

IN THE SUPREME COURT OF ESWATINI
JUDGMENT

HELD AT MBABANE

CASE NO: 16/2020

In the matter between:

LUCAS MAZIYA

Appellant

And

ESWATINI PROVIDENT FUND

Respondent

Neutral Citation: *Lucas Maziya vs Eswatini Provident Fund*

(16/2020) [2020] SZSC 36 (12th November 2020)

CORAM:

R.J. CLOETE JA

S.B. MAPHALALA JA

J.M. CURRIE AJA

DATE HEARD: 6th November, 2020.

DATE DELIVERED: 12th November, 2020.

SUMMARY: *Application for Condonation -Applicant to provide full, detailed and accurate account of cause of delay and full details of prospects of success - No allegations with regard to prospects of success-Record to be filed within 2 (two) months of date of noting of appeal - Requirements of Rule 30 (1) and 30 (4) discussed.*

Held-Application for Condonation dismissed

Held-Appeal deemed abandoned in terms of Rule 30 (4)

JUDGMENT

J.M. CURRIE - AJA

INTRODUCTION

[1] This is an appeal against the Judgment of the Court *a quo* handed down on the 13th March 2020.

[2] A Notice of Appeal was served and filed on the 13th March 2020. The Record of Appeal was filed on the 13th May 2020. The Record

was incomplete as it did not contain a copy of the Judgment appealed against.

[3] The matter first came before this Court on the 15th October 2020 when this Court made an *ex tempore* order to the effect that:

- (a) Appellant was to file its Heads of Argument and Bundle of Authorities by 30th October 2020;
- (b) The Respondent to file any further Heads of Argument, if they wished, by 2nd November 2020.

[4] When this matter came before this Court on the 6th November 2020, the Court issued an *extempore* order as follows:

"Having heard Mr. Nzima for the Appellant and Mr. Maseko for the Respondent the Court finds that:

- (1) ***The provisions of Rule 30 (1) & (4) have not been met, therefore the appeal is deemed abandoned and dismissed with costs.***
- (2) ***The application relating to condonation did not meet the necessary requirements and therefore there are neither Heads of Argument nor Bundle of Authorities before this Court.***

(3) ***Written reasons to follow. "***

[5] The written reasons for the *extempore order* are provided below.

[6] On 2nd November 2020 the Appellant filed an Application for Condonation in the following terms:

"(a) Condoning the late filing of the Appellant's Heads of Argument and Bundles of Authorities dated 30th October 2020.

(b) Admitting as part of the Record of Appeal the judgment of Her Ladyship M. Dlamini J dated the 13th March 2020 delivered on 05th October 2020."

[7] In this application the Appellant claims that on the last day for filing the Heads of Argument and Bundle of Authorities, Appellant's attorney had "technical glitches" with his computer and photocopying machine and was unable to have same repaired before 16h00 whereupon he rushed to Mbabane to file the Heads of Argument and Bundle of Authorities. These were not accepted and the Assistant

Registrar

advised Appellant's legal representative to file an application for condonation for late filing of the Heads of Argument and Bundle of Authorities.

[8] In the Application for Condonation in terms of Rule 17 the Appellant has failed to allege any prospects of success whatsoever.

[9] 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 an v of these Rules and any give such directions in matters of practice and procedure as it considers just and expedient.' (my underlining).

[10] This Rule is clear and unambiguous and provides that the Court may, on sufficient cause shown, excuse a party for non-compliance with any of the Rules.

[11] The relevant case law relating to the requirements for successful applications for condonation can be referred to as follows:

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 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." (my underlining)

[12] As Ste yn 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."

[13] Despite the plethora of authorities on this point, the Appellant made no attempt whatsoever to deal with the prospects of success on the merits and the Application for Condonation is accordingly fatally defective and stands to be summarily dismissed. The effect of this is that the Heads of Argument and Bundle of Authorities are not before this Court.

[14] Over and above that, there was a further fatal error in the prosecution of the Appeal in that the Record was filed out of time as the Notice of Appeal was served and filed on 13 March 2020 and the Record was filed on 13 May 2020.

[15] Rule 30 of the Appeal Court Rules provides as follows:

"The record.

