



IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

CIVIL APPEAL CASE NO.102/2018

In the matter between:

**THE PUB AND GRILL (PTY)
LIMITED & ANOTHER**

Applicant/Appellant

and

THE GABLES (PTY) LIMITED

Respondent

*Neutral Citation: The Pub and Grill (Pty) Limited and Another Pub and Grill
vs. The Gables Pty) Limited - (102/2018) [2019]
SZSC 17 (20th May 2019).*

Coram:

M.J. DLAMINI, JA

J.P. ANNANDALE, JA

A.M. LUKHELE, AJA

Date Heard: 19 February 2019

Date delivered: 20th May 2019

Summary: *Civil Procedure – application for condonation for the late filing
of Heads of Arguments and authorities.*

Held that Appellant has failed to satisfy legal requirements for condonation and has failed to make a reasonable explanation and has failed to establish prospects of success.

Accordingly Applicants application for condonation is dismissed with costs. An application for an order to admit entries made by Judge a quo on the cover file also refused, on the ground that such has not been certified as correct by the Registrar of the High Court.

JUDGMENT

A.M. LUKHELE, AJA -

INTRODUCTION

[1] This is an application filed by the Applicant / Appellant for the following orders, viz;

“1. that this Honorable Court condones the Appellant’s late filing of heads of arguments and authorities to be relied upon

2. that this Honorable Court condones the Appellant’s reliance on the entries of the Court Orders issued by the Learned Judge in the Court *a quo*.”

[2] The appeal in this matter arose as a result of a matter in the High Court, where Tshabalala J. heard and dismissed an application for rescission of a judgment

which the High Court had granted on the 16th November, 2018;

- [3] In the Court *a quo* the Respondent had also moved an application claiming arrear rentals and sought the eviction of the Applicant / Appellant from certain premises situate at Ezulwini area.
- [4] The eviction proceedings and claim for arrear rentals were defended by Applicant / Appellant.
- [5] The High Court heard the matter and granted judgment in favour of the Respondent. The application was granted in Appellant's absence, as the Appellant's attorney did not appear at Court when the matter was heard.
- [6] On the 17th November 2018 the Applicant / Appellant applied for a rescission of the judgment granted by the Court *a quo*. Tshabalala J. in the Court *a quo* heard the application for rescission and dismissed the application for rescission of the judgment on the 23rd November 2018 she gave full reasons for her decision and orders made in her judgment.
- [7] On the 26th November, 2018 the Applicant / Appellant noted an appeal against the judgment and orders of the Court *a quo*. The notice of appeal contained a number of grounds, the main being that the Court *a quo* erred in fact and in law in dismissing the application for rescission of the judgement that had been launched by the Applicant / Appellant.

- [8] After filing its notice of appeal the Applicant / Appellant:-
- (a) did not file the record as required by Rule 30 of the rules of this Honorable Court;
 - (b) did not file its heads of arguments timeously, as required by Rule 31 (1) of the Rule of this Honorable Court.
- [9] On the date the matter was enrolled by the Registrar of this Court, no record or heads of arguments had been filed by the Applicant / Appellant in this Court. When the matter was heard, a record of appeal had been filed in the Court file, but the record had been prepared and filed by the Respondent contrary to the Rules of this Court, apparently with a view to have this matter finalised. It was filed on the 20th day of December, 2018, and served on the same day to the Applicant / Appellant. The Respondent had also timeously filed its Heads of Arguments and all the authorities it was to rely on as envisaged in Rule 31 of this Court.
- [10] As the Applicant/Appellant had failed to comply with Rule 31 (1) of the Rules of this Court, it filed an application for an order condoning such non-compliance regarding the filing of its Heads of Arguments. In its application the Applicant / Appellant also applied for an order condoning its reliance on entries of the Court recorder on the case file by the learned judge *a quo*, which reflects the judge orders issued by the Court *a quo*.
- [11] The above application for condonation was filed with the Registrar of this Court on the 15th day of February, 2019, three days before the application was heard, because *prima facie*, the non-compliance was of a very serious

nature and also because the application for condonation was vehemently opposed by

the Respondent. Attorney Joseph Waring filed an opposing affidavit on behalf of the Respondent. On the date of hearing of the application both Counsel were called upon to argue the application for condonation only.

