IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO: 02/19**

In the matter between:

VICTOR TESAR **Appellant**

And

ANITA TESAR **Respondent**

Neutral citation: Victor Tesar vs Anita Tesar (02/19) [2019] SZSC 38(...09th October, 2019..)

Coram : MJ Dlamini JA

Heard : 6th August, 2019

Delivered : 09th October, 2019

SUMMARY: ***Civil Practice – Interlocutory Application – Application for condonation for late filing of heads of argument and bundle of authorities – No written judgment except for order of maintenance pendente lite – Written judgment promised but still not delivered at time of hearing – Record filed but incomplete without the judgment – Show of prospects of success not possible – Application for contempt by respondent not granted – No order made on the application – Application struck off the roll – Applicant may reinstate on same papers as may be supplemented – Order for maintenance sustained – No order as to costs.***

JUDGMENT

MJ Dlamini JA

[1] This application was brought in terms of Rule 17 of the Rules of this Court for an order condoning the late filing of the applicant's heads of argument and bundle of authorities to be used in support of an appeal noted by the applicant and pending before this Court. Accordingly, the applicant, who was the respondent at the High Court, is the appellant in the main matter in which he is appealing against an order of the High Court dated 28 December, 2018, in terms of which applicant/appellant was ordered to pay maintenance *pendente lite* at an amount of E14,000.00 per month. In the alternative, applicant seeks an order under Rule 16 for extension of time within which to file the documents already mentioned.

[2] Before counsel for applicant could stand and address the Court, Adv. M. van der Walt, counsel for the respondent, raised the issue of applicant being in contempt of the court order of 28 December 2018 and that applicant was coming to court with dirty hands and as is the practice and custom of the courts the applicant should not be heard until he purges his contempt. The order of the High Court (per Maphanga J) said to have been breached by the applicant reads:

"That the order nisi *issued by this court directing the Respondent to pay a maintenance contribution to the Applicant at a monthly rate of E14,000-00* pendente lite *(pending finalization of the divorce order) is hereby confirmed effective 28th December 2018".*

[3] Adv van der Walt argued that the applicant was in contempt since 28 January 2019 when the monthly contribution ordered by the High Court became due and owing. That applicant accordingly should not be heard and the application be dismissed with costs at attorney and client scale plus costs of counsel. The order of 28 December 2018 was in respect of an application by the present respondent in terms of Rule 43 of the High Court Rules. Against that order the applicant appealed by notice dated 30 January 2019. In this application, applicant filed a 67 paragraph and 53-page affidavit, excluding annexures which are equally lengthy. On an application like the present counsel could have been shorter and to the point without sacrificing anything important. For instance, there was no need to quote Rule 16 and Rule 17 in the affidavit.

[4] Applicant by his attorney, (Mr. T. Hlanze) stated that on the day the order was granted by Judge Maphanga applicant was not in court nor was he represented. It was only on 15 January 2019 that applicant was personally served with the court order of 28 December 2018. Applicant's attorney who attested to the applicant's founding affidavit, stated that he had been sick and could not be in court on 28 December and court recess had begun. He had requested the clerk of court to let him know of the court order soon after it was issued; but that did not happen. It was only when the affiant returned to office on 7 January 2019 that he aggressively sought to find out about the order granted.

[5] Deponent stated that he came from Manzini to the High Court to peruse the file but the file could not be located and the clerks at the registry promised to find it and let deponent know of the order as it was assumed the file would be with the Judge who had made the order: *"I waited in anticipation for an update from the Registry office without success. I again travelled to the High Court on 11th January 2019 in an effort to get hold of the file. I was again turned back with the same reason that the file [had] not been located"*, deposes Mr Hlanze. It was only on the 15th January or there about that the deponent says applicant informed him the deputy Sheriff wanted to serve applicant with a court order. It was after applicant received the court order that deponent got to peruse and know what the court had ordered – a full two weeks after the date of the order.

[6] As already stated, the applicant appealed against the order of the High Court concerning, *inter alia,* the monthly maintenance of E14000-00 and the costs order.

