



## IN THE SUPREME COURT OF SWAZILAND

### JUDGMENT

HELD AT MBABANE

CIVIL APPEAL CASE NO: 36/2016

SWAZILAND ELECTRICITY COMPANY	Applicant / Appellant
and	
GIDEON GWEBU	1 <sup>st</sup> Respondent
MUNICIPAL COUNCIL OF MBABANE	2 <sup>nd</sup> Respondent
In re:-	
SWAZILAND ELECTRICITY COMPANY	Appellant
and	
GIDEON GWEBU	1 <sup>st</sup> Respondent
MUNICIPAL COUNCIL OF MBABANE	2 <sup>nd</sup> Respondent

*Neutral Citation: Swaziland Electricity Company vs. Gideon Gwebu and Municipal of Mbabane – (36/2018) [2018] SZSC 25 (29<sup>TH</sup> May 2019)*

CORAM: M. J. Dlamini J.A.  
S. B. Maphalala J.A.  
A. M. Lukhele A.J.A.

Date of hearing: 4<sup>th</sup> March 2019

Date delivered: 29<sup>th</sup> May 2019

*Summary: Civil procedure – late filing of record of appeal, application for condonation of late filing of record and heads of arguments; guiding principles and legal requirements for granting such applications; Application for condonation refused. No sufficient cause shown. Appeal deemed to have been abandoned.*

*Costs granted to 1<sup>st</sup> and 2<sup>nd</sup> Respondents. Costs to the 1<sup>st</sup> Respondent to include certified costs of Counsel.*

---

## JUDGMENT

---

**A. M. LUKHELE A.J.A.**

### **INTRODUCTION**

- [1] Serving before this Court is an application for condonation of the late filing of the appeal record together with an order for granting of an extension of time within which to file Heads of Arguments moved by the Appellant.
- [2] The Applicant/Appellant appealed to this Court against the judgment of the High Court, per Magagula J, delivered on the 29<sup>th</sup> March 2018.
- [3] In the Court *a quo* the First Respondent had instituted a damages claim against the Applicant and Second Respondent. The matter was heard in the Court *a quo* and judgment was granted against the Applicant/Appellant. The Court *a quo* made the following orders viz:-

[29] I have accordingly come to the conclusion that Plaintiff's claim succeeds against the 1<sup>st</sup> Defendant only and the following order is made:-

a) *The Defendant shall pay:-*

- i) *the costs of relocating the power lines as quoted at the time the relocation is done;*
- ii) *compensation to the Plaintiff for loss of income occasioned by the non-use of the premises calculated at the rate of E5,400.00 per month from April, 2013 to the date the relocation is made;*
- iii) *costs of maintaining night security at the premises at the rate of E1,200.00 per month calculated from April, 2013 to the date electricity is connected at the premises;*
- iv) *costs of suit for both Plaintiff and the Second Defendant including certified costs of Counsel in respect of the Plaintiff.*

**Alternatively**

b) *The Second Defendant shall pay:-*

- i) *damages to the Plaintiff in the amount of E3,150,000.00 in respect of loss of the land, loss of building and loss of income;*

- ii) *interest thereon at the rate of 9% per annum calculated from the date of issue of summons to date of final payment;*
- iii) *costs of suit for both Plaintiff and Second Defendant including certified costs of Counsel in respect of the Plaintiff.”*

[4] The Applicant/Appellant was not satisfied with judgment of the Court *a quo*, and on the 2<sup>nd</sup> May 2018 noted an appeal on a number of grounds. After this Applicant /Appellant did not file the appeal record and its heads of arguments.

#### **APPLICATION FOR CONDONATION**

- [5] On the 1<sup>st</sup> March, 2019 the Applicant/Appellant filed an application seeking condonation for its failure to lodge the record and heads timeously. The application was supported by an affidavit of Mr. Sabela Dlamini, the Attorney for the Applicant.
- [6] At the hearing on the 4<sup>th</sup> March 2019, the application for condonation of the late filing of the record and the heads or arguments were argued. The First Respondent through its Counsel opposed the application and also raised a preliminary point from the bar that the appeal was not properly before Court and was, in fact deemed to have been abandoned.
- [7] Second Respondent’s Counsel informed the Court that Second Respondent will abide by the decision of this Court in the application for condonation but

emphasised that he came ready to argue the merits of the appeal, he on behalf of Second Respondent, having filed the heads and list of authorities timeously.

