IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 93/2020

HELD AT MBABANE

In the matter between:

ROYAL ESWATINI SUGAR CORPORATION LTD	**Appellant**
And	
ACTING JUDGE MSIMANGO	**1st Respondent**
MUSA DLAMINI N.O	**2nd Respondent**
M.T.E MTHETHWA N.O	**3rd Respondent**
MAX BONGINKHOSI MKHONTA	**4th Respondent**
ADVOCATE THANDO NTSONKOTA	**5th Respondent**

Neutral Citation: *Royal Eswatini Sugar Corporation Limited vs Acting Judge Msimango N.O and 4 Others* (93/2020) [2021] *SZSC* 27 (12/10/2021)

Coram: **S.P. DLAMINI JA, R.J. CLOETE JA AND S.B. MAPHALALA JA.**

Heard: 23rd September, 2021.

Delivered: 12th October, 2021.

SUMMARY : *Civil procedure – Notice of Appeal filed out of time – Application for dismissal in the light thereof – Application for Condonation – Requirements of such Application discussed – Non-compliance with the provisions of Rules 8, 16 and 17 – Applicant failing to give credible and reasonable explanation for the delay – Application for Condonation dismissed.*

JUDGMENT

CLOETE - JA

INTRODUCTION

[1] The actual parties to this matter are Royal Swaziland Sugar Corporation Limited who is the Appellant (and will be referred to as such) and Max Bonginkhosi Mkhonta who is the 4th Respondent (who will be referred to as the Respondent)

[2] Serving before us are two applications, the first being an application by the Respondent dated 8th February 2021 in terms of which the Respondent sought the following orders:

1. **Declaring the appeal filed by the Appellant on the 16th December 2020 to be filed out of time.**
2. **Dismissing the appeal noted on the 16th December 2020**
3. **Cost of Application**

The Appellant opposed that application and apparently in response to the Respondent's application, clearly as an afterthought since it was brought on 14th April 2021, almost 5 months to the day after the filing of the Notice of Appeal, in terms of which it sought the following order:

1. **Condoning the Appellant's late filing of the Notice of Appeal;**
2. **Cost of suit in the event the Application is opposed.**

[3] At the hearing of matter it was suggested that the Respondent's Application be heard first and then the Appellant's Application, but as it transpired the Counsel for both parties argued the Applications simultaneously and for all intents and purposes both matters will be dealt with as one in this Judgment.

[4] It would be useful to sketch the background and the timelines giving rise to this matter in order to give full insight into the actions and omissions of both parties.

[5] This matter started in the Industrial Court of Eswatini and after various processes the said Industrial Court handed down its Judgment on 28th February 2019. (I will refer to this in my *obiter* remarks at the foot of this Judgment).

[6] On 5th March 2019 the Appellant brought an Application to the High Court of Eswatini for an order in the following terms:

1. **Dispensing with the usual forms and procedures relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.**

2. **Condoning Applicant's non-compliance with the Rules and Procedures and time limits relating to institution of proceedings.**

3. **Reviewing, setting aside and correcting the whole Judgment of the Industrial Court dated 28 February 2019.**

4. **The order of the Industrial Court is substituted with the following:**

   4.1The Application is dismissed and no order as to costs.

5. **Costs of suit to be paid by the 4th Respondent. The other Respondents to pay costs only in the event of opposition, each Respondent paying the other to be absolved.**

[7] According to the Appellant, the Judge in the High Court indicated that he was not available to hear the matter until 31 July 2019. The Appellant then advised the Respondent on 15 April 2019 that it intended to institute new disciplinary procedures against him (bearing in mind that it appears that previous disciplinary proceedings had led to the matter being aired in the Industrial Court).

[8] As a result the Respondent, on 24 April 2019, brought an Application to the same Judge who was to hear the merits of the matter and after hearing both parties Mamba J granted the Respondent the interim relief sought by Respondent on 29 April 2019.

