



IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

CIVIL CASE NO: 89/2019

In the matter between:

EMANGWENI HOLDINGS SUGAR

APPLICANT

ASSOCIATION (PTY) LTD

And

KUBUTA AGRIC DESIGNS & CIVILS

RESPONDENT

(PTY) LTD

Neutral Citation: *Emangweni Holdings Sugar Association (Pty) Ltd vs Kubuta Agri Designs & Civils (Pty) Ltd (89/2019) [2020] SZSC 29 (21 September, 2020)*

CORAM:

S.P. DLAMINI JA

S.B. MAPHALALA JA

J.M. CURRIE AJA

DATE HEARD:

19 August, 2020

DATE DELIVERED:

21 September, 2020

Summary: *Civil Procedure: Application for leave of court to amend a Notice of Appeal considered and granted- Application for extension of time to file the Heads of argument out of time considered and dismissed - Application for condonation for the late filing of Heads of argument considered and dismissed - Held that the Applicant is to issue and deliver upon the Respondent the amended Notice of Appeal within 5 days of the delivering of this judgment - Held that the Applicant is to file Heads of Argument relating to the amendment within 10 days of delivery of the amended Notice of Appeal - Held that the Respondent is to file supplementary Heads of Argument relating to the amendment in 7 days after receipt of Appellant's Heads of Argument - Held that either party may approach the Registrar of the Supreme Court for date of hearing of the appeal within the current session of the Supreme Court but if not possible during the first part of the next session and held that the Respondent is awarded costs including certified costs of counsel on a punitive scale.*

JUDGMENT

THE PARTIES

[1] The Applicant is the Appellant in the main appeal. The Respondent in the interlocutory applications is the Respondent in the main appeal.

INTRODUCTION

[2] The Applicant in terms of a Notice of Appeal dated 17 December, 2019 launched an appeal against a judgment of the High Court per Her Ladyship M. Dlamini J. which was delivered on 26 July, 2019.

[3] The Appeal is opposed by the Respondent. The Applicant has launched two Interlocutory Applications that are canvassed fully below. These Applications are opposed by the Respondent.

ISSUES FALLING FOR CONSIDERATION

[4] At this stage the Court is concerned with the three applications and not the main appeal. It was determined by this Court that these applications have to be determined as of legal necessity prior to dealing with the main appeal.

[5] The two Interlocutory Applications launched by the Applicant are;

5.1 Notice of Application for leave to amend Notice of Appeal;

and

5.2 Notice of Application for condonation for the late filing of Heads of Argument and Extension of time for filing of the Heads of Argument. The Applicant in its application says nothing at all about the Bundle of Authorities.

NOTICE OF APPLICATION FOR LEAVE TO AMEND

NOTICE OF APPEAL

[6] The Applicant, by way of Notice of Application dated 29 June 2020 issued and served on the Respondent on 2 July 2020, sought the following relief;

- “1. That an order be and is hereby issued granting the Applicant and/or Appellant leave to amend its Notice of Appeal dated 18th December 2019 along the terms proposed in the Amended Notice of Appeal attached hereto and marked as “EM 1”.***
- 2. Costs of application in the event of unsuccessful opposition.***
- 3. Further and/or alternative relief.”***

[7] Bongani Sydney Dlamini, counsel for the Applicant, deposed to the Founding Affidavit in support of the relief sought by the Applicant and the latter deposed to the Confirmatory Affidavit through its General Manager Nobuhle Cynthia Dlamini.