[8] At the hearing of the matter the Applicant argued the condonation application. The Applicant relied on the affidavit of Attorney Sabela Dlamini. In the main this affidavit outlined the chronology of events surrounding the transcription and filing of the record of appeal and the delays occasioned thereto.

[9] In the affidavit, Attorney Sabela Dlamini, states inter alia that:-

- “4. *Even though the main protagonists in the main matter (the Appellant and the 1<sup>st</sup> Respondent) have agreed to the postponement of the matter which was enrolled to be heard on the 4<sup>th</sup> March, 2019, this application has been necessitated by the 1<sup>st</sup> Respondent’s contentions in his heads of arguments that the appeal be deemed abandoned by virtue of the record being filed out of time.*
5. *Technically, the contention by the 1<sup>st</sup> Respondent is correct hence the necessity for this application.*
6. *The record of appeal was filed out of time because of circumstances beyond the control of the Appellant transcription of proceedings in the Court a quo is outsourced to third parties who are difficult to control and confine to the periods stipulated in the Rules of this Honourable Court.”*

At paragraph 15 Attorney Sabela Dlamini proceeds to states:-

- “15. *The record of appeal was eventually filed on the 23<sup>rd</sup> August, 2018 and it was accepted by the Registrar of this Honourable Court none of the*

*Respondents raised any issue and the necessity of strict compliance with the Rules of this Honourable Court regarding the time periods of its filing slipped my mind. I apologise profusely.”*

ALLEGED AGREEMENT FOR POSTPONEMENT BETWEEN THE APPLICANT AND 1<sup>ST</sup> RESPONDENT

- [10] At the outset, it is important to deal briefly with the agreement allegedly entered into between the parties to postpone the matter. Attorney Sabela Dlamini stated that on the 28<sup>th</sup> January, 2019 he received a letter from First Respondent’s Attorney that indicated that First Respondent will on the 4<sup>th</sup> March, 2019, the scheduled date of the hearing of the appeal, request a postponement of the matter. Attorney Sabela Dlamini stated that he did not reply to this letter nor communicated his attitude towards the contemplated postponement to his opposite number, Counsel for the First Respondent.
- [11] When the matter was heard First Respondent’s Counsel stated that no agreement for a postponement of the matter was reached between the parties. Second Respondent’s Counsel stated that he was not aware of the contemplated postponement as no one contacted him about a postponement and he came ready to argue the appeal.
- [12] From the foregoing there is no doubt that there was no agreement between the parties that the matter will not be heard on the scheduled day of the appeal. In any event, no formal application for postponement of the matter was filed by any of the parties in this Court. In these circumstances, one can only conclude that no agreement was entered into by the parties for postponement of the matter.

### **APPLICANT'S AND RESPONDENTS' ARGUMENTS IN THIS COURT**

- [13] In this matter the Applicant urged this Court to consider and grant the application for condonation and extension of time on the basis of its Attorneys Affidavit and the reasons stated therein by Attorney Sabela Dlamini.
- [14] In the main, Applicant's Attorney attributed Applicant's failure to timeously file the record on difficulties he encountered in the transcription of the record of appeal and his failure to file the heads of arguments on his busy schedule, while attending to other cases that he was handling and on the understanding that the appeal was to be postponed on the hearing date.
- [15] The Respondent's contention before this Court was that Applicant had failed to timeously file the record and its heads of arguments and was in breach of the Rules of this Court, therefore its appeal was deemed to have been abandoned. At the hearing of the matter the Respondent had filed its heads of arguments and authorities even though such were late. To remedy this the First Respondent on the merits of the appeal filed an application in terms of Rule 16 and 17 of the Rules of this Court.

