



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

Civil Appeal Case No. 09/2020

In the matter between:

**ELLEN NOMSA DLAMINI**

**Appellant**

**AND**

**NONHLANHLA PRINCESS DLAMINI**

**1<sup>st</sup> Respondent**

**NOSIPHO ZWELAKHE DLAMINI**

**2<sup>nd</sup> Respondent**

**MAHAJELUSASENI DLAMINI**

**3<sup>rd</sup> Respondent**

**In re:**

**ELLEN NOMSA DLAMINI**

**Applicant**

**And**

**NONHLANHLA PRINCESS DLAMINI**

**1<sup>st</sup> Respondent**

**NOSIPHO ZWELAKHE DLAMINI**

**2<sup>nd</sup> Respondent**

**MAJAHELUSASENI DLAMINI**

**3<sup>rd</sup> Respondent**

**Neutral citation:** *Ellen Nomsa Dlamini vs Nonhlanhla Princess Dlamini and Three Others (09/2020 [SZSC] 41 [2020] (24<sup>th</sup> November, 2020)*

**Coram:** **M.C.B. MAPHALALA C.J.**

**S.B. MAPHALALA JA**

**J.M. CURRIE AJA**

**Heard:** 3<sup>rd</sup> August, 2020

**Delivered:** 24<sup>th</sup> November, 2020

Summary: *Civil Procedure – Application for condonation for late filing of Heads of Arguments – Application for leave to appeal – Court’s discretion exercised – condonation for late filing of Heads of Arguments and Application for leave to appeal granted – Applicant to pay wasted costs.*

**JUDGMENT**

**S.B. MAPHALALA JA**

**Application**

[1] Before this Court is an Application for condonation for the late filing of the Applicant’s Heads of Arguments, and, in prayer 2 thereof that the costs of this Application be costs in the main Application is for leave to appeal. Alternatively, the Applicant tenders payment of the costs occasioned by the late filing of the Heads of Arguments

[2] The Founding Affidavit of the Applicant Ellen Nomsa Dlamini is filed in support thereto. Pertinent annexures are also filed in support of the Application.

[3] The Respondents being 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> oppose the Application filing an Answering Affidavit of the 1<sup>st</sup> Respondent Nonhlanhla Princess Dlamini.

[4] In the said Answering Affidavit the Respondent thereon has raised three (3) points *in limine* and also answered on the merits of the Application for condonation. The

first point raised is that of *locus standi* or lack of vested interest. The second point is that of lack of jurisdiction where Respondent contends in respect of this point that the Applicant is forum-shopping in that she did not attain leave to appeal from the court *a quo* and thirdly the Respondents contends that the present Application before Court is not urgent in any way and the Applicant has dismally failed to comply with the mandatory provisions of Rule 6 (25) of the Rules of this Court. However, in arguments before us these points were not canvassed save that of urgency on behalf of the Respondents and therefore no further mention will be made in this regard.

[5] The Respondents also canvassed the merits of the dispute.

[6] The Applicant then filed a Replying Affidavit in answer to the averments of the Respondents in their Answering Affidavit.

### **Background**

[7] The short background of the matter is outlined in 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Head of Arguments at paragraphs 1 to 3 to be the following:

- 1. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were granted judgment in the court *a quo* in their favour by the Honourable Justice Maseko on the 10<sup>th</sup> of December 2019. Upon being served with the said judgment which stated that the Applicant in this matter was to pay maintenance to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to the tune of E7000.00 (Seven Thousand Emalangeni). The Applicant herein contested the order and sought that same be rescinded.**

2. **The court *a quo* then granted an interim order on the 4<sup>th</sup> day of February 2020 wherein the amount for maintenance was reduced to E3500.00 (Three Thousand Five Hundred Emalangi) pending the finalization of the rescission application. Upon an attempt to execute this interim order, the Applicant refused to comply with the order and then filed an application for leave to appeal before the above Honourable Court.**
  
3. **The basis for the Appellant's application is that she seeks to stay the execution of the maintenance interim order whilst she makes an application for leave to appeal.**

### **The Applicant's case**

[8] In the Founding Affidavit of the attorney for the Applicant various reasons are canvassed for the late filing of the Heads of Arguments in paragraphs 4 to 10 of the said affidavit. In paragraph 18 thereof stating that the Applicant has good prospects of success in the Application for leave to appeal on account of the following:

- 18.1 **The matter remains unopposed merits thereof and the legal points raised by the Respondents are totally unsustainable.**
  
- 18.2 **Clearly the application brought by the Respondents before the High Court suffers from a major defect being the non joinder of the other beneficiaries of the trust. The High Court ought not to have dealt with the matter without those parties having been joined.**
  
- 18.3 **The order appealed against resulted in an uneven treatment of the beneficiaries for no tangible reasons. This is more so because the payments provided for in the order could not be practically made to**

**all the beneficiaries from the rental collections which are the only source of income for the trust.**

**18.4 The order was granted without any support on the facts before the Court and ought not to have been granted.**

**19. I hereby personally tender payment of the costs occasioned by the late filing and submit that any prejudice suffered thereby would be alleviated by same.**

[9] On the substance of the Applicant's case Mr. Simelane appearing for Applicant cited a number of decided cases in support of his contentions including the cases of **Potgeiter vs Portgeiter N.O. and Others 2012 (1) SA 637(SCA) paragraph 10** and that of the **Doyle vs Board of Executors 1999(2) SA B05[C]**.