[8] Dlamini, at paragraphs 6 to 9 states the grounds for Leave to Amend the Notice of Appeal as follows;

- “6. The Applicant and/or Appellant proposes to amend its Notice of Appeal along the terms set out in the Amended Notice of Appeal attached hereto and marked as “EM 1”**

- 7. In preparing for the appeal hearing, it became clear that certain crucial issues may not be fully covered by the original notice of appeal.**

- 8. It was only upon scrutinizing and carefully analysing the record of proceedings that certain issues became clearer and thus the necessity that the notice of appeal be amended.**

- 9. I respectfully submit that at the time that the original notice of appeal was drafted and filed before the above Honourable Court, the record of proceedings was still being transcribed such that the appeal was noted without first going through the record and yet by all means, it is necessary to read the record before lodging an appeal.”**

[9] Dlamini further averred in paragraph 10 of the Founding Affidavit;

“ 10. I respectfully submit that it would not have been possible to wait for the record to be transcribed before lodging the appeal in that;

10.1 there are strict time lines for the filing and service of a notice of appeal in terms of the Rules of the above Honourable Court.

10.2 If one were to wait for the record of proceedings to be transcribed before lodging an appeal, the time lines stipulated in the rules of the above Honourable Court would not be possible to comply with”

[10] Dlamini concludes by stating that;

“11. I respectfully submit that the Respondent is not likely to suffer any prejudice if the proposed amendment is granted by the above Honourable Court in that;

11.1 The parties have not yet filed heads of argument in the matter.

11.2 All the issues raised in the proposed amended notice of appeal are issues well known by the Respondent and are captured in the record of proceedings.”

[11] The Application for Leave to Amend the Notice of Appeal is opposed by the Respondent.

[12] Earl John Henwood from the Respondent’s Attorneys deposed to the Answering Affidavit in opposition to the application on behalf of the

Respondent. The latter through its Director, Adrianus W. Vriend, deposed to what is erroneously termed as an Answering Affidavit yet the contents thereof show that it is a Confirmatory Affidavit. Accordingly, this Court will treat it as an Answering Affidavit.

[13] The thrust of the Respondent's opposition is found in paragraphs 9.1 to 9.4 of the Founding Affidavit when Henwood avers that;

“9.1 I dispute the contents of this paragraph and in particular dispute that “it would not have been possible to wait for the record to be transcribed before lodging the Appeal...”

9.2 The Appellant had four (4) weeks to prepare the Notice of Appeal in respect of a trial matter that Applicants attorneys were involved in from the very outset of the trial.

9.3 The Appellant indeed filed a Notice of Appeal, and the Appeal is now pending before this Honourable Court based on that Notice.

9.4 What the Appellant seeks to do, is to extend or widen the ambit of the Appeal, in circumstances where it is unclear what the basis for this is.”

[14] Henwood avers further as follows in paragraphs 10.1 to 10.7 of the Answering Affidavit;

“10.1 I dispute that the Respondent will not suffer any prejudice.

- 10.2 *In the context of the action, the prejudice is that the Appellant, who supplied the goods which are the subject of this litigation in March 2005 has been kept out of its legal relief by the Appellant by the studious use of delaying tactics and delays within the system.*
- 10.3 *The Appellant now wishes to add another bow to its arsenal of its various Heads of Appeal, in June 2020, when the judgment against which is appealing, was delivered more than six months ago.*
- 10.4 *In granting the amendment, it is submitted that this Honourable Court must take into account the prejudice that will be suffered by the Respondent.*
- 10.5 *Evidence was led at the hearing that the Respondent lost its business, it was forced to sell certain immovable properties due to the banks calling up their facilities, all because the Appellant refused to pay for certain irrigation equipment which the Respondent supplied to it.*
- 10.6 *Furthermore, I have already expended time and energy on the preparations thus far. To add more time and energy will be spent on the matter, at great expense to the Respondent.*
- 10.7 *The Respondent is anxious to finalise this matter and in that regard is looking forward to disposing of the Appeal.”*

[15] The Applicant filled a Replying Affidavit in response to the Respondent's Answering Affidavit. However, in my view the Replying Affidavit simply restated what was already covered in the Founding Affidavit.