30. (1) The appellant shall prepare the record on appeal in accordance with sub-rules (5) and (6) hereof and shall within 2 months of the date of noting of the appeal lodge a copy thereof with the Registrar of the High Court for certification as correct." (my underlining)

(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)

[16] This rule requires proactivity before the time limit in Rule 30(1) expires. The Appellant did not make an application for such an extension of time within which to file the Record in terms of Rule 16(1).

[17] In the circumstances Rule 30 (4) applies and the Appeal is deemed to be abandoned and stands to be dismissed. The Appeal having been issued and served on 13 March 2020, the Appellant ought to have filed the Record on or before 12 May 2020 but the Appellant failed to do so.

[18] The Appellant's Counsel sought to rely on the Interpretation Act 21/1970 to contradict this computation but this Act does not assist the Appellant in that Section 8 of the said Act provides:

"Computation of Time

8. *In computing time for the purposes of a law, unless the
contrary intention appears -*

(a) *a period of days from the happening of an event or the doing
of*

*an act or thing shall be deemed to be exclusive of the day on
which the event happened or the act or thing is done;*

(my underlining)

[19] In the same Act a "month" is defined as a calendar month. The legal definition of a "month" is as set out in the Law Insider Dictionary is "The lesser of a calendar month or 30 (thirty) consecutive days" and Appellant's Counsel himself averred this at the hearing of the matter.

(20] A calendar month is not what is envisaged by provisions of Rule 30(1) of the Rules of this Court. In the matter **ofTuntex Textile vs Eswatini Government and Others, Matsebula AJA**, in a unanimous Judgment, stated as follows:

"My opinion is that using the Interpretation Act 1970, except causing absurdity, is an unreasonable thing to do when trying to interpret the Rules of the Court."

[21] So despite the dictum above, and even taking into account the provisions of the Interpretation Act and the definition of a "month", the Appellant ought to have filed the Record on or before the 12th day of May 2020 and was thus out of time in doing so and by the operation of law the Appeal is deemed to have been abandoned in terms of Rule 30(4).

[22] This Court previously had occasion to consider the operation and consequences of Rule 30(4). In this regard, refer to the following cases; **Debbie Sellstrohm versus Ministry of Housing and Urban Development and 4 Others (25/2014) [2018] SZSC 02 (27/02/2017)**, **Timothy Khoza versus Pigg's Peak Town Council and Ian Van Zuydam (51/2015) [2017] SZSC 08 (12/2017)**, **The Pub and Grill (Pty) Limited and Another versus The Gables (Pty) Limited (102/2018 (2019) SZSC 17 (20/05/2019)** **Thandie Motsa and 4 Others versus Richard Khanyile and Another (69/2018) [2019] SZHC 24, (17/06/2019)**, **Cleophas Siphon Dlamini versus**

Cynthia

Mpho Dlamini (65/2018) [2019] SZSC 48 and Nhlanhla Macingwane versus Family of God Church and 2 Others (60/2018)(2019) SZSC 56 (26/11/2019). In all of these cases, this Court found that the Appeal was deemed to be abandoned and as such dismissed.

[23] 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.

[24] 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 [2019] SZSC 17 (20/05/2019).**"

[25] Despite the plethora of Judgments, circulars, and warnings from Judges, practitioners in this Court nevertheless continue to fail to abide by the Rules of this Court resulting in countless appeals having been dismissed as a result thereof. This is unnecessary as this Court will always consider well documented applications in terms of the Rules provided that full necessary and acceptable allegations are set out in the affidavit accompanying the application which meet the requirements laid down by this court in the plethora of authorities referred to by this Court.

ORDER

[26] In view of the foregoing I make the following order:

1. The Appeal is deemed to have been abandoned in terms of Rule 30 (4) and is dismissed and the Judgment of the Court *a quo* is confirmed.
2. The Application for Condonation is dismissed.
3. Costs are awarded to the Respondent.


J.M. CURRIE

LAJ'--A...J)


ACTING JUSTICE OF APPEAL

I agree



CLOETE
JUSTICE OF APPEAL

I agree



S.B. MAPHALALA
JUSTICE OF APPEAL

For Appellant:

For

Respondent:

Mr A. C. Hlatshwayo together with Mr . 0. Nzima

Mr. W. Maseko