



IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

Case No.: 60/2018

In the matter between:

NHLANHLA MACINGWANE

Applicant

and

FAMILY OF GOD CHURCH

Respondent

In re:

NHLANHLA MACINGWANE

Appellant

and

FAMILY OF GOD CHURCH

1st Respondent

THE COMMISSIONER OF POLICE

2nd Respondent

THE ATTORNEY GENERAL

3rd Respondent

Neutral Citation: *Nhlanhla Macingwane vs Family of God Church & 2 Others*
(60/2018) [2019] SZSC 56 (26/11/ 2019)

Coram: **S.P. DLAMINI JA, R.J. CLOETE JA AND J.M. CURRIE AJA.**

Heard: **4th November, 2019.**

Delivered: **26th November, 2019.**

SUMMARY: *Civil Procedure – Court of Appeal Rules – Provides procedure to be followed – Incorrect procedure followed – Three applications for condonation – Acceptable explanation to be given for delay in filing record and for delay in seeking condonation – Prospects of success important but not decisive – Number of applications for condonation of grave concern – Appeal deemed abandoned and consequently dismissed.*

JUDGMENT

CURRIE – AJA

BACKGROUND

[1] The appellant was the first respondent and the respondent was the applicant in the court a quo, which delivered a judgment on 28 September 2018, reading as follows:

1. Applicant’s application succeeds in the following manner:

1.1 The 1st respondent under case No. 733/18 is ordered to:

- (a) restore possession of the land situate on Swazi Nation land at Hhababa area, Matsapha near Lusushwana Water Services Depot and adjacent to Manzini-Mbabane High Way to the applicant;**
- (b) demolish all structures built by him on the said piece of land.**

ALTERNATIVELY

1.2 Should 1st respondent be inclined to insist on the said piece of land, 1st respondent is ordered to compensate the applicant for the structures therein at a fair market value upon which order no. 2 hereunder shall not apply.

2. Kwaluseni (Mbikwakhe) Royal Kraal is ordered to apportion another piece of land of a similar use (trade) to the 1st respondent within reasonable time from date of this judgment.

[2] An appeal against the judgment was noted to this Court on 31 July 2019 by the appellant and in the notice of appeal the following grounds are set out:

- 1. The Court *a quo* erred in law and in fact in ordering that the applicant maintains the land apportioned to its failure to which first respondent is to compensate applicant for the structures erected thereon at its market value. (*sic*)**
- 2. The Court *a quo* erred in law and in fact in ordering that Kings Council is to allocate first respondent another piece of land. (*sic*)**
- 3. The Court *a quo* erred in law and in fact in ordering that the first respondent is to remove all his belongings from the piece of land. (*sic*)**

- 4. The Court *a quo* erred in law in fact in deciding the dispute between the parties without the aid of oral evidence in light of the apparent material dispute of facts on the affidavits. (sic)**
- 5. The Court erred in law and in fact in that whilst recognizing the authority of kwaluseni Kings Council to allocate land at Kwaluseni, did not consider that first respondent was allocated the land with approval of the Kings Council. (sic)**
- 6. The Court *a quo* erred in law in fact in granting the orders as they were issued in so far as the same orders were not sought by applicant. (sic)**
- 7. The Court *a quo* erred in law and in fact in assuming jurisdiction over the matter in so far as the issues involved fell squarely to be decided by traditional authorities in terms of Swazi Law and custom. (sic)**
- 8. The Court *a quo* erred in law and in fact in granting a final mandatory interdict in so far as applicant had not shown that it has a clear right to the relief sought.(sic)**

[3] Rule 30 of the Court of Appeal Rules provides that:

“(1) The appellant shall prepare the record on appeal in accordance with subrules (5) and (6) hereof and shall within two months of the date of noting of the appeal lodge a copy thereof with the Registrar of the High Court for certification as correct.

(2)

(3)

(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.” (my underlining).

[4] Rule 16 provides that:

“(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.

- (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.”**

[5] Rule 17 provides that:

“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.”

CONDONATION: THE FACTS

[6] The following applications have been filed in this Court pending the hearing of the appeal:

1. On 6th May 2019 an application by the respondent deeming the appeal abandoned in terms of Rule 30 (4) of the Rules of this Court, which application is opposed by the appellant, together with a counter-application for condonation.
2. On 4th June 2019 an application for condonation by the appellant seeking leave to file the record of appeal.
3. On 14th October 2019 an application for condonation of the late filing of his heads of argument by the respondent.

4. On 16 October 2019 an application for condonation of the late filing of the heads of argument and bundle of authorities by the appellant.