### **ESTABLISHED LEGAL PRINCIPLES**

- [16] In the textbook on Practice and Procedure: Herbstein and van Winsen's The Civil Practice of the Supreme Court of South Africa, 2<sup>nd</sup> Edition Page 64 there is the following passage :-

*“Condonation of the non-observance of the rules is by no means a mere formality. It is for the Applicant to satisfy the Court that there is a sufficient cause for excusing him from compliance and the fact that the Respondent has no objection, although not irrelevant, is by no means an overriding consideration.*

*The Court’s power to grant relief should not be exercised arbitrarily and upon the mere asking, but with proper judicial discretion and upon sufficient and satisfactory grounds being shown by the Applicant. In the determination whether sufficient cause has been shown the basic principle is that the Court has a discretion to be exercised judicially upon a consideration of all the facts and in essence it is a matter of fairness to both sides in which the Court will endeavour to reach a conclusion that will be in the best interests of justice. The facts usually weighed by the court in considering applications for condonation include the degree of non-compliance, the explanation for it, the importance of the case, the prospects of success, the Respondents interest in the finality of his judgment, the convenience to the Court and the avoidance of unnecessary delay in the administration of justice. It is therefore well established that the Court has a discretion to grant condonation when the principles of justice and fair play demands it, and when the reasons for non-compliance with the rules have been explained by the Applicant to the satisfaction of the Court.”*

- [17] *In Floyd Mlotshwa and Another vs. Chairperson Elections and Boundaries Commission – Civil Appeal Case No. 96/2018, M.C.B. Maphalala C.J. at Page 10 Paragraph 12 stated that:-*

*“It is trite law that there are two main legal requirements for the granting of an application for condonation. Firstly, the Applicant must present a*



*reasonable explanation for the delay in complying with the Rules of Court. Secondly, he must satisfy the Court that he has prospects of success on the merits.*

[18] In *Bani Ernest Masuku vs Maqbul and Brothers Investments (Ltd) and Others* - Civil Case No. 25/2011 Moore J.A. at Page 8, paragraph 8, states that:-

*“[8] The rules of the Supreme Court have been designed to ensure the smooth, orderly and, most importantly, the timely and expeditious conduct of litigation. The timelines set down in the rules represent realistic periods within which a given step in litigation must be taken. These periods of time were not plucked out of the air. They were based upon years of experience of what can in all probability be achieved with diligence and dispatch in the absence of any unforeseen eventuality.*

*[9] That is why, cognizant of the fact that perfection in human affairs is not always achievable, the rules themselves allow for the extension or enlargement of time in deserving cases. Accordingly this Court will exercise its facilitative discretion in favour of a litigant who is out of time for good and sufficient reason.”*

[19] In *Unitrans (Swaziland) Ltd vs. Inyatsi Construction Ltd* – Civil Appeal Case No. 9/1996. Kotze J.P. at Page 11 stated 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 default immediately, also apply for condonation without delay.”*

[20] In *Mfanukhona Maduna and two others vs. Junior Achievements Swaziland and others*— Civil Appeal Case No. 105/2017, the Court per S. P. Dlamini J.A., R. J. Cloete J.A. and M.J. Manzini A.J.A., at page 4 Paragraph 9 in a unanimous judgment, had this to say:-

*“[9] There is 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 an the application for condonation, that in [the] 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 vs. A. G. Thomas (Proprietary) Limited – Case No. 30/2015 and the other cases referred to in that judgment.)”*

[21] In the context of the present case, the Appellant/ Applicant ought to have utilised the provisions of Rule 16 of The Rules of this Court when it became apparent that the appeal record was not going to be filed on time.

[22] Rule 16 provides that:-

*“16. (1) The Judge President or any Judge of Appeal designated by him may on application extend any time (limits) prescribed by these rule.”*

- [23] Applicant did not utilise this rule. Failure to do so should attract consequences against the Applicant / Appellant.

### **RECORD OF APPEAL**

- [24] In terms of Rule 30 (1) and (4) of the Supreme Court Rules the Applicant/ Appellant ought to have submitted the record for certification to the Registrar of the High Court not later than the 30<sup>th</sup> May 2018.
- [25] The Applicant/Appellant failed to so file the record of Appeal timeously and its Heads of Arguments, thus failed to comply with The Rules of this Honourable Court.
- [26] The Applicant/Appellant only filed the record of appeal with the Registrar of this Court on the 23<sup>rd</sup> August, 2018. The Registrar of the High Court stamp affixed on the Registrar's Certificate is that of the 22<sup>nd</sup> August 2018. The record was filed outside the four week period as stipulated by Rule 30 (1) of the Court of Appeal Rules 1971. The record was filed approximately three months after the due date.
- [27] In this application, the Applicant belatedly now seeks condonation of the late filing of the record. The grounds and explanation presented by the Applicant for the late filing, i.e. difficulties in the transcription of the record and busy schedule as stated by Attorney Sabela Dlamini, are inadequate and not reasonable. Attorney Sabela did not show to this Court that he could not delegate the work of either the transcription of the record or the drafting of the heads of arguments to another Attorney of the Firm acting for the first Respondent. The explaining

given by Attorney Dlamini represents a most disrespectful explanation to this court. This Court, is the highest Court in the land and requires that Practitioners and Litigants alike should show and give it the respect it deserves. Accordingly the application for condonation for the late filing of the record should fail on this ground alone.