[16] Rule 12 deals with amendment of Notice to appeal and provides that:

“ the Court of Appeal may allow an amendment of the notice of appeal and arguments, and allow parties or their counsel to appear, notwithstanding any declaration made under rule 11 upon such terms as to service of notice of such amendment, costs and otherwise as it may think fit.”

[17] The Rule bestows upon the Court discretionary powers either to grant or refuse an amendment and make orders as to whether to award costs or not. It is trite law that when Courts are vested with discretionary powers that in the exercise of those powers the Courts must do so judiciously. I have reached the decision herein with this principle being pivotal in my considerations.

[18] There are no major differences between the initial Notice of Appeal and the proposed amendment. In fact some grounds or certain aspects thereof

have been abandoned in the proposed amendment for example, the first, fourth and seventh grounds of appeal have been abandoned.

[19] The only significant difference between the original Notice of Appeal and the proposed amendment is the introduction of the challenge against the impugned judgment on the basis that hearsay and untested evidence of PW1, Mr. Vriend was relied upon at the High Court.

[20] In my view to allow this amendment would not be prejudicial to the Respondent's case particularly because the Respondent will have the opportunity to respond to same. Furthermore, the Appeal has not been heard on its merits yet.

[21] In fact, on the reading of the Respondent's papers, it appears that the amendment *per se* is not opposed, but the Respondent opposes it on the basis that it is one of the delaying tactics utilized by the Applicant.

[22] In the circumstances, I am inclined to grant the Applicant leave to amend the Notice of Appeal. Under the prayer for further or alternative relief the Court *mero motu* and in the interests of justice orders the Applicant to file

Heads of Argument together with a Bundle of Authorities with respect only to the amendment.

[23] The Applicant also prayed to this Court to be awarded costs in the event it was successful and the application was opposed by the Respondent. It is trite law that ordinarily costs follow the event. However, in the circumstances of this case, in particular the delay caused by the Applicant, I am not persuaded to make an order as to costs.

THE APPLICANT'S APPLICATIONS FOR EXTENSION OF TIME AND CONDONATION FOR THE LATE FILING OF HEADS OF ARGUMENT

EXTENSION OF TIME

[24] In terms of Rule 16 the extension of time must be sought and granted by the Court prior to the expiry of the *dies*.

[25] Rule 16 provides that;

“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, (Amended L.N.102/1976.)

(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.”

[26] In this instance, the Applicant ought to have sought an extension of time prior to the expiry of the *dies* for filing Heads of Argument. However, the Applicant only launched the Application on 21 July, 2020 well after the expiry of the *dies* for filing of the Heads of Argument. Accordingly, the Application of the extension is flawed at law and must be dismissed with costs.

CONDONATION

[27] The Application for condonation launched by the Applicant purports to relate to both two periods to file Heads of Argument namely as per Rule 31 and post the determination of the issue of the Application for leave to amend the Notice of Appeal. This approach has no legal basis at all.

[28] Rule 31 provides that an appellant is to file Heads of argument within 28 (twenty eight) days prior to the hearing of a matter, this was not done and the application is without merit.

[29] This Court has pronounced itself on numerous occasions regarding the law and the principles governing an Application for condonation are provided for in Rule 17.

[30] In the case of **Abel Mphile Sibandze vs Magagula & Hlophe Attorneys (86/2019) [2019] SZSC 25 (24/08/2020)** this court had this to say at paragraph 34;

“[34] In the Nokuthula Mthembu case (supra) per His Lordship Dr. Odoki JA, nearly all the cases referred to above coming from both within and outside our jurisdiction were considered and cited with approval thus the issue of the requisite factors for a party to succeed in an Application for condonation namely;

(a) That as soon as a party becomes aware of non-compliance with the Rules she or he must immediately take steps to remedy such by way of application;

(b) That in such an application the Applicant must provide a reasonable explanation for the default;

(c) That in the application the Applicant must demonstrate good prospects of success; and

(d) That the Court in granting or denying the relief sought ought to consider prejudice likely to be suffered by the innocent party and the importance of the case.”