[10] The main argument by Counsel for the Applicant on the merits of the case is that the interim order could not be granted without there being a ruling on the issue of whether or not the Respondents (Applicants *court a quo*) were actually entitled to maintenance, both in terms of the Trust Deed as well as in terms of their needs.

[11] Furthermore, it is contended for the Applicant that on the papers before Court, it is clear and undisputed that the amount allegedly collected as rentals are on average, a sum of E60,000.00 (Sixty Thousand Emalangeni) per month. On that basis it is submitted that compliance with the interim order result in unfair discrimination against those beneficiaries who are not part of the court proceedings. That the aforesaid discrimination cannot be sustained on the basis that the other beneficiaries have not approached the Court. Same could only be justified on the basis of need. That in *casu* there is no evidence of what the Respondents' needs are hence they are not entitled to any favourable treatment *vis a vis* the rest of the beneficiaries.

[12] That it is further on that basis that it was essential that the rest of the beneficiaries be joined in the proceedings. That therefore, the court *a quo* ought not to have granted any relief on the Respondents' Application unless all interested parties have been joined on the proceedings. In this regard the Court was referred to the case of **Maria Mavimbela vs Sedcon Swaziland and Others 943/08) 2008 SZSC6.**

[13] Lastly Counsel for the Applicant contends that in view of the above considerations that the Applicant has reasonable prospects of success on the appeal and therefore leave to do so may be allowed.

#### **The Respondents' case**

[14] On the other hand it is contended for the Respondents that the Application ought to be dismissed filing an Answering Affidavit in regard thereto.

[15] The 1<sup>st</sup> Respondent contend on the main that it is correct that the Applicant filed such an Application, but given the fact that a trust is operating within the parameters of the document giving rise to such an entity, that 1<sup>st</sup> Respondent has not been able to find a provision that obligates the trust to pay monthly maintenance of any amount and consequently Applicant must show that there is such a provision and the amount claimed.

[16] Further arguments are canvassed in the said Answering Affidavit in opposition of the Application. The final submission by the Respondent is that the Application be dismissed with costs.

#### **The Court's analysis and conclusions thereto**

[17] The Court heard arguments by both Counsel of the parties on the 3<sup>rd</sup> August 2020 which I have considered to and fro and come to the considered view that in the interest of justice the Applicant's condonation of the late filing of its Head of Arguments and also Applicant is granted leave to appeal. Furthermore, that the Applicant pays wasted costs tendered by the Applicant. In this regard I have to consider what has been averred by the Applicant in paragraph 15 of Founding Affidavit in support of the Application where the following is stated:

- 15.1 The order ought not to have been granted without a determination of the issue as to whether the Respondents were entitled to any monthly allowances from the trust. This was moreso, because no security had been put up by the Respondents for the reimbursement of the money in the event that it were to be found that they are not entitled thereto. In any events it is hereby submitted that they are not so entitled.**
- 15.2 The order issued was not based on any assessment of the evidence before the court as contained in the following affidavit and answering affidavit in the rescission application which papers were before the court at the time the matter was heard.**
- 15.3 The order on its own could not be carried out effectively, without discriminating against the beneficiaries who were not before court. This is more so because the amount payable as per the order could not be paid to all the beneficiaries equally from the monthly collections as the beneficiaries are twenty four (24) in number yet the collections average an amount of E60 000.00 (Sixty Thousand Emalangi).**
- 15.4 The court order ought not to have been granted as there was a clear case of no-joinder when the main matter was initially brought to**

**court, hence no order should have been issued thereon at the time. The interim order perpetuated the non-joinder.**

**15.5 If the amounts payable as per the interim order were paid to all the beneficiaries, the business of the trust would grind to a halt and the trust would not be in a position to sustain itself.**

[18] It would appear to me that on these facts the interest of justice *in casu*, require that the operation of the order of the 10<sup>th</sup> December, 2019 be stayed pending finalization of the rescission.

[19] In the result for the foregoing reasons the following order is made:

1. Condonation for the late filing of Heads of Arguments is granted,
2. Applicant is granted leave to appeal.
3. The Applicant to pay wasted costs.

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**S.B. MAPHALALA JA**

**I AGREE**

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**M.C.B MAPHALALA C.J**

**I ALSO AGREE**

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**J.M. CURRIE AJA**



**For the Applicant:**

**Mr. S. Simelane  
N.E. Ginindza Attorneys**

**For the Respondents:**

**Mr. S. Jeje  
S.M. Jeje Attorneys**