



IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Civil Appeal No.53/2017

In the matter between:

EKUHLAMUKENI FARMERS ASSOCIATION

Appellant

and

SIPHO DLAMINI

Respondent

Neutral Citation: *Ekukhlamukeni Farmers Association vs Sipho Dlamini*
(53/2017) [2018] SZSC 46 (31/10/2018)

Coram : **R. J. CLOETE JA, J. P. ANNANDALE JA AND**
S. J. K. MATSEBULA AJA

Heard : 10th September 2018

Delivered : 31st October 2018

Summary: *Civil matter-application for condonation for late filing of Heads of Argument in terms of Rule 17 of the Court of Appeal Rules (Supreme Court) – requirements to satisfy the rule – application fails test.*

JUDGMENT

MATSEBULA AJA

- [1] On the 15th June, 2017, the appellant filed an appeal to this Court in that –
- 1.1 The Court *a quo* erred in fact and in law in holding that the Appellant was indebted to the Respondent in the sum of E302,400 (Three hundred and two thousand four hundred Emalangeni) in respect of certain sails.
 2. The Court *a quo* erred in holding that the Appellant was liable to pay the Respondent for the use of “brick layers”.
 - 2.2 The Respondent failed to prove how many blocks were made using the block makers.
 3. The Court *a quo* erred in fact and in law in rejecting the explanation given by Appellant’s witness that the Respondent was paid for the use of his canvas sails.

The grounds of appeal are actually four in number and this is significant as it would be later shown.

- [2] It is common cause between the parties that the Appellant/Applicant herein failed to file its Heads of Argument and bundle of authorities in terms of Rule 31 of the Rules of this Court.

Rule 31 provides that the appellant shall not later than 28 days before 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.

The entrenched practice of this Court is that instead of a list of authorities, a bundle of authorities is filed.

- [3] In the present case, the Appellant on realization that he had fallen in default of this Rule filed an application for condonation in terms of Rule 17 which provides-

“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”.

THE ISSUES FOR DETERMINATION.

- [4] The Court is called upon to make a ruling on the condonation application, whether it meets the terms of Rule 17 and the settled case law or not.

Consequently an application must be scrutinized by the Court to verify whether it complies with the Rule under which it is being brought. Under Rule 17, the first test to be passed by Applicant is based on the words “The Court of Appeal may on application and for sufficient cause shown...” (My underlining).

[5] The Applicant formulated his application for condonation in this manner:

“5. *I was taken ill on the 23rd July 2018 and consequently was away from work until the 31st July 2018.*

5.1 *In the result I was not able to start preparing the Appellant’s Heads of Argument until then.*

6. *When I was finally able to complete the Appellant’s Heads of Arguments, I was out of time.*

7. *I state that I am not in willful default of filing Appellant’s Head of Argument timeously, but the circumstances were such that I could not file the Appellant’s Head of Argument on time.*

7.1 *The Appellant begs for the indulgence of this Honourable Court and I state that the failure to file her Heads of Argument timeously was not due to the negligence or disregard of this Rules of this Court, but the delay was due to the reason of me being taken ill.*

8. *I therefore beg that this Honourable Court condones my late filing of the Appellant’s Heads and grant me leave to file same out of time.*

9. *In terms of Rule 17 of the Rules of this Honourable Court, the court may excuse any party from compliance with any of these rules, on application and for sufficient cause shown.*
10. *The Respondent will suffer no prejudice if condonation for the late filing of Heads of Argument is granted and the matter be determined by this Honourable Court and bring it to finality”.*

[6] The Respondent opposed the application for condonation and submitted as follows in its Opposing Affidavit, that -

- (a) *that the contents therein are denied and Appellant and/or Deponent is put to strict proof thereof;*
- (b) *that there is no sufficient cause shown, why the delay in late filing of Heads of Argument. The mere allegation that appellant’s attorney was taken ill on the 23rd July 2018 and consequently was away from work until the 31st July 2018, without proof thereof is not sufficient cause. The party asking for condonation must provide a full, detailed and accurate account of the reasons for the delay to enable the court to understand and assess such delay.*
- (c) *that in a case such as the present where there is a flagrant breach of the rules, particularly where there is no acceptable explanation for it, the indulgence of condonation may be refused, whatever the merits of the appeal may be.*
- (d) *that no sufficient cause for the delay has been shown by Appellant.*