APPELLANT'S CONTENTIONS

[7] The appellant concedes that the record was filed out of time but contends that this conduct was not wilful. The appellant submitted that:

- (a) The written judgment was delivered on 28 September 2018.
- (b) Upon the receipt of the judgment appellant's erstwhile attorney recommended the engagement of Advocate Mabila to prosecute the appeal and he was approached in October 2018. A deposit of E 5 000 was paid to him. The appellant claims that he had no knowledge that the record was to be filed within two months of the noting of the appeal and he only became aware of this fact when the respondent lodged the application deeming the appeal abandoned.
- (c) The appellant alleges that thereafter he and his attorney made numerous attempts to contact Advocate Mabila to enquire about progress. No dates were given, nor was correspondence attached indicating the attempts made but the appellant contends that he did not wish to abandon Advocate Mabila as he had paid a deposit to him. The situation continued until the filing of the application by the respondent deeming the appeal abandoned. Upon receipt of the application the appellant managed to contact

Advocate Mabila, who undertook to work on the matter, but upon his failure to do so appellant retrieved his file from him on 17 May 2019. At that stage the appellant took it upon himself to compile the record and he presented it to the respondent's appellant's attorneys? on or about 17 May 2019 and on 29 May 2019 the record was certified by the Registrar. The record should not have been accepted and certified by the Registrar as it was out of time.

- (d) The appellant sought the services of another attorney and on 29 May 2019 his current attorneys took over the matter.
- (e) The appellant contends that at no stage did he abandon the appeal and taking into account the Christmas break and his difficulties with Advocate Mabila, that there was no inordinate delay in filing the record.
- (f) The appellant further submitted, in view of his prospects of success in the matter, that the condonation should be granted. He contended that:
- (g) The respondent had sought an interim order in the court *a quo* pending the determination of action proceedings, clearly on the basis that the respondent had foreseen a dispute of fact. Despite this fact, a final order had been granted, rendering the action proceedings nugatory and with drastic consequences for the

appellant, in that he was to be evicted from the property occupied by him.

- (h) There is a material dispute of fact as to whom the rightful authority is to allocate land in the area of dispute.

- (i) Despite the fact that the Court *a quo* came to the conclusion that it had no original jurisdiction pertaining to matters involving land held under the traditional authorities, it had jurisdiction to ensure that orders of traditional authorities were carried out. The result was that the appellant was evicted from the land despite the fact that there is a material dispute of fact as to who the rightful authority is entitled to allocate land in the area in dispute.

- (j) The appellant has been in occupation of the land for a period of over nine years. The respondent as applicant in the proceedings in the court *a quo* disguised a genuine land dispute as spoliation proceedings and the court *a quo*, in effect, granted spoliatory relief.

- (k) The court *a quo* had usurped the powers of the traditional authorities in granting relief in a matter in which it does not have jurisdiction, including ordering that that the appellant be allocated another piece of land when the matter fell for

determination by the Regional Administrators of the Manzini District.

[8] The Court thoroughly traversed the submissions by the appellant's counsel and it became clear that the appellant, , as soon as he became aware that he had not complied with the rules, should have taken steps to rectify the situation and should have made an application in terms of rule 16 for an extension of time within which to file the record. Both parties were given leave to file further submissions on the issue of abandonment of appeals.

[9] Unfortunately for the appellant, the further heads take the matter no further in that he prays that the court considers the application filed by him in terms of Rule 16 (1). He relies on various South African cases including the case of **Roman Catholic Church (K'DORP) v Southern Life Association Ltd 1992 (2) SA 807 9A0 AT 812 |A-B**. This case does not support the application brought by the appellant in that the appellant sought an application for condonation for the late lodging of the appeal as well as an order re-instating the appeal. This was not done in the present case as the appellant failed to lodge an application for re-instatement as he should have done.

[10] The appellant further submitted that at the first hearing of the appeal, he had indicated from the Bar that he wished to amend the prayers to reflect reinstatement but had not been permitted to do so. He prayed for the Court's indulgence stating that the Court should consider the prospects of success, which were very strong, when considering an application for condonation. In support thereof he submitted that in the matter of **Silence Gamedze and 2 Others v Thabiso Fakudze (14/2012) [2012] SZSC 52** it was held that "*the recent trend of the Courts towards substantial justice which dictates that Courts should strive to do justice and should not sacrifice same on an altar of procedural technicalities, which were put in place in the first place as a handmaid to justice.*"

RESPONDENT'S CONTENTIONS

[11] The respondent contends that seven months had elapsed from the time of the filing of the appeal and the record had not yet been filed. No application for an extension of time was made in terms of Rule 16. Furthermore, that the conduct of the appellant is prejudicial to the respondent's right to the enjoyment and peaceful possession of the piece of land allocated to him.