### PROSPECTS OF SUCCESS

[28] Applicant's Counsel argued before this Honourable Court that there are good prospects of success in the appeal, hence this Court was urged to grant the application for condonation for the late filing of the record and Heads of Arguments and let the appeal be argued on the merits.

[29] *In Kodwa vs. Secretary of Health and Another 1999 (1) ZLR 313 3 Sadura J. (with whom McNach J.A concurred) stated that:-*

*“While the presence of reasonable prospects of success on appeal is an important consideration which is relevant to the granting of condonation, it is not necessarily decisive. Thus in the case of 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. This was made clear by Muller JA. In P.E. Bosman Transport Works Committee and others vs. Piet Bosman Transport (Pty) Limited 1980 (4) Sa 794 (A) at 799 D-E, where the Learned Judge of appeal said.”*

*“In a case such as the present where there has been flagrant breach of the Rules of this Court, in more than one respect, and where in addition there is no acceptable explanation for some periods of delay and indeed, in respect of other periods of delay, no explanation at all, the application,*

*should in my opinion not be granted whatever the prospects of success may be.”*

[30] In order to determine the merits of the argument of the appeal, this Honourable Court is obliged to have regard to the grounds of appeal and to consider the evidence adduced and the Judgement thereto in the Court *a quo*. In considering the issue of prospects of success on the issue of liability I am of the view that:-

- 1.1. *the Court a quo correctly, established the issue of locus standi of the First Respondent;*
- 1.2. *the Second Respondent discharged its obligations in so far as the process and requirements for the approval of a building permit in respect of the property in question;*
- 1.3. *the Court a quo correctly identified that the onus that lay on the Applicant/ Appellant to satisfy itself that the proposed structure did not constitute a source of danger in relation to its powerline;*
- 1.4. *the Court a quo correctly found that the Applicant / Appellant was negligent in not processing the building application;*
- 1.5. *on the evidence led the negligence of the Applicant / Appellant was correctly established in the Court a quo;*
- 1.6. *the Applicant / Appellant therefore failed to discharge the duty of care that it had in respect of First Respondent's building application;*

1.7. *the Court a quo correctly found that Appellant breached its duty of care in the present matter; Knop vs. Johannesburg City Council 1995 (2) SA (1);*

- [31] In the present matter, assuming without concluding, that the appeal is not without merit, the non-observance of the Rules of this Court has been flagrant and gross that the application for condonation should not be granted, whatever the prospects of success might be. The record of appeal has not been filed timeously and the heads of arguments have not been prepared and filed at all.
- [32] In *Melane vs. Santam Insurance Co. Limited* – 1962 (4) SA 531 (A) the Court, per Holmes J.A., held that without a reasonable and acceptable explanation for the delay, for prospects of success are immaterial and without prospects of success, no matter how good the explanation for the delay is the application for condonation should be refused.
- [33] The principles of law espoused in *Melane vs. Santam Insurance Co. Limited* (Supra) and in several cases decided by this Court, have over the years been interwoven into our jurisprudence on the issue of condonation thus making them part of our law.
- [34] Cloete J. A. in *The Swazi Observer Newspaper (Pty) Limited t/a Observer on Saturday and two others vs. Dr. Johannes Futhi Dlamini* (13/2018) [2018] S Z S C 26, while conducting a review and analysis of comparative cases on the subject provides a lucid extensive and helpful exposition of the law on this topic, *cited Melane vs. Santam Insurance Co. Limited* (Supra) with approval, and at Page 4 Paragraph 27 he had this to say:-

“[27] *In Melane v Santam Insurance Co. Limited, 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] ***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. 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. (my underlining)***”

[35] In *Ferreira vs. Ntshingila* 1990 (4) SA 271 (A) (a) 281 Friedman AJA had this to say:

*“The degree of non-compliance may be so gross and the explanation so inadequate that the Court may be moved to refuse condonation regardless of the prospects of success on Applicant.”*

[36] The same sentiments are true in the instant case. For the foregoing reasons, I am of the view that there are no prospects of another Court finding that the Applicant / Appellant was not negligent and not liable to the Respondent. The delay in bringing the application for Condonation and the total disregard of The Rules of this Court by the Appellant / Applicant also cannot be excused.