(e) *that the Respondent humbly states that he has been inconvenienced and prejudiced by the appellant's late filing of the Heads of Argument, for he had to file his Heads of Argument having not seen and received the one for Appellant to enable him to respond thereto, much against the rules of this court".*

[7] In reply to the Respondent's Opposing Affidavit, the Applicant denied and put Respondent to strict proof thereof and on realization or as an afterthought that he had omitted to say anything about his prospects of success added the following -

"7.2. I state that there has not been a flagrant breach of the Rules of this Honourable Court and a just explanation has been given by Appellant's Counsel.

7.3. I state that the Appellant seeks condonation from this Honourable Court as it has prospects of success on appeal that is; (my underlining)

7.3.1 The Court a quo granted judgment against the Appellants in favour of the Respondent when no evidence was led by the Respondent to prove how many bricks were made.

7.3.2. The Court a quo should not have rejected the evidence of the Appellant's witness who corroborated each other that the Respondent was paid and accepted payment of the sum of E17,

435.45 (seventeen Thousand Four Hundred and Thirty five emalangeneni forty five cents) for use of his two canvas sails.

And states at paragraph -

9.2. *I state that the Respondent has suffered no prejudice by the late filing of the Appellant's Heads of Argument, the Respondent may at anytime with leave of this Honourable Court supplement its Head of Argument if necessary and/or if need be. (my underlining)*

9.3 *In fact the Appellant's Heads of Argument were ready by the 13th August 2018 but when they were sued out with the Registrar of this Honourable Court on the 13th in order for them to be served, the Registrar advised that the Heads of Argument could not be sued out, served and filed without an application for condonation as they were filed out of time, thus they were filed on the same date with the Respondent's, being the 15th August 2018 together with the application for condonation".*

THE APPLICABLE CASE LAW/PRECEDENTS

[8] In the case of **Trans-Africa Insurance Co. Ltd v Maluleka 1956 (2) SA 273 at 278-FG** it was stated as follows:-

"No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the rules, which are an important element in the machinery for the administration of Justice. But on the other hand technical objections to less than perfect procedure steps should not be

permitted, in the absence of prejudice, to interfere with the expeditious and if possible, inexpensive decisions of cases on their real merits.” (my underlining)

- [9] In the present case it was no technical objection to point out the insufficiency of the reasons for the delay in filing the Heads of Argument as well as non-submission on the prospects of success of the appeal. The Applicant could be said was slack and this Court should not encourage it.
- [10] **In Unitrans Swaziland Limited V Inyatsi Construction Ltd Supreme Court Case No.9/1996** the court held that whenever a prospective Appellant realizes that he has not complied with the rules of court he should apart from remedying his fault immediately, also apply for condonation without delay.
- [11] The Applicant states that he was indisposed as he was taken ill on the 23rd July, 2018 and only returned to work on the 31st July, 2018 but only filed his application for condonation some two weeks later on the 15th August, 2018. A four or five page condonation application took the Applicant two weeks to compile and file. By any standards, this Court refuses to accept in the present case that the two weeks could be regarded as immediate action to remedy the fault.
- [12] In **Van Vyke v. Unitas Hospital and Another, 2008 (2) SA 472 at paragraph [20]** the Constitutional Court of South Africa stated as follows –
- “This court has held that the standard of considering an application for condonation is the interests of justice. Whether it is in the interests of*

justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to the enquiry include but not limited to the nature of the relief sought and the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success’.

At paragraph [22] -

“An Applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And what is more, the explanation must be reasonable”.