[12] The conduct of the appellant amounts to an abuse of the court process and a flagrant abuse of the rules of the court.

FINDINGS

- [13] The notice of appeal is dated the 31st July 2018 and was filed after the Honourable Justice Dlamini made an *ex tempore* ruling under Case No. 733/18 (consolidated with High Court Cases Numbers 325/18 and 731/18) and this was filed before the court *a quo* delivered its written judgment on the 28th September 2018. The judgment delivered on 28th September 2018 incorporated the aforesaid ruling.
- [14] It is not disputed that the notice of appeal was timeously filed but the appellant has not complied with the provisions of Rule 30 with regard to the filing of the record, The record ought to have been filed within two months of the date of the noting of the appeal, being the 28th November 2019 but nothing whatsoever was done.
- [15] No application in terms of Rule 16 for an extension of the prescribed time within which to lodge the record was made and in terms of rule 30 (4) the appeal is deemed to have been abandoned.
- [16] Rule 16 provides a procedure for seeking an extension of time prescribed in the rules for carrying out of certain specified procedures. Rule 17, on the other hand, deals with an application for condonation for the failure to have compliance with the provisions of any rule including that laid down in rule 16. It is necessary, however in either case to furnish good and substantial reasons for the indulgence being sought.
- [17] In the present case, there has been no application in terms of rule 16 and the explanation given in the application for for condonation in terms of

rule 17 is unsatisfactory. The appellant has laid the entire blame for the late filing of the record on Advocate Mabila which is not a reasonable explanation in that it is the attorney of record who is responsible, together with the appellant, for compiling the record and not an advocate.

[18] Whilst the Court has a discretion to be exercised judicially, as to whether it will grant condonation of a breach of the rules, there must be a sound basis for it to do so.

[19] It appears that it was only after the respondent had brought an application on the 6th May 2019 seeking an order that the appeal be deemed to have been abandoned in terms of rule 30 (4) of the Rules of this Court, that the appellant made an attempt to rectify the situation and the record was filed on 4th June 2019.

[20] Whilst the appellant alleges he has good prospects of success on appeal the appellant cannot escape the fact that the appeal has been deemed to have been abandoned and there is no appeal pending before this Court. Whilst the appellant has brought an application for condonation, he has omitted to bring an application for re-instatement of the appeal together with the application for condonation.

[21] In the matter of **Cleophas Siphon Dlamini versus Cynthia Mpho Dlamini (65/2018) [2019] SZSC 48**, in a unanimous judgment penned by J.P. Annandale JA and agreed to by M.C.B. Maphalala CJ and J.M. Currie AJA, it was held that if an appeal is deemed to be abandoned it has

the same effect of it having been dismissed. By specific reference to the provisions of Rule 30 (4), it is stated as follows at paragraph [26] thereof:

“By operation of law, Rule 30 (4) provides for such closure when an Appeal is not prosecuted in accordance with the Rules of Court.

In Thandie Motsa and 4 Others versus Richard Khanyile and Another (69/2018) [2019] SZHC 24, in another unanimous judgment penned by S.P. Dlamini JA and agreed to by M.J. Dlamini JA and S.J.K. Matsebula AJA, it was again held that the Appeal was deemed to have been abandoned and as such dismissed.

At paragraph 17 of the judgment Dlamini JA states that “The courts have had occasion to consider and pronounce themselves on the status of the Rules and consequences of failing to comply with the Rules” and at paragraph 18 made reference to a number of these judgments including The Pub and Grill (Pty) Limited and Another versus the Gables (Pty) Limited (102/2018 [2018] SZSC 17.”

[22] At paragraph [24], Dlamini JA refers with approval to the **Pub and Grill** matter where this Court had the following to say:

“[32] In this matter the Applicant/Appellant had 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.” (In that matter it was also found that the appeal was deemed to have been abandoned and as such dismissed). (My underlining)

[23] Dlamini JA, with approval, further cited the matter of **Ronald Mosemantla Somaeb versus Standard Bank Namibia LTD Case No. SA 26/2014** as follows:

“[21] It is incumbent on every litigant to comply with rules of court in view of the fact that rules of court serve a specific purpose. In Molebatsi v Federated Timbers (Pty) Ltd 1996 (3) SA 92 (3) quoted with approval in S v Kakololo 2004 NR 7 (HC) at 10 C-E the following was set out (at p 96 G-H);

