



**IN THE SUPREME COURT OF ESWATINI**  
**JUDGMENT**

Appeal Case No. 76/2018

In the matter between:

<b>SANDRA KHUMALO</b>	<b>1<sup>st</sup> Appellant</b>
<b>NELISIWE MTSHALI</b>	<b>2<sup>nd</sup> Appellant</b>
<b>ELIZABETH MTHEMBU</b>	<b>3<sup>rd</sup> Appellant</b>
<b>TOBHI GAMEDZE</b>	<b>4<sup>th</sup> Appellant</b>
<b>THOKOZANI MTHEMBU</b>	<b>5<sup>th</sup> Appellant</b>

and

<b>LOMDASHI LIMITED</b>	<b>Respondent</b>
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**Neutral Citation** : *Sandra Khumalo and 4 Others vs Lomdashi Limited*  
(76/2018) [2019] SZSC 7 (20/03/2019)

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

**Heard** : 12 MARCH 2019

**Delivered** : 20 MARCH 2019

**SUMMARY** : *Condonation Applications – Requirements restated – Full explanation for delay and prospects of success – Neither party even mentioning prospects of success in founding papers – Both Applications dismissed – Final warning to Practitioners in the Kingdom.*

### JUDGMENT

#### **CLOETE – JA**

- [1] It is necessary for me to place on record that when this matter was called, Mr S. C. Simelane advised the Court that he was appearing on behalf of the Respondent and that he had received instructions the previous night. He wished to hand up his Notice of Appointment from the Bar which was refused and when questioned on the Notice of Withdrawal of the Attorneys of record, he indicated that his was to be a co-appointment. I do not know of any such provision in the Kingdom of Eswatini. Despite that, Mr Simelane indicated that he was ready to argue the matters before us and in the interests of moving the matter forward, he was allowed to appear.
- [2] Both the Appellant and the Respondent filed Applications for Condonation for the late filing of their Heads of Argument. Due to the fact that both

Applications are almost identical as regards subject matter, it is my intention to deal with both applications in one Judgment.

- [3] It is further necessary to point out that neither of the parties filed a Bundle of Authorities or even a List of Authorities at all and neither party has brought an Application in terms of Rule 16 for an extension of time within which to do so.
- [4] The Appellant's Application was supported by an Affidavit attested to by Attorney Bhembe who alleged that he had signed the completed Heads of Argument on 31 January 2019 with the intention of serving and filing same the next day but did not do so because he had to rush to South Africa to register his son at a University in Johannesburg and that he had forgotten to instruct his messenger to file and serve the Heads on 01 February 2019.
- [5] In his address before the Court, Mr Bhembe alleged that he was only out of time by two (2) days because of the emergency. He further admitted that his Affidavit did not comply with the requirements relating to applications of this nature in that it did not raise or even mention the prospects of success of the Appellants on the merits of the matter, but merely requested the Court to be lenient and advised that he was under the misapprehension that because the

other side indicated that it would not oppose the Condonation Application, that it would accordingly be a mere formality before this Court.

- [6] The Application for Condonation by the Respondent was supported by an Affidavit from one Innocent Mahlalela who alleged that he had prepared the relevant Heads on 13 February 2019 and that he had given same to his Messenger, one Thulani Ngcamphalala, to file and serve on that day which would have meant that the filing would have been within the required time limit. He alleged that he was appalled on 08 March 2019 to learn that the Heads had not been filed and served and the said Thulani Ngcamphalala filed a vague Affidavit in support of the allegations.
- [7] In his address before this Court, Mr Simelane, quite correctly, pointed out that the papers of his client had suffered the same fate as those of the Appellants in that there was no mention of any nature of the prospects of success by his client on the merits of the matter and merely argued that it was in the interest of justice that the Application be granted.
- [8] In both Applications, even if one were to accept that the reasons set out for the respective delays were credible, the fact is that such explanations only covered one of the requirements of condonation applications as set out in the Rules and a plethora of Judgments of this Court. I hasten to add that the

explanation by the original Attorneys of record of the Respondent are hard to believe and perhaps that was the reason why there was no appearance by them in the matter.

- [9] In my view there is no difference between the required documents being filed one day or one month late. The time limits are clearly set out and have to be adhered to. The other argument that the Rules and decisions of this Court should simply be ignored so that litigants are not prejudiced is not a sustainable argument. In passing, I point out that as was said at Paragraph 9 of the Judgment of this Court, confirmed on review, in the matter of **De Barry Anita Belinda vs A. G. Thomas (Pty) Limited, Appeal Case No. 30/2015**, **“The Appellant in any event will, given the adverse findings of this Court, be able to pursue an alternate remedy”**. No doubt the parties will seek legal advice in that regard.