[7] On the date when applicant noted the appeal, that is on 30 January 2019, there still was no written judgment in support of the order of 28 December 2018. Applicant's attorney said he needed the *"written judgment to understand the perspective and viewpoint of the court* a quo *on the case"*. Accordingly, on 11 February 2018 the attorney *"wrote to the Registrar of the High Court requesting written reasons for the judgment of ... Maphanga J"*. To date of this application, no written judgment has been delivered stating the reasons for the order granted: *"26. I submit that it is fundamental that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, and, when judgment is appealed, written reasons are indispensable. Failure to supply said reasons is usually a grave lapse of duty, a breach of litigant's rights and an impediment to the appeal process"*, averred the deponent attorney.

[8] On 12 February 2019 the respondent had commenced urgent proceedings for leave to execute the judgment as per the said court order pending finalization of the appeal as noted by applicant. The application by respondent was opposed by applicant. The parties were given tight timelines and the matter was argued on 26 February 2019 with judgment being reserved. To date of this hearing the said judgment has not been delivered. I need only mention here that applicant argued against the contempt issue raised by the respondent at the start of the hearing, pointing out that the matter of the said contempt had been raised at the application for leave to execute in February 2019. If that be correct then another judgment is still pending on that point in the court *a quo* since 26th February, 2019. When these judgments will be delivered remains unknown.

[9] On 29 March 2019 Mr. Hlanze attempted to lodge the record as required by Rule 30. He also wrote informing the attorney for the respondent that applicant was *"experiencing difficulty at the court* a quo *due to technical issues in getting hold of the audio recordings for the oral submissions and directives of the court in relation to the proceedings which would enable the Court of Appeal to at least have an understanding of the perspective and/or view point of the court* a quo *when dealing with the matter"*.

[10] Applicant's deponent averred that he understood Rule 30 to be *"premised on the handing down of a written judgment..."*. In the result, the lodging of the record was hampered by the absence of a written judgment *"and the* dies *as provided in Rule 30 cannot be said to have run its course when the record is incomplete for want of a written judgment"*, says deponent. He further says the incomplete record was filed within two months and was *"prepared with the consultation of counsel of the Respondent with both parties certain that the record was complete"*.

[11] Attorney Hlanze further deposed: *"34. During the hearing of the application for leave to execute, again the issue of the absence of a written judgment was brought to bear during argument. The issue of the absence of the written judgment was submitted by myself during argument and the court* a quo *stated and promised that the same would be dealt with in his written reasons of the judgment for leave to appeal. To date I have not been furnished with the written reasons as promised by the court* a quo... *36. It is common knowledge that up (to) today's date there is no written judgment, notwithstanding the fact that I wrote on behalf of the applicant to the Registrar [of the High Court] requesting for a written judgment..."*

[12] In the result, applicant has applied for condonation for not filing the heads and bundle and for extension of time within which to file a complete record. The applicant submits: *"41. ...the 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"*. Applicant also refers to the interests of the minor children as a matter of paramount importance in the present case. It is clear that the applicant appreciates the issues for consideration in the present matter bearing on the condonation and or extension and the importance of the case.

[13] The applicant's attorney further points out that his seeking for medical advice in mid-June and being told that he had *"recurring painful carbuncles and abscess, building up under my arms and other parts of my extremities"*, contributed to the failure to comply with the rule of court. From the medical reports on record, the said attorney evidently suffers from intermittent and recurrent physical illnesses which must have adversely affected his prosecution of the appeal. In my opinion the

physical disability as described in the affidavit coupled with the unavailability of a written judgment evincing the reasons for judgment, in particular, the order granted on 28 December 2018, justify the granting of the order prayed for, that is, the late filing of the complete record on appeal and the heads of argument. The actual grant of the prayer however must be subject to what is said below.

[14] A reasonable and acceptable explanation for the delay or non-compliance with the Rules alone is however not sufficient for the grant of condonation and or extension of time in terms of Rules 17 and 16 respectively. Condonation of a breach of the rules of court is granted not as of right but as an indulgence. The applicant must also show reasonable prospects of success. And that he acted expeditiously when he discovered his delay. (See **Melane v Santam Insurance Co Ltd** 1962 (4) SA 531 (A) at 532 C – F; **Saloojee and Another, NN.O v Minister of Community Development** 1965(2) SA 135 (A) at 138E). All in all, the applicant must show sufficient cause why he must be granted the indulgence.