[12] As no appeal record has been filed by the Applicant / Appellant, this Court must first decide the import of such an omission in this matter.

[13] Rule 30 (1) of the Rules of this Court provides *inter alia* that:-

“Rule 30 (1): The Appellant shall prepare the record of appeal in accordance with sub rules (5) and (6) hereof and shall within two (2) months of the date of noting of the appeal lodge a copy thereof with the Registrar of the High Court certified as correct...”

Rule 30 (4). Subject to Rule 16 (1), if an Appellant fails to note an appeal or to submit or resubmit the record for certification within the time provided by this Rule, The appeal shall be deemed to have been abandoned.”

[14] In a number of decisions of this Court, this rule has been held to be clear in setting out the obligation of the party who is supposed to file the record of appeal in the fashion of this rule.

[15] In *De Barry Anita Belinda vs A.G. Thomas (Pty) Limited* – Appeal Case No.

30/2015 at Page 25 (Paragraph 5) Cloete A.J.A (as then he was) stated an Appellant's obligation regarding the filing of the record of appeal by saying that:-

“All of these rules are clear and unambiguous and set out the obligations of a party who is obliged to submit a record of appeal in the fashion set out in Rule 30 and Heads of Arguments in the fashion set out in Rule 31 and failing that, as provided for in the case law which will be referred below, to bring applications set out in Rule 16 and / or 17 above contrary to what the Appellant alleged about shared responsibility, the onus is squarely on Appellant to prepare and file the record in consultation with the Respondent.”

[16] In *Meshack Ngwenya vs. Swazi Poultry Processors* – Appeal Case No, 65/2001 Odoki J.A at page 7 paragraph 12 put the obligation to prepare the record thus:

“ The preparations and filing of records of appeal in this Court are governed by Rule 30 of the Rules of this Court. The Appellant must prepare the record on appeal in accordance with sub-rules (5) and (6) of Rule 30 and must within two (2) months of the date of noting of the appeal lodge a copy of the record with the Registrar of the High Court for certification as correct.”

[17] The Respondent, anxious to have the appeal being heard without delay, filed a certified record herein. The Rules require of the Appellant to do so, in consultation with the Respondent. Strictly speaking, it is not in conformity with the Rules, but by doing so, no prejudice was caused to the Appellant, who remained at liberty to either amplify or supplement the

filed record, or to do so afresh if it so wished to file a different record, again certified by the Registrar. As no challenge in this regard was raised and from whichever perspective this apparent anomaly is viewed, the object of the exercise remains to have a full and proper record of proceedings availed to the court which is to determine the appeal, irrespective of which of the litigants actually collates and prepares the record

- [18] In the present matter the Applicant / Appellant has failed to file the record of appeal as required by the Rules of this Honorable Court. No attention has been paid at all by the Appellant and /or its Attorneys on this crucial obligation. The Applicant / Appellant has also not sought to utilize the provisions of Rule 16 and 17 of the Rules of this Court. Attorney Mr. S. Dlamini's affidavit makes no mention at all about the filing of the record in his affidavit.
- [19] In this Court, the Applicant's / Appellant's Attorneys have contented themselves with using and relying on the appeal record filed by the Respondent. This omission is an indication of a total disregard of the Rules of this Court by the Applicant / Appellant and should no doubt attract serious consequences. The Applicant cannot totally disregard the Rules of this Court and then seek this Court's indulgence in connection with filing of heads of arguments and list of authorities.
- [20] The second issue for decision is whether the explanation offered by the Applicant / Appellant for the delay in the filing of the heads of arguments is a reasonable and acceptable one.

[21] In the present matter, the explanation for the delay in not filing the heads of arguments timeously is given in the affidavits of Palesa Ntentesa, Mphilo Nkambule's confirmatory affidavits of Attorney Sabela Dlamini and Lebohang Clayton. The explanation for the delay clearly appears in the affidavit of Attorney Sabela Dlamini.

