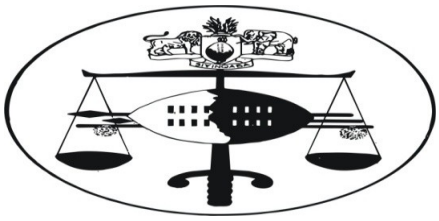

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No.: 39/2018

In the matter between:

BUYISILE MAVIMBELA **1st Appellant**

SIMANGELE KHUMALO & 48 OTHER TENANTS **2nd Appellant**

and

HAPPY COLISILE MAVIMBELA N.O. **Respondent**

Neutral Citation: *Buyisile Mavimbela and 49 Others vs Happy Colisile Mavimbela N.O.* (39/2018) [2019] *SZSC* ~~……~~(51 (26~~….~~/11~~….~~/2019)

Coram: **M.C.B. MAPHALALA CJ, R.J. CLOETE JA AND J.M. CURRIE AJA.**

Heard: **15th October, ~~……~~2019.**

Delivered: **26th November, ……2019.**

SUMMARY: *Application for Condonation for late filing of Heads of Argument and Bundle of Authorities by Appellant – Appellant as applicant to supply full, detailed explanation of reasons for the delay in filing heads of argument and bundle of authorities timeously bringing the application for the delay in filing of the documents – Prospects of success – Standard of details to be set out in the papers in support of the application – Required to set out sufficient information to enable the Court to assess the whether appeal prospects prospects of success exist in the substance and merits of the – I appeal – Innsufficient allegations to persuade Court to grant Condonation and Condonation refused.*

JUDGMENT

CURRIE – AJA

BACKGROUND AND SEQUENCE

[1] The late Christopher Mtjengiseni Mavimbela (the "deceased") who passed away on the 11th April 1999 was married in accordance with Siswati Customary law to three wives. The first wife was Thoko Dlamini who bore three children, Melusi Mavimbela, Buyisile Mavimbela ("first appellant") and Temakholo Mavimbela. During their marriage the parties

built certain flatsapartments on Eswatini nNation land at KaNdlunganye. Upon the demise of the deceased, Happy Colisile Mavimbela ("the respondent") was appointed executrix dative of his estate.

[2] Thoko passed away on 6th November 2013. Upon her death, her daughter (first appellant) collected the rentals which accrued from the flats apartments but refused to pay them into the deceased'–s estate account although the flats apartments were listed as an asset of his estate, asand she claimed they belonged to her mother. There appears, therefore, to be a dispute regarding the ownership of the flats apartments but this dispute does not affect the issues to be decided by this Court.

[3] On 6th April 2018 the respondent in her capacity as executrix dative of the deceased's estate instituted application proceedings against the forty nine tenants occupying the flats apartments at KaNdlunganye (the "second appellant") claiming their eviction. One of the grounds alleged for the eviction was that the rentals were being collected and retained by the first appellant, who did not pay them into the estate account for the benefit of all the beneficiaries of the estate. FuthermoreFurthermore, the flatsapartments had deteriorairated to such an extent that they had become a health hazard to the tenants and the Ministry of Health had issued a letter condemning the flats apartments as unfit for human habitation.

[4] On the return day of the rule *nisi* the first appellant applied for leave to intervene, which application was granted and which gave the first appellant the right to file an answering affidavit. However, on the return

day being 15th June 2018, there was no opposing affidavit filed by first appellant and the court *a quo* confirmed the rule *nisi* issued for the ejectment of the second appellant tenants from the said ~~flats~~apartments.

[5] The first and second appellants noted an appeal against the judgment of the court *a quo* on 22nd June 2018 as follows:

> ***"1. The court a quo erred in confirming the rule nisi without affording the 1st Respondent a chance to file her answering affidavit. The court a quo should considered (sic) the difficulties the 5th ~~espondent~~respondent was facing in retrieving pertinent documents from the Master of the High Court.***
>
> ***2. The court a quo err~~i~~ed in law and in fact by depriving the right the 5th Respondent the right to be heard in an important estate matter which has competing ~~interet~~interest of the 5th Respondent a quo, her mother's estate and her father's estate.***
>
> ***3. The court a quo erred in law and in fact by ~~makig~~making findings that the 5th Respondent was still expected to file replying affidavit in the ~~interlocutary~~interlocutory application yet an order for joinder was already made.***
>
> ***4. The court a quo did not exercise its discretion judiciously when it refused to grant postponement which was made for the first time by the 5th Respondent. The court a quo has not made time lines in which the parties should have filed their papers.***
>
> ***5. The court a quo erred in law and in fact at paragraph 9 of its judgment to consider factual averments made by the Applicant in her affidavit of the interlocutory application because the court was already functus officio. The court a quo***

~~demontrated~~demonstrated ***that it has already a foregoing conclusion even if the 5th Respondent was to file its answering affidavit.***

6. The court a quo erred in law and in fact to issue an ejectment order against Respondents a quo without giving enough notice for acquisition of alternative ~~accomodation~~accommodation. The right to have shelter is a constitutional right which should not be unduly tempered with.