[9] On 31 July 2019 the Review Application of the Appellant was heard by Mamba J. On 12 September 2019 Mamba J handed down an *ex tempore* Judgment in terms of which the Application by the Appellant was dismissed with costs. It is necessary to highlight that both parties were fully represented at the time of the said *ex tempore* Judgment and as such both Counsel (and presumably their clients) became aware of the result on that date.

[10] On 15 October 2019 the Appellant's Counsel wrote a letter to the Registrar of the High Court which reads as follows:

1. **We refer to the above matter.**

2. **The above matter was heard and finalized on the 12th September 2019, whereupon, His Lordship Mamba J dismissed the Applicant's Review Application and pronounced that the reasons would follow.**

3. **We are instructed by client to request the reasons for the decision.**

4. **We trust the above is in order.**

[11] The written reasons of Mamba J are dated 27 January 2020. It is the contention of both Counsel that neither were invited to attend the formal handing down.

[12] The Appellant alleges that it only became aware of the reasons on 1 December 2020 and that accordingly its Notice of Appeal was filed and served on 16 December 2020 and the record was filed on 18 January 2021.

[13] The Respondent filed Heads of Argument relating to its Application of 8 February 2021. The Appellant did not file any Heads in respect of the Respondent's Application nor its Application for Condonation of 14 April 2021 and only filed Heads of Argument in respect of the merits of the actual Appeal.

[14] The Respondent in its Founding Papers in respect of his Application of 8 February 2021 raised the following pertinent issues in argument as per Mr. Shongwe:

1. That the *dies* for the filing of an Appeal had long lapsed and was not in compliance with Rule 8 of the Court of Appeal Act 74/1954.

2. That the Appellant had further failed to apply for Leave to Appeal.

3. That the Appellant did nothing to follow up with the Registrar about the reasons for the *ex tempore* Judgment.

4. That the Appellant immediately ought to have brought an Application in terms of Rule 17 as soon as it became aware of the written reasons.

5. He referred the Court to the matter of **Unitrans Swaziland Limited vs Inyatsi Construction Limited Civil Appeal Case No. 9/1996** and the matter of **Simon Musa Matsebula vs Swaziland Building Society Civil Appeal No.11/1998, De Berry Anita Belinda vs AG Thomas Pty (Ltd) Civil Appeal Case 30/2015,** all of which will be dealt with in some detail below.

6. That the matter was, as found by Mamba J, moot in that the Appellant had fully complied with the Order of the Industrial Court Judgment.

[15] The Appellant represented by Mr. Magagula raised the following arguments:

1. This was a matter of great importance to his client which according to Mr. Magagula is the biggest company in Eswatini and that this being the apex Court of the land, it should not be dealing with trivial technicalities.

2. That a letter was written to the Registrar on 17 October 2019 (quoted above), requesting the reasons for the *ex tempore* Judgment.

3. That he was not invited to receive the reasons dated 27 January 2020.

4. That he only became aware of the said reasons on 1 December 2020.

5. That the Appellant accordingly complied with the provisions of Rule 8 of the Court in filing its Notice of Appeal on 16 December 2020.

6. That the Record filed on 18 January 2021 was accordingly within the time limits stipulated by the Rules.

7. That he conceded that a Notice of Appeal could have been filed without the reasons for the Judgment being available.

8. That he contended that it was not necessary to bring an Application in terms of Rule 16 of this Court.

9. That the Application for Condonation needs to deal with two issues only namely that the explanation for the delay in filing the Notice of Appeal

was reasonable and that the Appellant needed to show that it had prospects of success.

10. That there was no need to apply for Condonation for the late filing of the Record as it was filed within the prescribed time limits.

11. That the matter between the parties was certainly not moot, very much alive and that the Respondent would be able to use the Judgment of the Court *a quo* in an Industrial Court action for unfair dismissal

[16] Both Counsel agreed that the costs should follow the result of the relevant applications.