[22] The reason for the failure to timeously file the heads of arguments and list of authorities is stated by Attorney Sabela Dlamini as the difficulties experienced by his office in the transcription of the record of appeal and his busy schedule in attending to other matter cases.

[23] The question which this Court must decide is whether sufficient cause has been shown to justify this Court to exercise its discretion to condone the non-filing of the heads of arguments and list of authorities.

[24] In *Floyd Mlotshwa and Another vs Chairperson – Elections and Boundaries Commission and two others* – Civil case No. 96/2018 M.C.B Maphalala Chief Justice at page 10 paragraph 12 states that :-

“It is trite law that there are two main legal requirements for granting of an application for condonation. Firstly, the Applicant must present a reasonable explanation of the delay in complying with the Rules of Court. Secondly, he must satisfy the Court that he has prospects of success on the merits.”

[25] In *Phakama Mafucula vs Thembi Khanyisile Maziya (Born Bhiya)* – Civil Appeal Case No. 16/2017 page 22 Paragraph 25 – M.C.B Maphalala Chief Justice stated that:-

“It is well-settled in our law that a party seeking condonation should give a reasonable explanation for the delay, and in addition he must show that there are reasonable prospects of success on appeal.”

[26] In the present case, the reasons given by the Applicants / Appellant for not filing the heads of arguments and list of authorities relate largely to Mr. Dlamini’s busy schedule. The explanation is not reasonable and does constitute sufficient cause for this Court to exercise its discretion to grant the condonation sought.

[27] Attorney Sabela Dlamini is an experienced attorney and capable to prepare and settle the heads of arguments and list of authorities in this matter. Attorney Sabela Dlamini’s explanation demonstrates an obvious lack of attention that plainly calls for an explanation and evidences a failure to fully and candidly enlighten the Court, as an Applicant’s representative in a matter such as this he was obliged to do. His explanation in not timeously attending to the filing of the record, his heads and authorities has not been stated in a manner that is satisfactory and acceptable. The circumstances in this matter are such that this Court would be entitled to refuse this application for condonation on this ground alone. However, and not without some hesitation, I shall nonetheless address the issue of prospects of success.

[28] As regards prospects of success in *Swazi MTN Limited / M V Tel Communications (Proprietary) Limited* – Civil appeal Case No. 1/2006 at Page 4 - Paragraph 4 Magid J.A states that:-

“It is settled law that in an application such as this, an Applicant must give a reasonable and acceptable explanation for failure to make the application timeously and also show that there are reasonable prospects of success on appeal.”

[29] Similarly in *Hezekiel Mthezuka Magagula vs Swaziland Government* – Civil Appeal Case No, 31/1998 (1999) SZSC 13 Justice Leon J.P had this to say:-

“As a rule the Applicant for leave must allege, and the Court before it grants the application will have to be satisfied, that the appeal has some chance of success on the merits.”

[30] In *O.K.H. Farms (Proprietary) Limited vs Cecil John Littler N.O. and others*

– Supreme Court Case No. 56/2008 at Page 15 A.M Ebrahim J.A stated that:-

“As a Rule, an Applicant who seeks condonation will need to satisfy the

Court that the appeal has some chance of success on the merits – See de Villiers vs. de Villiers 1947 (1) SA 635 AD. A Court will not exercise its power of condonation if it comes to the conclusion that on the merits there is no prospect of success or are so slender that condonation would not be justified. See Penrise vs Dicknson 1945

AD6; de Villiers vs de Villiers supra ad Herbstein Van Wisen *Supra at Page 902.*”

[31] In the present application the Applicant / Appellant on the issue of prospects of success has recited the grounds of appeal as they appear in the notice of appeal and has invited the Court to refer to the heads of arguments that it has filed in the present application. The Applicant has failed to make allegations in its papers that go to show that it has prospects of success on appeal. It follows therefore that one can only reach the conclusion that the appeal is devoid of merit. For these reasons this application cannot be granted.

