IN THE SUPREME COURT OF ESWATINI

HELD AT MBABANE Civil Appeal Case No: 66/2020

In the matter between:

TERROR MAZIYA **APPELLANT**

And

THE ATTORNEY GENERAL **RESPONDENT**

Neutral Citation: *Terror Maziya v The Attorney General (66/2020) [2021] SZSC 03* ***(02ND JUNE, 2021)***

Coram : JUSTICE MCB MAPHALALA CJ
JUSTICE JP ANNANDALE JA
JUSTICE MJ MANZINI AJA

Heard : 05TH MAY, 2021

Delivered : 02ND JUNE, 2021

SUMMARY:

Civil appeal – action for damages arising from unlawful arrest, detention and unlawful arrest – court *a quo* dismisses the action on the basis that the appellant had not established the cause of action;

Appellant lodged the appeal timeously but failed to file the record on time – Appellant filed an application seeking extension of time in terms of Rule 16 as well as a prayer for condonation in terms of Rule 17 for failure to comply with the Rules of Court - Rule 16 on extension of time and Rule 17 dealing with condonation for non-compliance with the Rules considered;

On appeal this Court held that the application for extension of time to file the transcript which is part of the record was not competent in the circumstances on the basis that the time for filing the record had lapsed;

Held further that Rule 16 was competent where the time for filing has not lapsed; and that the general principle is that the litigant should apply for extension of time as soon as he realises that he will not be able to comply with the Rules of Court;

Held further that an application for condonation for non-compliance with the Rules of Court should be lodged as soon as the applicant realises that he has not complied with the Rules;

Held further that the application for condonation cannot succeed on the basis that the appellant had failed to show the existence of 'good cause' or 'sufficient cause' which is the essential prerequisite for the granting of condonation;

Held further that there are two essential requirements of 'sufficient cause' being a reasonable explanation for the delay as well as showing the existence of prospects of success on the merits of the appeal;

Accordingly, the application for extension of time as well as condonation is dismissed. No order as to costs.

JUDGMENT

M. C. B. MAPHALALA, CJ

[1] The appellant instituted action proceedings in the court *a quo* against the Attorney General in his nominal capacity representing the Government of Eswatini.

[2] The claim was for payment of damages in the amount of E800 000.00 (Eight Hundred Thousand Emalangeni) for unlawful arrest, detention and malicious prosecution. According to the particulars of claim filed by the

appellant on the 20th October, 2000 the police and the Director of Public Prosecutions allegedly set the law in motion by laying a false charge of house-breaking and theft against the appellant. The police subsequently arrested, charged and detained the appellant.

[3] The appellant contends that the police and Director of Public Prosecutions were acting during the course and within the scope of their employment with the Government of Eswatini for which it was vicariously liable. His further contention is that the police and the Director of Public Prosecutions had no reasonable or probable cause to arrest and charge him with the criminal offence.

[4] Generally a litigant is not bound to institute legal proceedings against the Attorney General in his nominal capacity whenever there is claim against the Government. Consequently, the failure to cite the Attorney General in his nominal capacity but cite the Government official or Ministry responsible does not render the summons or proceedings excipiable.

[5] The Government Liabilities Act[1] gives the litigant an option to the extent that it provides the following:[2]

> **"2. Any claim against the Swaziland Government which would, if it had arisen against an individual person or corporate body, be the ground of an action in any competent Court, shall be cognizable by any such Court, whether the claim arises or has arisen out of any contract lawfully entered into on behalf of the Government or out of any wrong committed by any servant of the Government acting in his capacity and within the scope of his authority as such servant:**
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> **3. In any action or other proceedings which are instituted by virtue of section 2, the plaintiff, the applicant or the petitioner, as the case may be, may make the Attorney General the nominal defendant and in any action or other legal proceedings by the Government or any Minister, the**

[1] No. 21 of 1967 .

[2] Sections 2 and 3 .

Attorney General may be cited as the nominal plaintiff or applicant, as the case may be."

[6] In response to the summons the respondent in the defendant's plea admitted setting the law in motion against the appellant, arresting and detaining him on the 26th October, 2000. However, the respondent denied that the arrest and subsequent detention of the appellant was unlawful. The respondent's contention was that the arrest of the appellant was lawful on the basis that the police when effecting the arrest had a reasonable belief that he had committed an offence referred to in Part II of the First Schedule to the Criminal Procedure and Evidence Act.[3]

[7] The defence pleaded by the respondent is contained in section 22(b) of the Criminal Procedure and Evidence Act,[4] which provides the following:

"Every police officer and every other officer empowered by law to execute criminal warrants is hereby authorized to arrest without a warrant every person whom he has reasonable

[3] No. 67 of 1938 as amended .