[31] Regrettably, notwithstanding all the judgments of this court on the issue of condonation, quite frequently applications for condonation that are launched before this Court fail to pass muster. The present application is no exception as it also fails to meet the legal requirements espoused in the said judgments.

[32] In the majority of cases coming before this Court they are preceded by one or more applications for condonation due to failure to comply with the Rules of the Court. This results in many instances in unjustified delays in hearing and finalizing of cases expeditiously as well as avoidable legal fees.

This state of affairs should be of great concern to all the stakeholders in our justice system.

[33] It is apposite at this stage to note that amendment and promulgation of Rules of this court is long overdue, notwithstanding that the Constitution of Eswatini Act No1 of 2005 calls for the promulgation of new Rules. For example, the implementation of section 148 requires new Rules but no new

Rules or amendments have been promulgated. In my view, Rule 17 needs to be expanded in order to avoid the difficulties of delay usually experienced by the Respondents when the Appellants fail to comply with the Rules.

[34] In matters of commerce such as this one, an entity can be permanently destroyed as a result of delays in finalizing litigation at least partly as a result of outdated Rules.

[35] The Applicant argues that it was not convenient to file Heads of Argument prior to the determination of the application for leave to amend the Notice of Appeal. This not the Applicant's call to make but the Court. The Applicant cannot use his common sense as a basis to suspend the operation of the Rules of this Court. The Applicant and/or its attorney cannot be allowed to be a judge and juror in its cause.

[36] The legal avenue open to Applicant was to file the Heads of Argument and the Bundle of Authorities as per Rule 31 and in the event the application to amend the Notice of Appeal was granted by this Court to seek leave of Court to file Supplementary Heads of Argument in relation to the amended Notice of Appeal. This was not done and instead Applicant embarked on a course that could be perceived to be both dilatory and a pose designed to

escape the fact that it did not meet the *dies* in relation to the filing of Heads of argument. Therefore, the Application for Condonation does not meet the legal requirements and stands to be dismissed with costs.

COSTS

[37] Having already determined that the Respondent be awarded costs, what remains to be considered is the scale of the awarded costs. Due to Applicant's flagrant and unjustified breach of the Rules of this Court in the prosecution of the appeal thus far by the Applicant, I consider it appropriate to award the Respondent costs on a punitive scale.

COURT ORDER

[38] In view of the foregoing, this Court makes the following order;

1. That the Applicant's application for leave to amend the Notice of Appeal in terms of the proposed amendment is granted;
2. That the Applicant is to cause to issue and serve upon the Respondent the Amended Notice of Appeal within 5 days of this Judgment;

3. That the Applicant is to file Heads of Argument together with a Bundle of Authorities only relating to the amendment of the Notice of Appeal within 7 days of delivering of the amended Notice of Appeal.
4. That the Respondent is to file supplementary Heads of Argument together with a Bundle of authorities relating only to the amendment of the Notice of Appeal within 7 days of delivery of Applicant's Heads of argument as per paragraph 3 above.
5. That Applicant's application for extension of time is dismissed.
6. That the Applicant's application for condonation for the late filing of Heads of Argument is dismissed.
7. That the Respondent is awarded costs on an attorney and own client scale including duly certified costs of Counsel, excluding the costs in relation to the application for leave to amend the Notice of Appeal.
8. That the hearing of the appeal is postponed *sine die* pending a date of hearing to be arranged with the Registrar of the

Supreme Court preferably during the current session of this
Court.

S. P. DLAMINI JA

I agree

S. B. MAPHALALA JA

I agree

J. M. CURRIE AJA

FOR THE APPLICANT:

**Advocate L. Maziya
(Instructed by B. S. Dlamini
& Associates)**

FOR THE RESPONDENT:

**Advocate M. Van Der Walt
(Instructed by Henwood & Company)**