[32] In this matter the Applicant / Appellant has disregarded its obligation to file the record, but applied to this Court to condone the late filing of its heads. An Applicant cannot pick and choose which of the Rules of this Court it decides to follow. Needless to state that each of the Court’s Rules is important and is there for a purpose. The attitude displayed by the Applicant in the present case is that some Rules of the Court are not important and can be disregarded with impunity. This attitude is not acceptable.

[33] In a similar matter, in the case of *Musa Magongo and Swaziland Development and Savings Bank and the Registrar of Deeds* – Court of Appeal of Swaziland
– Civil Court Case No. 27/2000 Zietsman J.A. at Page 3 had this to say:-

“In this matter there had been a flagrant disregard of the Rule by the Appellant. The Appellant’s failure to comply with the Rules was specifically brought to the attention of his Attorney by the Respondent’s Attorney. The Appellant’s Attorneys was advised that because of the failure to comply with the Rules an application for dismissal of the Appeal would be made.

Despite the facts the Appellant sought to proceed with the appeal without making any attempt to remedy his fault, to comply with the Rules or to apply for condonation for this failure to do so.”

[34] In this matter the Applicant / Appellant has no doubt disregarded the Rules of this Court and the application stands to be dismissed.

[35] In its second prayer the Applicant applies to this Honorable Court to rely on manuscript entries made by the learned judge in the Court *a quo* on the file cover of the case file. The Applicant / Appellant made photocopies of the file cover and asked this Court to rely on the entries made thereon. These entries have not been certified by the Registrar as correct. Applicant / Appellant’s application has no basis in law and cannot be supported by the Rules of this Court and is contrary to Rule 30 of the Rules of this Court.

[36] Rule 30 of the Rules of this Court provides that the record of appeal submitted to this Honorable Court must be one that has been certified by the Registrar of the High Court as correct. The rationale for this Rule is clear and it is to ensure

that any document, entry and /or pleading to be relied upon in the proceedings on appeal is a true record of the proceedings in the High Court and has been duly certified as correct by the Registrar of that Court. The mere fact that a Respondent prepared and filed a certified record does not dispense with the duty of an Appellant to timeously file it.

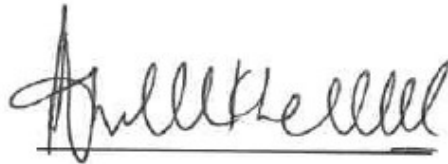
[37] The use of documents not certified by the Registrar is undesirable and may lead to the miscarriage of justice. Rule 30 (2) of the Rules of this Court provides for a procedure for amendment of records that are filed before this Court. The procedure provided by the Rules was available to Applicant had it wished to amend the record. The Applicant failed to utilize the procedure allowed in this Rule. Had Applicant's /Appellant's Attorneys followed the above Rule this Prayer would not have been made. Applicant's request cannot in the present case be acceded to.

[38] For the reasons that Applicant / Appellant has failed to file the record of appeal, set out prospects of success and failed to file its heads of argument, this Court finds that the application for condonation should fail and that this Court is enjoined to invoke Rule 30 (4) of the Appeal Court Rules and to make the finding that the appeal is deemed to have been abandoned.

[39] With regard to costs there are no reasons why costs in this case should not be paid by the unsuccessful party. Therefore, Applicant / Appellant is to pay the costs.

[40] In the result the order of the Court is as follows:-

- i) **Appellant's / Applicant's application for condonation for leave for the late filing of heads of Arguments is hereby refused, with costs.**
- ii) **The Appellant's application to admit certain entries made in the court file is refused.**
- iii) **Appellant's / Applicant's appeal is deemed to have been abandoned in terms of Rule 30 (4) of the Rules of this honorable Court and such appeal is dismissed.**



A.M. LUKHELE

ACTING JUSTICE OF APPEAL

I agree



M.J DLAMINI

JUSTICE OF APPEAL

I agree



J.P ANNANDALE

JUSTICE OF APPEAL

For the Appellant : Mr. Sabela Dlamini

For the Respondent : Mr. M. Tsambokhulu