[17] At the outset it would be remiss of me not to deal with some of the issues raised by Counsel for the Appellant. In the first instance let it be placed on record that this Court dispenses justice in the same degree of fairness to all who come before it, big or small. In addition, contrary to the notion that this Court does not deal with trivial technicalities, this Court requires full and complete compliance with its enabling Act and the Rules promulgated

thereunder and furthermore is required to oversee the full compliance with all laws and regulations promulgated in Eswatini.

[18] It is trite that the Appellant (certainly its Counsel) became aware of the adverse finding against it when represented in the High Court on 12 September 2019 when Mamba J handed down the *ex tempore* Judgment.

[19] The Appellant's Counsel wrote to the Registrar on 15 October 2019 requesting reasons for the Judgment. There is absolutely no allegation or evidence before us that the Appellant thereafter made any further attempt to obtain the reasons concerned. That would mean that for a period of some fourteen (14) months between 15 October 2019 and 1 December 2020, it did absolutely nothing to further the matter by enquiry with the Registrar relating to the reasons. It did not bring an Application in terms of Rule 16 for an extension of time within which to file its Notice of Appeal and/or seek relief from this Court to direct that the reasons be furnished within a suitable time which is customary practice .

[20] Given that the Deponent to the Affidavit in support of the purported Application for Condonation, one Lungile Masango, who is the head of Governance, Risk and Compliance of the Appellant at paragraph 26 of the Application stated that **"This matter is a matter of great importance to the Appellant who was dissatisfied with the High Court's failure to hear the merits of the Review on the tenuous ground that the Review was academic in spite of the fact that this decision could be used by the 4th Respondent in a claim of unfair dismissal. For the Appellant, the intention was always to appeal the decision of the Court to dismiss the Application for Review of the Industrial Court's decision to stop disciplinary proceedings".**

[21] Even more startling is the admission by the Deponent at paragraph 27 of the Founding Affidavit where she states **"The Appellant only became aware of the Judgment on 1 December 2020 and has acted promptly to note an Appeal. In terms of the Rules the Appeal must be noted within 4 weeks from the date of Judgment appeal against or from the date of the written Judgment".**

[22] Contrary to the argument of Mr. Magagula that the Appellant has complied with the Rules of this Court, it needs to be pointed out that Rule 8 of this Court clearly provides that the **"Notice of Appeal shall be filed within four weeks of the date of the Judgment appealed against and provided if there is a written Judgment such period shall run from the date of delivery of such written Judgment"** and not from the date upon which the Appellant became aware of the written Judgment. (my underlining)

[23] The actual Application for Condonation, seemingly as an afterthought in response to the Application brought by the Respondent on 8 February 2021, is only brought on 14 April 2021, some 5 months after the filing of the purported Notice of Appeal and as such some 19 months after the Appellant became aware of the adverse finding against it and some 18 months after it made the one and only enquiry to the Registrar for the reasons concerned. Surely if the matter was so important to the Applicant as alleged in the Founding Affidavit, it must surely be reasonable to have expected that the Appellant would have pestered the Registrar persistently for the reasons but sadly there is absolutely no evidence before us that this was ever done. See the remarks at the foot of paragraph 19 above. This is not to downplay in any way the duty of the Courts to deliver Judgments expeditiously.

[24] Nor was an Application in terms of Rule 16 ever brought or apparently considered.

[25] The law relating to applications of this nature has been set out *ad nauseam* in a host of Judgments and I will refer to some of them once again.

[26] In the matter of **De Barry Anita Belinda vs AG Thomas (Pty) Ltd Appeal Case No. 30/2015**, which was confirmed on Review by this Court by a Full Bench, the following cases cited by it with approval, are pertinent.