7. The Court a quo erred in law and in fact by granting an order of costs without hearing the Respondents a quo's defence".

[6] The preliminary issue to be dealt with by this Court is the issue of ~~condonation~~Condonation for the reasons set out below.

[7] The record of appeal was prepared, certified by the Registrar of the Supreme Court on 19th July 2018 and filed on the same day, i.e. ~~i.e.~~ the record was lodged within the prescribed time period. The appeal was enrolled for hearing on 15th October 2008 and as set out more fully below, none of the parties timeously filed their Heads of Argument.

[8] On the 31st January 2019 the appellants filed their heads of argument together with an application for ~~condonation~~Condonation for the late filing of the heads of argument.

[9] No bundle of authorities was filed together with the heads of argument and the bundle of authorities was only filed on 13 September 2019,

without any application for ~~condonation~~Condonation for the late filing of the bundle of authorities.

[10] The respondent filed her heads of argument on 8th February 2019 together with a bundle of authorities and an application seeking ~~condonation~~Condonation for the late filing of the heads of argument as well as the b~~ook~~undle of authorities.

[11] Neither of the applications for ~~condonation~~Condonation were opposed. However, ~~condonation~~Condonation or extension of time are not there for the taking by consent between parties and ~~.~~this Court still had to satisfy itself that a sufficient case for the granting of such indulgence had been made out by the party seeking same.

APPELLANTS' AFFIDAVIT IN SUPPORT OF THE APPLICATION AND THE ARGUMENT BY COUNSEL FOR THE APPELLANTS

[12] The affidavit in support of the application for ~~condonation~~Condonation was attested to by K.N. Magagula, an attorney of the High Court of Eswatini practising with the firm Sithole & Magagula attorneys. The Court and Mr. Magagula traversed the affidavit in detail as set to hereunder.

[13] The deponent alleges that, after the noting of the appeal, the respondent, infuriated at the noting of the appeal and the consequent suspension of the ejectment order, instructed officers of Eswatini ~~Elecricity~~Electricity Company to disconnect the electricity at Logoba leading to the

matrimonial home of Mavimbela and Thoko Mavimbela as well as the ~~flats~~apartments, thus making the life of the tenants ~~unbearable.There~~unbearable. There was no other reason for the delay and on being questioned by this Court, Mr. Magagula was unable to give any other explanation for the delay, nor provide any dates in response. It was pointed out to him that his vague allegations did not comply with the requirements laid down by this Court and was hopelessly defective with regard to both the reasons for the delay in bringing the application for ~~condonation~~Condonation and well as the prospects of success.

[14] In response to the actions of the respondent, the first appellant instituted proceedings in the court *a quo* seeking reconnection of the electricity. The deponent alleges that his energies were concentrated on this issue which included inspections *in loco* and attempts to ~~negotitiate~~negotiate a settlement and for this reason he did not focus on filing the heads of arguments as required. He does not provide any dates as to when the events took place and does not provide any further reasons as to why the heads of argument were not timeously filed.

[15] With regard to the prospects of success the deponent submits that:

(a) The appellants have good prospects of success on appeal in that the ~~the~~ appellants were denied the right to be heard in that they had not filed an answering ~~affdavit~~affidavit on the day of the hearing;

(b) The ~~tentants~~tenants were evicted without being heard and without being given adequate notice of the date of the delivery of the judgment in order to allow them to secure alternative places of residence.

[16] It was pointed to Mr. Magagugula that these were not adequate allegations with regard to the prospects of success and when he was repeatedly asked by this Court as to what they prospects of success were, all he could do was repeat the allegations set out above. He further submitted that it was justifiable that the appeal should be heard and that there was no prejudice to the respondent.

RESPONDENT'S AFFIDAVIT IN SUPPORT OF THE APPLICATION AND THE ARGUMENT BY COUNSEL FOR THE RESPONDENT

[17] The affidavit in support of the application for condonationCondonation was attested to by N. B. Dlamini, an attorney of the High Court of Eswatini practising with the firm Robinson Bertram attorneys. It is submitted therein that the sole reason for the delay in filing the heads of argument was the fact that the appellants filed their heads of argument late and the deponent was out of the office until 4th February 2019, and it was for these reasons that he only filed the respondent's heads on 8th February 2019.

[18] The deponent conceded, both in the affidavit and in his submissions in Court, that it was wrong offor him not to have filed respondent's heads of argument in accordance with the prescribed time period, despite the fact that the appellants had not filed their heads of argument in time.

[19] It was pointed out to him by the Court that this excuse is unacceptable and that a respondent is not entitled to wait until an appellants' heads of argument had been filedbeen filed before filing his/her own; all heads of argument are too be filed in accordance with the prescribed timelinesprescribed timelines. Furthermore, the affidavit did not at all deal with the issue of prospects of success, as is required in an application for condonationCondonation.

[20] The deponent was only able to submit in response that there was no prejudice to the appellants in not filing timeously.