[15] In the present matter, the appeal is practically against the order for the payment of E14000-00 per month by way of maintenance. In different parts of the founding affidavit the deponent avers that in fact the applicant is presently paying more than E14000-00 monthly maintenance and in para 49.1 a figure of E16 668.00 is indicated as the 'monthly amount' of the children's maintenance. The question raised by this narrative is why appeal against an order for a lower amount of maintenance than you are currently paying. This alone does not make sense. Why is it a burden to applicant to pay less than he normally pays. Between the manner the applicant pays maintenance as determined by himself and the payment as per the court order, there lies a jurisdictional gulf or chasm. A self-determined and regulated payment of maintenance without a court order does not carry the penalty of contempt

on default. As such, applicant would not be legally obliged to pay maintenance and that would be a serious drawback and prejudice to the rights of the children.

[16] The problem facing the applicant is what happens to the appeal prosecution where after a full hearing on merits only an order *pendente lite* was made and a written judgment was reserved, and the reservation proves to be indefinite? Checks at the Registrar of the High Court's office has yielded no positive result. In my view, the applicant/appellant either has an appeal pending or he does not have it. If he has an appeal pending it is only in terms of the order dated 28 December 2018, without a reasoned judgment in support of it. Is such an appeal sustainable? I do not think so. Without the reasoning of the court *a quo* in support of the order granted this Court on appeal would virtually double as a court of first instance in conducting the appeal. That would not be acceptable. Having granted the order on 28 December 2018, it is difficult to understand why the learned Judge *a quo* has not delivered a reasoned judgment. Worse still, applicant submitted during the hearing that the issue of contempt was raised and argued during the month of January or February 2019 before the same learned Judge who issued the order *pendente lite* and on that hearing the judgement remains reserved. This pendency makes it difficult to consider and decide the matter of contempt. The respondent did not file any papers in opposition to this application. I did not hear from the respondent that the applicant was not correct on the foregoing submission regarding the pending judgments on the matter of contempt and leave to execute.

[17] The uncertainty of the appeal hearing has a negative impact on this application for condonation and or extension. In considering whether or not to condone or extend the time for the late filing of the heads and bundle of authorities this Court must have in mind reasonable prospects not only of the pending appeal being heard but also of reasonable prospects of success of that appeal. In the case at hand, none

of this is ponderable. There is no basis, no material, on which this Court can say there is an appeal pending and that appeal has any prospects of success. What is pending before this Court is essentially a notice of appeal. That is all. I have not come across an appeal argued only on the notice of appeal, unless, may be, if the order grounding the appeal was patently defective. That is not the case here with the order *pendente lite*. In the absence of a complete record on appeal, as in the present case, granting the application for condonation and or extension would serve no useful purpose. On the present papers no prospect of success can seriously be contemplated in the absence of the written judgment. As it is, we do not know why the order *pendente lite* was granted and shall never know until reasons are furnished. The same is true regarding the costs order made by the Judge *a quo*: we cannot interfere with it until we know why it was granted. Only the written judgment can assist us in that regard.

[18] To conclude, it is gratifying to hear that the applicant is currently maintaining his children at an amount above that ordered by the court *a quo*. The grave and insurmountable drawback with this arrangement, depending as it does, on the will of the applicant is that its sustainability is not guaranteed. The matter of the maintenance of the children is of such a priority it should not be left in doubt. A court order allows for certainty of enforcement and execution. It would be risky to leave the matter of the maintenance of the children unregulated as is contended for by the applicant, as I understand the thrust of the appeal. It is therefore unacceptable that the order granted by the court *a quo* on 28 December 2018 should still be floating, in limbo, uncertain if it will ever fix and be enforced. Its enforcement should not be held back by an appeal whose time is very uncertain. The applicant should accordingly abide by the court order until duly set aside or altered by a court.

[19] In the result the following order is made-

1. The application for contempt is not granted.

2. Subject to any necessary adjustments on the amount, the applicant must pay the monthly maintenance in terms of the order of 28 December 2018.

3. No order is made on the application for condonation and or extension of time.

4. The application is struck off the roll.

5. The applicant may reinstate the application on the same papers as may be supplemented.

6. No order as to costs.

MJ DLAMINI JA

For the Applicant/Appellant – Atty. T. Hlanze

For the Respondent – Adv. M. Van der Walt

For the Applicant/Appellant – Atty. T. Hlanze

For the Respondent – Adv. M. Van der Walt