expiry or not and the consequences thereof.

APPLICATION FOR POSTPONEMENT

- [5] In fact when the matter was called, Mr Dlamini for the Appellant made a feeble attempt to apply from the bar for the matter to be postponed: the excuse was provided to the Court for the postponement was that Mr Dlamini had recently been allocated the matter because Mr Manana from the same office who had handled the matter was apparently away representing the Attorney General in overseas assignments.
- [6] An application for a postponement ordinarily ought to be made by way of a proper application duly served on the other party with sufficient notice and not from the bar as it was the case in this matter. This is not to suggest that in deserving circumstances an application for a postponement may never be made from the bar. However, in the present case no justification whatsoever existed for the application for a postponement for the matter to be made in the way it was made. Surely, the officer concerned knew well ahead that this matter was enrolled for hearing and when he subsequently took the trip overseas he ought to have ensured that the matter is passed on to another officer to proceed with it. It is noteworthy to point out that this is not the first time where the same excuse was presented in a matter that was pending before this Court resulting in a matter being struck off with costs and an application and its reinstatement launched at a huge expense to the taxpayer. This conduct

must be censured with the contempt it deserves. All attorneys whether from the public sector or private sector are officers of the court and ought to conduct themselves in a manner which accords the Courts the due decorum that the Courts deserve.

APPLICATION FOR CONDONATION FOR THE LATE FILING OF THE HEADS OF ARGUMENT BY RESPONDENT

- [7] The Respondent belatedly filed Notices of Application for the condonation for the late filing of the Heads of argument and attached a copy thereof to the application. The Appellant did not file any papers in opposition to the application.
- [8] Accordingly, the Court expressed the displeasure at the reason proffered by Mr Dlamini for the postponement and ordered that the matter be proceeded with. It is at this juncture that Mr Dlamini made submissions that the application for condonation was being opposed.
- [9] There are a plethora of authorities regarding the requirements to be met by a party applying for condonation. The Courts have formulated a triad-test in order to grant condonation namely: that as soon as a party becomes aware of the omission or commission the party must launch the application for condonation, that in application the party must address the prospects of success of his or her case and that a reasonable explanation for such an omission or commission must be provided. (**See De Barry Anita Belinda and A G Thomas (Pty) Ltd appeal case no. 30/2015** and the other cases referred to in that Judgment).
- [10] The Court considered the application for condonation and made an *ex tempore* order reluctantly granting the application for condonation for the late filing of Heads by the Respondent.

[11] The Court found that the application did not meet the triad threshold; the Counsel initially handling the matter did not immediately take steps to address the omission. While the court has sympathy for her falling sick she recovered and there was sufficient time for her to prepare and file the Heads of arguments. In any event the Heads that were subsequently filed did not require any extensive research particularly because they related to straight forward issues such as compliance with the Rules of Court.

The other reasons for the delay are that she was studying and had other matters to attend to, stand to be rejected for being not reasonable and justifiable grounds for failure to comply with the Rules of Court. As to why the matter was not given to any of her colleagues in the office remains a mystery. The only thing that is said with the prospects of success is that they are covered under the Heads of argument and not set out in the papers at all. In my view, this is insufficient and improper at law.

[12] Notwithstanding the foregoing, the Court *mero mutuo* and in the interest of justice reluctantly granted the application. The Court considered the following factors; that the Appellant did not file any papers in opposition to the application, that the matter has been outstanding for quite a long time and any further delay would not have been in the interest of justice, and that there was no prejudice to be occasioned against the Appellant particularly as it will appear below in the final analyses the matter turned on the question as to whether there was compliance or lack of compliance on the Rules of Court.

[13] Had the Appellant filed any opposing papers to the application for condonation, The Court would have been inclined to order that the Respondent pays the Appellant any wasted costs. I hasten to point out that the leniency of the Court in granting the application for condonation

in the circumstances of this case must not serve as a precedent for the relaxation of the requirement that a party ought to meet in order to be successful on an application for condonation. The Court came to the conclusion in considering the totality of the circumstances including the next point relating as to whether the purported appeal was filed out of time or not.

WAS THE NOTICE OF APPEAL FILED AFTER THE EXPIRY OF THE DIES?

[14] The dies regarding the filing of a Notice of Appeal is covered in Rule 8 of the Court of Appeal Rules 1971 (the Rule(s)).

[15] Rule 8 provides that:

“8.(1) The notice of appeal shall be filed within four weeks of the date of the judgment appealed against:

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

And provided further that if the appellant is in gaol, he may deliver his notice of appeal and a copy thereof within the prescribed time to the officer in charge of the gaol, who shall thereupon endorse it and the copy with the date of the receipt and forward them to the Registrar who shall file the original and forward the copy to the respondent. (Amended L.N. 102/1976).