[13] In the present matter, the Applicant states that he was indisposed as he was taken ill on the 23rd July 2018 and only returned to work on the 31st July 2018 and only then started preparing the Heads of Arguments and by the time he was through he was also out of time. He did not immediately apply for condonation but instead tried to file the Heads of Arguments notwithstanding the fact that he was already out of time. It would appear to him all was alright. This attempt was done on the 13th August, 2018 but the Registrar would not permit the infringement or the irregular step to be taken and rightly advised him to apply for condonation for the late filing. The Applicant does not even attempt to explain why when he returned to work he failed to apply for an extension in terms of rule 16 or rule 17 for condonation. He did not file even the hospital’s sick note or doctor’s letter to assist this Court to measure if he was fit or not fit to do any work and further vouch for the bare allegation that he was indisposed.

- [14] There are just no facts put forward to assist this Court to make a fair determination. The Applicant does not even go so far as to provide any details of the alleged dispensation, such as the nature, severity, treatment or any other aspects of “being taken ill”. The bare allegation of being taken ill and without any supporting documents does not satisfy the test of “just cause” and fails also to meet the requirements of “remedying his fault immediately and also applying for condonation without delay”. The court agrees with the Respondent’s submission that a party asking for condonation must provide a full, detailed and accurate account of the reasons for the delay to enable the court to understand, assess and accept such delay.
- [15] On the issue of prospects of success, the Applicant made no submissions whatsoever in his Founding Affidavit where it should have been made. It was only after the Respondent had filed his opposing affidavit that the Appellant tried to cure the defective Founding Affidavit by then pleading the prospects of success in his Replying Affidavit.
- [16] As indicated earlier on, the significance of the grounds of appeal lies in this: the appeal is mainly on the award of E302,400 for certain canvas sails. This is the main ground of appeal. On the prospects of success the Appellant relies on the subsidiary ground of appeal, which is the E17,435.45 for the use of the brick-making machines. Could this be reasonably be regarded as being slack or lack of confidence on the prospects of success in the main ground of appeal. For this Court to come on a fair decision on the prospects of success, the appellant must himself exhibit such confidence.

[17] **THE DECISION/JUDGMENT**

For an application for condonation to succeed, it must satisfy, at least, the following elements -

- (a) as soon as an applicant or party realises that he or she has not complied with the rules of court, that party should apart from remedying the fault immediately, also apply for condonation without delay;
- (b) must also give a full explanation for the delay. In addition, the explanation must cover the entire period of delay and the explanation must be reasonable;
- (c) must address the importance of the issue to be raised in the main appeal and the prospects of success in the main appeal; and
- (d) the effect of delay in the administration of justice and to the other litigants (prejudice).

[18] The present application (notwithstanding that the applicant at the hearing conceded) does not satisfy the requirements, as stated above and stands to be dismissed. At the hearing, Counsel also conceded that the Condonation application cannot pass muster.


[19] On the question of costs being visited on the person of the Applicant's attorney, Mr. DuPont pleaded illness on the part of the Applicant and non-

deliberate and non-intentional flagrant breach of the rules of this Court. The Court is mindful of the *dictum* of **Steyn CJ in Saloojee & Another v The Minister of Community Development 1965(2) SA 135 at 141 C-E** where it is stated –

“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 disastrous affect upon the observance of the rules of this court.”

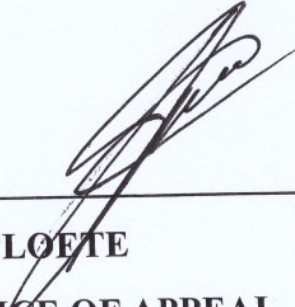
This Court is sympathetic to the submission by Mr, Du Pont and the Applicant shall shoulder the costs.

[20] In the result the application for condonation is dismissed with costs.




S.J.K. MATSEBULA
ACTING JUSTICE OF APPEAL

I agree



R.J. CLOETE
JUSTICE OF APPEAL

I agree



J.P. ANNANDALE
JUSTICE OF APPEAL

For the Appellant: P.M. du Point from Zonke Magagula Attorneys

For the Respondent: M.V. Nxumalo from Lucas KBS Dlamini Attorneys