1. In **Dr. Sifiso Barrow v. Dr Priscilla Dlamini and the University of Swaziland (09/2014) [2015] SZSC 09 (09/12/2015)** the Court at 16 stated **"It has repeatedly been held by this Court, almost *ad nauseam*, that as soon as a litigant or his Counsel becomes aware that compliance with the Rules will not be possible, it requires to be dealt with forthwith, without any delay."**

2. In **Unitrans Swaziland Limited v Inyatsi Construction Limited, Civil Appeal Case 9 of 1996,** the Court held at paragraph 19 that:- **"The Courts have often held that whenever a prospective Appellant realises that he has not complied with a Rule of Court, he should, apart from remedying his fault, immediately, also apply for Condonation without delay.** The same Court also referred, with approval, in **Commissioner for Inland Revenue v Burger 1956 (A)** in which **Centlivres CJ** said at **449-G** that: **"…whenever an Appellant realises that he has not complied with the Rule of Court he should, without delay, apply for Condonation."** (my underlining)

3. 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) prospects of success on Appeal and (4) the Respondent's interest in the finality of the matter."**

4. In the same matter, 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 <u>Salojee vs The Minister of Community Development 1965 92) SA 135 at 141</u>, *"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."

5. In the matter of **Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA),** the summary of the matter is as follows: **"Appeal – Prosecution of – Proper Prosecution of – Failure to comply with Rules of Supreme Court of Appeal – Condonation Applications – Condonation not to be had merely for the asking – Full, detailed and accurate account of causes of delay and effect thereof to be furnished so as to enable Court to understand clearly reasons and to assess responsibility – To be obvious that if non-compliance is time-related, then date, duration and extent of any obstacle on which reliance placed to be spelled out."**

6. **Herbstein and van Winsen, The Fifth Edition** at page 723, is instructive on when a Court may grant Condonation on good cause shown. It stated therein:

   "Condonation

   The Court may on good cause shown condone any non-compliance with the Rules. <u>The circumstances or 'cause' must be such that a valid and justifiable reasons exists why compliance did not occur and why non-compliance can be condoned."</u> (my underlining)

7. In **Standard General Insurance Co Ltd v Eversafe (Pty) Ltd** it was stated that:

   "It is well-established that an Application for any relief in terms of Rule 27 has the burden of actually proving, as opposed to merely alleging, the good cause that is stated in Rule 27 (1) as a jurisdictional prerequisite to the exercise of the Court's discretion. <u>Silber v Ozen Wholesalers (Pty) Ltd</u> 1954 (2) SA 345 (A) at 325G. <u>The Applicant for any such relief must, at least, furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about and to assess his conduct and motives Silber v Ozen Wholesalers (supra at 353A)).</u> (my underlining)

8. As was said in **Kombayi v Berkhout 1988 (1) ZLR 53 (S)** at 56 by **Korsah JA:**

"Although this Court is reluctant to visit the errors of a legal practitioner on his client, to who no blame attaches, so as to deprive him of a re-hearing, error on the part of a legal practitioner is not by itself a sufficient reason for Condonation of a delay in all cases. As Steyn 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."

[27] In the matter of **Melane v Santam Insurance Co Ltd 1962 (4) SA 531(A) 532C-**F the Court held that **"without a reasonably 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."** This decision has been confirmed with approval in many matters before this Court.

[28] In **Gaoshubelwe & Others v Pie Man's Pantry [2008] JOL 22302 (LC)** it was stated at paragraph [26] that **"an applicant in an Application for Condonation has to show good cause by providing an explanation that shows how and why the default occurred. There is authority that the Court could decline the granting of Condonation if it appears that the default was wilful or due to gross negligence on the part of the applicant. In fact the Court could on this ground alone decline to grant an indulgence to the applicant."** The *dictum* in Melane *Supra* referred to in paragraph 28 above was approved.

[29] From all the above it can safely be said that the stated reason for the delay cannot remotely be accepted as reasonable and credible under any circumstances. In fact the timelines are of such a nature that the explanation for the delay is of the sole making of the Appellant and no one else.

[30] Accordingly the Appellant, having failed badly to cross the first hurdle successfully in that the reason for the delay is completely unacceptable, it is

not necessary to deal with the issue of the prospects of success of the Appellant.