8.(2) The Registrar shall not file any notice of appeal which is presented after the expiry of the period referred to in paragraph (1) unless leave to appeal out of time has previously been obtained.” (my own underlining for emphasis).

- [16] The Judgment in this matter was written and it was delivered on 3 November 2017. The Appellant's Appeal was filed on 12 December 2017.
- [17] If one leans in favour of the Appellants in calculating the dies and take 4 weeks to mean 30 days, the appeal ought to have been filed on or before the 3rd December 2017. Clearly the Appeal was filed out of time contrary to Rule 8 (1). The requirement in Rule 8 (1) is therefore preemptory
- [18] But the matter does not end there: Rule 8 (2) directs the Registrar in clear preemptory terms that he or she "shall not" file any notice of appeal which is presented after the expiry of the 4 weeks period without leave to appeal out of time sought and granted by the Court first.
- [19] There was no such leave sought and granted in this matter. Therefore, the Registrar ought not to have accepted and filed a notice of appeal that was out of time without an application being heard and granted by this Court and allowing the appeal to proceed.
- [20] It follows that the matter is not properly before Court and therefore there is no appeal pending and falling for consideration by this Court. In view of the incontrovertible fact which was also admitted by Mr Dlamini for the Appellants that the notice of appeal was filed out of time, a legal *cul de sac* is unavoidable. The Appellants were represented at the hearing of the matter and when the Judgment was delivered at the Court *a quo*. The assertion by Mr Dlamini for the Appellants that the dies is supposed to be calculated from the date of service of the court order and judgment has no merit and stands to be dismissed.
- [21] In view of the above findings of this Court there are no other issues that require consideration. However, it is apposite at this juncture to caution the office of the Registrar that where the Rules preclude the office from

accepting processes that are out of time, that is must be done so at all times in a uniform fashion. Therefore, the phenomenon whereby filing of papers which are out of time is allowed in certain cases and rejected in others must stop forthwith. In this matter the Respondent's Attorneys wrote a letter to the Registrar that the Appellant's Notice of Appeal was filed out of time. It appears that the Registrar neither acknowledged nor responded to the said letter and the office of the Attorney General was downright dismissive of the letter.

[22] **COSTS**

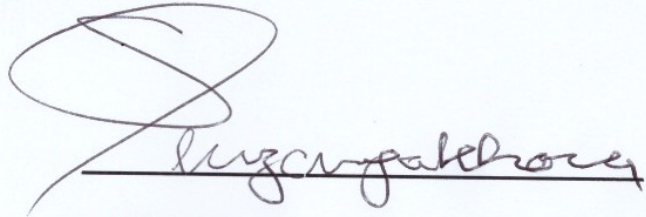
For the reasons stated herein the Respondent is awarded wasted costs. However, considering the manner in which the application for condonation was handled by the Respondent such costs ought not to include the costs for application of condonation.

COURT ORDER

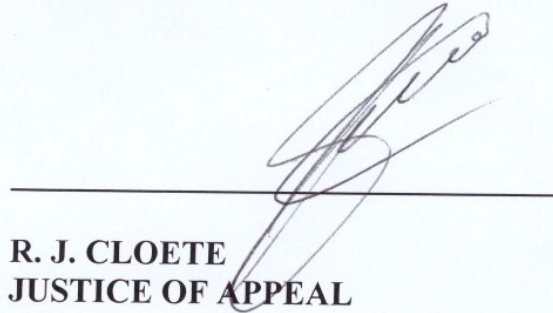
[23] Accordingly, this Court makes the following order:

1. That the purported appeal was filed and enrolled erroneously and improperly.
2. That there is no appeal pending and falling for consideration by this Court.
3. That the Respondent is awarded wasted costs at a normal scale.

I agree

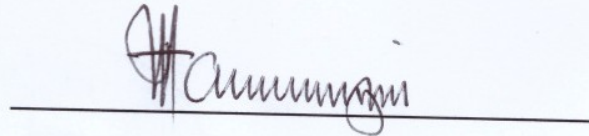


**S.P. DLAMINI
JUSTICE OF APPEAL**



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

I agree



**M. J. MANZINI
ACTING JUSTICE OF APPEAL**

For Respondent : Mr Sabela Dlamini assisted by
Ms Qondile Magagula from Magagula Hlophe
Attorneys

For Appellant : Mr Ndabenhle Dlamini from Attorney General
Chambers