FINDINGS OF THIS COURT

[21] Rule 31 (1) of the Court of Appeal Rules of this Court provides as follows:

> **"31 (1) In every Civil Appeal and in every Criminal Appeal the Appellant shall, not later than twenty eight days before the 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."**

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 his argument and supporting authorities to be presented on appeal and shall serve a copy thereof upon the appellant."

[22] Rule 16 of the Court of Appeal Rules of this Court provides as follows:

"Rule 16 (1) The Judge President or any Judge of Appeal designated by him may on application extend any time prescribed by these rules: 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) An Application for extension shall be supported by an Affidavit setting forth good and substantial reasons for the Application 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."

[23] Rule 17 of the Court of Appeal Rules of this Court provides as follows:

"Rule 17. The Court of Appeal may on application and for sufficient cause shown, excuse any party from compliance with any of these Rules and any give such directions in matters of practice and procedure as it considers just and expedient."

[24] These rules set out clearly the obligations of a party who is obliged to submit Heads of Argument in terms of Rule 31. Failing compliance with these rules a party is entitled to bring applications in terms of rule 16 and rule 17 above and failing that, as provided for in the case law which will be referred to below:

> The relevant case law in this regard is set out; for instance, in **Dr. Sifiso Barrow v. Dr Priscilla Dlamini and the University of Swaziland (09/2014) [2015] SZSC09 (09/12/2015)** where this 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."**
>
> 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 realizes 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~~Cantilevers CJ** said **at 449-G** that: **"… whenever an Appellant realizes that he has not complied with the Rule of Court he should, without delay, apply for condonation."**

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 propriis. 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."**

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."**

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:

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."

[25] In the present matter no application was brought in terms of Rule 16 which should have been brought by appellants whilst they were allegedly

engaged in other court proceedings concerning the same matter. No full, detailed and accurate account of causes of delay and effect thereof were put before the Court.

[26] Accordingly the appellants dismally failed the first test relating to the giving of detailed and acceptable reasons for delay and non-compliance with the Rules.

[27] The respondent's reasons for the delay in filing her heads of argument is also completely unacceptable and it is quite clear that counsel for both parties has been dilatory in handling the appeal and both of them having flagrantly disregarded the rules of this Court and their conduct cannot be condoned. In view of the ultimate finding of this Court that the appeal is to be struck off, it would suffice to state, for *current* purposes, that it had been the respondent's lucky day that her non-compliance was not visited by some form of a penalty, in addition to censure.

[28] As regards the issue of prejudice, Mr. Magagula~~Shabangu~~ stated that the Appellant should not be punished because of the actions or omissions of its Attorneys. In this regard, the words of Steyn CJ in **Saloojee and Another, NNO v Minister of Community Development, 1956 (2) SA 135 (A)** at 141 C – E, which was also referred to in **Unitrans** (*supra*), are apposite. With reference to **R v Chetty, 1943 AD 321** at 323 and **Regal v African Superslate (Pty) Ltd, 1962 (3) 18 (AD)** at 23, ~~–~~where non-compliance with the Rules was also attributed to the laxity of legal representatives, he held that, **"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."

[29] With regard to the prospects of success the appellants have, once again dismally failed to meet the necessary requirements. They rely on their founding affidavit (on which they are bound to stand or fall in terms of trite law) which is inadequate and does not purport to deal with the prospects of success. They failed to file an answering affidavit in the court *a quo* setting out their defence and they merely submit that they should have had an opportunity to be heard when they were not heard due to their own dilatory conduct.:

[30] Accordingly this Court has not been persuaded by the appellants that they have ~~a~~ reasonable prospects of success on appeal.

[31] In the **Uitenhage** matter referred to above it was stated that:

"It is trite that where non-compliance of the Rules has been flagrant and gross, a Court should be reluctant to grant condonation whatever the prospects of success might be. Darries v Sheriff, Magistrate's Court, Wynberg 1998 (3) SA 34 (SCA) at 41D."

[32] The dictum in the aforementioned cases was cited with approval in the matters of Anita Belinda De Barry vs A.G. Thomas (Pty) Ltd Case No. 30/2015 and **the Swazi Observer Newspaper (Pty) Ltd and Others v Dlamini (13/2018) [2018] SZSC 39."**

[3232] There have been numerous Ceirculars and judgments of this Ceourt and dealing with condonation and practitioners are fully aware of the requirements set by this Court for it tothe granting of condonationcondonation, however, but practitioners continue to fail to abidedisregard by the requirements to the detriment of their clients which and this is unacceptable.

[33] A I accordingly, I make the following order:

ORDER

1. The application lodged by Appellants for Condonation for the late filing of heads of argument and bundle of authorities is hereby dismissed.
2. Appellant's application for Condonation is dismissed with no order as to costs.
3. The appeal is struck off and not to be reinstated without the leave of this Court.

4.

J. M. CURRIE

ACTING JUSTICE OF APPEAL

I agree

M.C.B. MAPHALALA

CHIEF JUSTICE

I agree

R. J. CLOETE

JUSTICE OF APPEAL

For the Appellant: Mr. K. Q. Magagula

For the Respondent: Mr. M. M. Dlamini