[31] To finally drive this point home, in the **Uitenhage** matter *Supra* it was stated that **"It is trite that where non-compliance of the Rules has been flagrant and gross, a Court should be reluctant to grant Condonation <u>whatever the prospects of success might be, Darries v Sheriff, Magistrate's Court Wynberg</u> 1998 (3) SA 34 (SCA) at 41D."**

[32] As was pointed out in **<u>Kodzwa v Secretary for Health & Anor</u> 1999 (1) ZLR 313 (S)** by **Sandura J:**

<u>"Whilst the presence of reasonable prospects of success on Appeal is an important consideration which is relevant to the granting of Condonation, it is not necessarily decisive.</u> Thus in the case of a flagrant breach of the Rules, particularly where there is no acceptable explanation for it, the indulgence of Condonation may be refused, whatever the merits of the Appeal may be. This was made clear by <u>Muller JA</u> in <u>P E Bosman Transport Works Committee & Ors v Piet</u>

Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A) at 799 D-E, where the learned Judge of Appeal said:

'In a case such as the present, where there has been a flagrant breach of the Rules of this Court in more than one respect, and where in addition there is no acceptable explanation for some periods of delay and, indeed, in respect of other periods of delay, no explanation at all, the Application should, in my opinion, not be granted whatever the prospects of success may be." (my underlining)

[33] For all of the above reasons it is clear that the Appellant has not satisfied any of the requirements set out in the Rules or the decisions referred to above and as such the Application for Condonation must fail. That said, given that the Respondent brought an Application on 8 February 2021 in the terms referred to above, it must follow that prayer 1 in the said Application must be successful on the basis that the Notice of Appeal is irregular and as such there is no appeal before this Court.

[34] As set out above, the parties agreed on the issue of costs and as such the costs of both Applications are awarded to the Respondent, he having been substantially successful in both.

[35] In the light of the provisions of Rule 8 (2), the Registrar should not accept any Notice of Appeal filed out of time unless it has been preceded by a successful application for Leave to Appeal out of time. This happens all too often and on a number of occasions it has been pointed out that the Registrar appears to accept all documents willy nilly without checking whether such documents are filed in terms of the Rules.

[36] I turn now to what I referred to in my introduction and these remarks are *obiter*. The issue was not specifically argued by either party but was raised by the Respondent in its Founding Affidavit to the Application of 8 February 2021 and that is that the Appellant had failed to obtain Leave to Appeal. In that regard, the matter having emanated in the Industrial Court of Eswatini, which was found by a Full Bench of this Court in the matter of **Derrick Dube vs Ezulwini Municipality and Others in Case No. 91/2016** to be an "inferior Court" and as such the argument for another day is whether the

Appellant under those circumstances required leave to Appeal in the first instance and whether Sections 14 or 15 of the Court of Appeal Act could be invoked.

[37] It is accordingly ordered as follows:

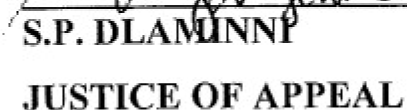
1. The first prayer in the Application of the Respondent dated 8 February 2021, namely that the purported Notice of Appeal filed by the Appellant on 16 December 2020 was filed out of time, is upheld with costs on the ordinary scale.

2. The Application for Condonation by the Appellant is accordingly dismissed with costs on the ordinary scale.

R.J. CLOETE

JUSTICE OF APPEAL

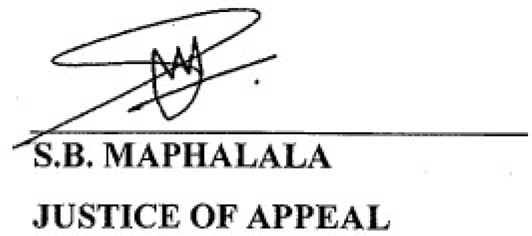
I agree



S.P. DLAMINNI

JUSTICE OF APPEAL

I agree



S.B. MAPHALALA

JUSTICE OF APPEAL

For the Appellant: M. MAGAGULA FROM MAGAGULA & HLOPHE ATTORNEYS

For the Respondents: P.M. SHONGWE FROM MAGAGULA ATTORNEYS