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 and Cross Appellant

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 39* (19/10/2018)

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

Heard : 16 October 2018

Delivered : 19 October 2018

Summary : *Application for Condonation for late filing of Heads of Argument and Bundle of Authorities by the Cross Appellant – One of the absolute requirements being a full explanation for delay - Attorney filing founding affidavit not dealing with the delay adequately in terms of our Law – Application fatally defective – Flagrant disregard for rules of this Court – Application dismissed.*

JUDGMENT

CLOETE - JA

BACKGROUND

[1] This is an Application for Condonation for the late filing of his Heads of Argument and Bundle of Authorities by the Cross-Appellant who shall be referred to as the Applicant in this Judgment.

[2] It is unnecessary to set out any facts relating to the appeal itself but it is necessary to point out that this Court, in the same matter, delivered a Judgment on 19 September 2018 under Case No. 13/2018 in terms of which it dismissed the Application of the Appellants for condonation for the late filing of their Heads of Argument with costs and gave the Applicant in this

matter the opportunity to set his Application for Condonation down for hearing and if successful the Cross-Appeal was to be heard.

[3] Counsel for the Applicant, Mr N. D. Jele, filed the Affidavit in support of the Application for Condonation and I set out herein the salient paragraphs of the Application;

"8. In essence, the Applicant was expected to file her Heads of Argument as well as the Book of Authorities 18 days before the hearing of the Appeal. The Heads of Argument were filed in this Court on the 25th day of July 2018 and the list of authorities. The Applicant was therefore out of time in terms of the Rules of Court and that has necessitated the present condonation Application. (My underlining)

9. I must mention that the Heads of Argument were filed late because the Respondent (who is the Appellant in the main Appeal) did not file the Heads of Argument timeously. It was difficult to then prepare the Heads without knowing the case of the Respondent. The Respondents served me with the Heads on the 20th July 2018. I had engaged Advocate Christian Bester

from the Pretoria Bar to assist me with the draft Heads I had prepared by settling them as per my client's strict instructions. Due to his busy schedule as well he only able to provide me with the settled Heads on the 02nd of August 2018. I refer to the copy of his email attaching the Heads marked "DJ1" (My underlining)

10. The delay in the filing of the Heads of Argument was not as a result of deliberate disregard of the Rules of this Court but was due to mater beyond my control and for that I apologise to the Court and the other side.

11. The other side will not be taken by surprise by our Heads of Argument as they know our position even in the Court *a quo*. There is no prejudice therefore that the Respondents intend to suffer from the late filing of the Heads of Argument and list of authorities. In fact, it is the Respondents that also filed their Heads late and they have filed a defective condonation application which does not address the basic and necessary allegation of prospects of success." (My underlining)

[4] For the sake of the record, it is to be recorded that Counsel for the Appellants did not file any papers or documentation in opposition to this Application and in fact indicated to the Court that he preferred not to say anything about the Application and that is of course is right. He stated that his attitude was not to oppose condonation applications. However, that does not stand in the way of this Court in dealing with the Application and the relevant requirements in terms of well-established Law in Eswatini and just because the Application was not opposed, it does not place any obligation on this Court to grant the Application concerned willy nilly.

THE LAW

[5] Rule 31 (3) of the Rules of this Court provide as follows:

> "**31 (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 Argument and supporting authorities to be presented on appeal and shall serve a copy thereof upon the Appellant."**

[6] 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."**

[7] 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)

[8] 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.

[9] 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."** (my underlining)

[10] 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."**
(my underlining)

[11] 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."** (my underlining)

[12] 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 propris. 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." (my underlining)

[13] 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)

[14] 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."

[15] 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."

[16] 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)

[17] 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.

FINDINGS

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

[19] Despite all of the Rules and case law referred to above, Mr Jele has failed to comply with the absolute requirement that a full explanation of the delay including dates and times has not been presented to this Court.

[20] In dealing with the allegations of Mr Jele in his Affidavit as set out *supra*, the following emerges;

1. In Paragraph 8 of his Affidavit he acknowledges that he was out of time but further conceded at the hearing of the matter that he never brought an Application in terms of the Rules 16 or 17 as required by the case law referred to *supra*.

2. At Paragraph 9 he firstly alleges that his Heads were filed late because the Appellants did not file their arguments timeously and it was difficult to then prepare the Heads without knowing the case of the Appellants. This is clearly not correct at law as Rule 31 (3) provides that the Heads shall be filed within a set time period and it is not dependent on the other side having filed their papers. Clearly on 20 July 2018 when the Heads of the opposition were served on him, he already knew that he was out of time but just ignored the provisions of the Rules.

3. Further in the same Paragraph 9 he alleges that he had engaged the services of Counsel from Pretoria to settle the Heads but due to the busy schedule of Counsel he only received the settled Heads of 02 August 2018. He annexes as "DJ1" an email from the Counsel which, with respect, says absolutely nothing. Mr Jele does not take the Court into his confidence by setting out exactly when he allegedly briefed the Counsel and when he was advised of the supposedly busy schedule of Counsel and more damning, he simply ignores the provisions of the Rules and case law and does not bring the required Application in terms of the Rules. In addition, as pointed out Mr Jele

himself in the Application for Condonation by the Appellants, which was dismissed, it is trite law that the unavailability of Counsel was not an acceptable ground.

[21] 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 Applicant.

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

[23] 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.

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

"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"
(my underlining)

[25] 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.

[26] In **Saloojee** above, it was said by Steyn CJ that;

> **"<u>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.</u>"** (my underlining)

[27] Accordingly, having found that the Application for Condonation by the Applicant is fatally defective and having found that it failed in that the explanation for the delay did not meet the requirements of our law, there is no valid cross-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.

[28] It needs to be recorded that this Court has every sympathy with litigants who are let down by their Counsel. Accordingly, the Court does not intend (nor did it intend in the dismissed Application of the Appellants) to close the door on the litigants. The Cross Appeal is (as was the Appeal) merely struck off the roll and not dismissed with an accompanying Order that the Cross Appellant, (and the Appellants in the dismissed Application) have every right to bring an Application to this Court for the reinstatement of the appeals, subject to the said Applications fully meeting the requirements of the Rules of this Court and fully setting out all relevant facts and factors.

[29] As regards the issue of costs, the Applicant barely convinced this Court of its prospects of success but failed to adequately deal with the issue of an extension of time being sought in terms of the Rules and failing to give adequate reasons for the delay. However since Counsel for the Appellants decided not to participate in the application proceedings and did not apply for a costs order, no costs are accordingly awarded.

JUDGMENT

1. The Application for Condonation by the Applicant is hereby dismissed with no order as to costs.

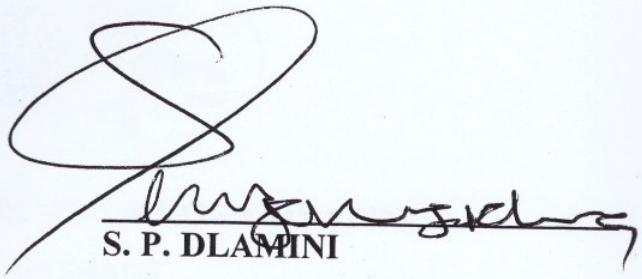
2. The Cross Appeal by the Applicant is hereby struck from the Roll and is not to be reinstated without the prior leave of this Court having been sought and obtained.

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 Applicant/Cross Appellant : N. D. JELE

For the Appellants : M. B. MAGAGULA