### **HEADS OF ARGUMENTS**

[37] Rule 31 provides that:-

*“In every civil appeal and in every criminal appeal the Appellant shall, not later than 28 days before the hearing of the appeal file with the Registrar six copies of the main heads of arguments to be presented on appeal, together with a list of the main authorities to be quoted in support of each head. Amended L.N. 37/1983 LN 77/1989.”*

[38] In the present matter, as at the date of the hearing of the Application for condonation, the Applicant had not filed its heads of argument. The heads were not even attached to the application which this Court heard. The Application for condonation includes a prayer for “Granting the Appellant an extension of time within which to file its heads of argument”. How Applicant expect this Court in such circumstances to grant it extension of time to file its Heads of Arguments eludes me. The Court cannot in these circumstances come to the rescue of the Applicant / Appellant. Applicant/Appellant request stands to be refused.

### **CONCLUSION**



- [39] After carefully considering all the a foregoing and the legal arguments advanced on behalf of the parties, I find that the Applicant / Appellant has failed to convince the Court that this is a matter in which condonation for the late filing of the record and Heads of Arguments should be granted. The explanation given by Applicant's / Appellant's Attorneys is wanting and is not reasonable. Added to that, are the several breaches of the procedure committed by Appellant. It would be unfair to the First and Second Respondents if this Court were to overlook the flagrant disregard of the Rules of this Court exhibited by the Applicant / Appellant in this matter.
- [40] Applicant's Counsel in this Court stressed the fact that Second Respondent's does not oppose the application for condonation. The fact that the Second Respondent has not opposed the application for condonation does not assist the Applicant in any way since an application for condonation is not just for the asking. The onus is on the Applicant to convince the Court that there exists good cause for granting the application.
- [41] It is for this Court to decide whether a proper explanation has been advanced and the Respondent's attitude cannot bind this Court. In *Saloojee and Another N.O. vs, Minister of Community Development* 1965 (2) S.A 135 (A) at 138 E. Steyn C.J. had this to say:-
- "It is for the Applicant to satisfy this Court that there is sufficient cause for excusing him from compliance, and the fact that the Respondent's has no objection, although not irrelevant, is by no means an overriding consideration."*
- [42] In this matter the Applicant has failed to meet the necessary requirements and the application for condonation cannot succeed and the provisions of Rule 30 (4)

of the Rules of this Court should be invoked, thus the finding that the appeal is deemed to have been abandoned.

- [43] To conclude, following the findings that this Court has reached on the application for condonation, it is not therefore necessary to consider and decide the application for the late filing of the heads of arguments filed by the First Respondent.

### COSTS

- [44] On the issue of costs it is important for this Court to show its disapproval of the disregard of The Rules of this Court. This is more so because the Applicant filed its application for condonation late and did not give the other parties an opportunity to file their papers in opposition to the application for condonation. The Respondents were forced to argue and oppose the application without filing any papers. The Applicant should therefore pay the costs attendant on the enrolment and hearing of the application for condonation.

### ORDER

- [45] In the result:-
- 1. The Application for condonation is refused, with costs to the First and Second Respondents. First Respondents costs to include certified costs of Counsel.**
  - 2. The appeal is deemed to have been abandoned in terms of Rule 30 (4) of the Rules of this Court.**



**LUKHELE A. M.**  
**ACTING JUSTICE OF APPEAL**

I AGREE

  
DLAMINI M. J.  
JUSTICE OF APPEAL

I AGREE

  
MAPHALALA S. B.  
JUSTICE OF APPEAL

**For Applicant:** Attorney Sabela Dlamini  
**For 1<sup>st</sup> Respondent:** Ms. Van der Walt instructed  
by Attorney Mlangeni & Company  
**For 2<sup>nd</sup> Respondent:** Attorney Zweli Jele