“The Rules of Court contain quantities of concrete particularity. They are not of an aleatoric quality. Rules of Court must be observed to facilitate strict compliance with them to ensure the efficient administration of justice for all concerned. Non-compliance with the said Rules would encourage casual, easy-going and slipshod practice, which would reduce the high standard of practice which the courts are entitled to in administering justice. The provisions of the Rules are specific and must be complied with; justice and the practice and

administration thereof cannot be allowed to degenerate into disorder”

[22] Rules of court cannot be applied selectively in the sense that they are bound to be complied with only by a certain group of persons engaged in litigation in our courts.

[24] The rules of court are intended to introduce certainty and facilitate the speedy administration of justice. Non-compliance, therefore, will introduce uncertainty and frustrate the administration of justice. It encourages negligence amongst practitioners and, in the absence of good and sufficient reason, will not be condoned.

[25] In the present matter the appellant contends that he has good prospects of success on the appeal and for this reason, and in the interests of justice that the condonation should be granted and the appeal be heard. In **Worku v Equity Aviation Services (Namibia) (Pty) Ltd (In Liquidation) & Others 2014 (1) NR 234 (SC) at 240** the court stated the following at para 17:

“It follows from what has just been said that the appellant has not complied with the rules of the court that regulate the prosecution of appeals in material respects. In reaching this conclusion, it has been borne in mind that appellant implored the court to overlook his procedural non-compliance and determine the substantive issues that he asserts underlay the appeals, namely, the satisfaction of the judgments of the district labour court mentioned above. However, we cannot overlook the rules which are designed to control the procedures

of the court. Although a court should be understanding of the difficulties that lay litigants experience and seek to assist them where possible, a court may not forget that court rules are adopted in order to ensure fair and expeditious resolution of disputes in the interests of all litigants and the administration of justice generally. Accordingly, a court may not condone non-compliance with the rules even by lay litigants where non-compliance with the rules would render the proceedings unfair or unduly prolonged.”

[26] The appellant has laid the entire blame for the late filing of the record on Advocate Mabila which, as aforesaid, is not a reasonable explanation in that it is the attorney who is responsible, together with the appellant for compiling the record and not an advocate.

[27] In the matter of **Francesca Thandeka Shayo vs Linah Thembi Mbhamali and 2 Others (57/2018) [2019] SZSC 49 (14/11/2019)** the learned Justice Cloete cited with approval the judgments referred to above and stated:

“In my view, and it is abundantly clear from all of the above, that non-compliance with Rules will generally result in adverse judgments in some form or another.

In addition I agree entirely with the sentiments expressed by this Court previously that the provisions of Rule 30(4) are peremptory and as such by operation of law the Appeal has reached the end of the road and accordingly formally results in the dismissal of the said Appeal.”

[28] In conclusion, it is abundantly clear that there has been a flagrant disregard of the Rules of this Court. There appears to be a general ineptitude amongst practitioners in complying with the rules and that strict compliance with the rules is not regarded as essential. Applications for condonation for failure to comply with the rules are included in almost every appeal brought to this Court and this practice of non-compliance with the Rules is of grave concern and should cease.

[29] In the circumstances I have no alternative but to find that the appeal is deemed to be abandoned in terms of Rule 30 (4) and stands to be dismissed. In addition I agree entirely with the sentiments expressed by this Court previously that the provisions of Rule 30(4) are peremptory and as such by operation of law the appeal has lapsed, which results in the dismissal of the appeal.

[30] Whilst I am sympathetic to the plight of the parties who require the allocation of land to be referred back to the traditional authorities for determination, the appeal has been abandoned and no application for reinstatement has been brought to this Court. One cannot escape the dictum in *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) where it was held at 141 C-E that **“there is a limit beyond which a litigant cannot escape the results of his attorneys’ lack of diligence or the inefficiency of the explanation tendered”**.

ORDER

[31] Accordingly the following Order is made:

1. The appellant's application for condonation for late filing of the record of appeal is dismissed.
2. The appeal is deemed to have been abandoned as provided for in Rule 30 (4) and it is accordingly dismissed.
3. Costs are awarded to the Respondent on the ordinary scale.

J.M. CURRIE
ACTING JUSTICE OF APPEAL

I agree

S. P. DLAMINI
JUSTICE OF APPEAL

I agree

R. J. CLOETE
JUSTICE OF APPEAL

For the Applicant: MR. S. K. DLAMINI

For the Respondent: MR. B. GAMEDZE