- [10] In **De Barry**, *supra*, reference with approval was made at Page 27 of the Judgment to the following;

**“In Maria Ntombi Simelane and Nompumelelo Prudence Dlamini and Three Others in the Supreme Court Civil Appeal 42/2015, the Court referred to the dictum in the Supreme Court case of Johannes Hlatshwayo vs Swaziland Development and Savings Bank Case No. 21/06**

at Paragraph 7 to the following: ‘It is required to be stressed that the whole purpose behind Rule 17 of the Rules of this Court on condonation is to enable the Court to gauge such factors as (1) the degree of delay involved in the matter, (2) the adequacy of the reasons given for the delay, (3) the prospects of success on Appeal and (4) the Respondent’s interest in the finality of the matter’”.

[11] As regards the requirement of convincing the Court that an applicant has good prospects of success, the following *dictum* in **Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A) at 532C-F** is important to note, 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**”.

[12] In **Darries v Sheriff, Magistrate’s Court, Wynberg, and Another 1998 (3) SA 34 (SCA)** Plewman JA (with whom Hefer JA, Eksteen JA, Olivier JA and Melunsky AJA concurred) at 401 – 41A/B stated as follows: ‘**Condonation of the non-observance of the Rules of this Court is not a mere formality**’.

- [13] Similarly, in the matter of **Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA)** the Court held that **“Condonation is not to be had merely for the asking”**.
- [14] In **Commissioner for Inland Revenue v Burger 1956 (4) SA 446 (A)** it was held that **“Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the Appellant’s Attorney, condonation will be granted, See Saloojee’s case, *supra* at 141B-G”**.
- [15] Rule 31 (1) of the Rules of Court provide 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”**. (my underlining)
- [16] Rule 17 of the 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". (my underlining)

- [17] It is again necessary for this Court to express its displeasure in that in virtually every matter which has come before this Court in the last few years, the matter has been accompanied by a now almost customary Application for Condonation and as such it is now necessary to once again point out what has been said by this Court on previous occasions. In **Hlatshwayo**, *supra*, and approved in **De Barry**, 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 result in 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 **Solejee vs The Minister of Community Development 1965 (2) 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."

[18] In *Nhlavana Maseko and Others v George Mbatha and Another*, Civil Appeal No. 7/2005, the Court stated at 15; "In a circular dated 21 April 2005 practitioners were again warned that failure to comply with the Rules in respect of the filing of Heads of Argument would be regarded with extreme disapproval by this Court and might be met with an order that the appeals be struck off the roll or with a punitive cost order. This warning is hereby repeated".

[19] In *Salojee 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 Attorneys’ 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”**.

[20] Accordingly, despite all of the above warnings, the malpractice by legal Practitioners in the Kingdom continues unabated. At Page 38 of **De Barry** the following was said;

**“Despite numerous Judgments, circulars, warnings from Judges, practitioners in this Court nevertheless continue to fail to abide by the Rules of this Court with seeming impunity and we hope that this Judgment will demonstrate that this Court will no longer tolerate non-compliance of the Rules of this Court nor the flagrant abuse of such**

**Rules. Having said that, this Court will always consider genuine, well documented Applications in terms of the Rules provided that full acceptable details are set out in Founding Affidavits, the Court taken into the confidence of the Applicant and such Applications brought in terms of the Rules of this Court immediately upon a problem arising”.**


- [21] Practitioners should take this as a final warning that this Court will no longer tolerate the total disregard for the Rules and as such by extension the disrespect for this Court.
- [22] Neither of the parties remotely complied with the Rules or the case law and as such both Applications stand to be dismissed.
- [23] In addition, due to the flagrant disregard for the Rules and the numerous warnings issued by this Court, the Appeal is dismissed. I again refer to the fact that the Appellants do have alternative remedies in that regard.
- [24] Neither of the litigants should suffer from the actions or omissions of their legal representatives and as such the Attorneys concerned should bear all of their own costs themselves.

**ORDER**

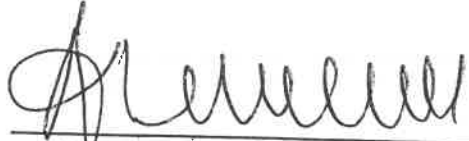
1. The Application for Condonation for the late filing of the Heads of Argument by the Appellants is dismissed.
  
2. The Application for Condonation for the late filing of the Heads of Argument by the Respondent is dismissed.
  
3. The Appeal of the Appellants is hereby dismissed.
  
4. Neither the Appellants nor the Respondent are to be mulcted with any form of costs which will be borne by their respective Attorneys themselves.

  
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**R. J. CLOETE**  
**JUSTICE OF APPEAL**

I agree

  
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**M.C.B. MAPHALALA**  
**CHIEF JUSTICE**

I agree

  
A. M. LUKHELE AJA  
ACTING JUSTICE OF APPEAL

**For the Appellants** : S. BHEMBE  
**For the Respondent** : S. C. SIMELANE