[4] No. 67 of 1938 as amended .

grounds to suspect of having committed any of the offences mentioned in Part II of the First Schedule.''

[8] Incidentally, breaking or entering any premises with intent to commit an offence as well as theft are some of the offences contained in Part II of the First Schedule to the Criminal Procedure and Evidence Act. However, without venturing into the merits of the appeal, it is pertinent to mention that the test for determining the lawfulness of the arrest was laid down in Sibongiseni Khumalo v Commissioner of Police and Another[5] where the Chief Justice delivering a unanimous judgment of this Court on appeal had this to say:

"It is well-settled that a police officer who effect an arrest without a warrant bears the onus of proving on a balance of probabilities that reasonable grounds exist for the suspicion that the accused has committed an offence mentioned in Part II of the First Schedule. The basis of the onus being placed on the arresting police officer is that every arrest constitutes an invasion on the fundamental human rights of the individual and

[5] Civil Appeal Case No. 47/2019 para 38 .

deprives the arrested person of his personal liberty. The test for determining the existence of reasonable grounds for the suspicion is objective in nature enquiring what a reasonable man would have done in similar circumstances with the same information at his disposal."

[9] The respondent's further contention was that the subsequent detention of the appellant was lawful on the basis that the appellant was brought before Court within a reasonable time after his arrest, and, that he was granted bail on the first day of his appearance but he could not afford bail. This contention is part of the merits of the appeal; hence, it is beyond the determination of this judgment.

[10] The hearing of the present matter commenced before the court *a quo* on the 8th June, 2020 and judgment was delivered on the 29th September, 2020. The Judge *a quo* dismissed the appellant's action on the basis that he had failed to establish the cause of action and in particular that the arrest and detention were unlawful. The appellant could not succeed on

the claim for malicious prosecution on the basis that the trial Court found that he was never subjected to a criminal trial.

[11] The appellant lodged the present appeal timeously on the 20th October, 2020 against the judgment of the court *a quo.* The main basis for the appeal was that the court *a quo* erred in law in dismissing the appellant's claim for damages for unlawful arrest, detention and malicious prosecution. The Rules provide that the Notice of Appeal shall be filed within four weeks of the date of the written judgment.[6] The appeal was filed within the time prescribed by the Rules.

[12] However, the appellant failed to lodge the record of proceedings within two months of the date of noting the appeal as required by the Rules. An incomplete record of proceedings was lodged on the 9th November, 2020 containing the pleadings but excluding the transcript of proceedings which is part of the record. Ironically the incomplete record of proceedings was certified as correct by the Deputy Registrar of the High Court; however, the certification of the record does not render the record complete.

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[6] Rule 8 .

[13] Rule 30 which deals with the record of proceedings provides the following:

> **"30. (1) The appellant shall prepare the record on appeal in accordance with sub-rules (5) and (6) hereof and shall within two months of the date of noting of the appeal lodge a copy thereof with the Registrar of the High Court for certification as correct.**
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> **. . . .**
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> **(4) Subject to Rule (16), 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.**
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> **(5) The appellant in preparing the record shall, in consultation with the opposite party, endeavour to**

exclude therefrom documents not relevant to the subject-matter of the appeal and to reduce the bulk of the record so far as practicable. Documents which are purely formal shall be omitted and no document shall be set forth more than once. The record shall include a list of documents omitted. Where a document is included notwithstanding an objection to its inclusion by any party, the objection shall be noted in the index of the record.

(6) All copies of the record shall be clearly typed on one side of the paper only on stout foolscap paper, double-spaced, in black ink, and every tenth line of each page of the record shall be numbered, and at the top of each page there shall be typed the name of the witness whose evidence is recorded thereon. Photostats of original documents are permissible only if they be legible. The pages of the record must be consecutively numbered. The record must be properly indexed and securely bound in suitable

covers. Bulky records must be divided into separate conveniently sized volumes.

(7) The Registrar of the High Court shall satisfy himself that, the provisions of sub-rule (6) hereof have been complied with before furnishing the certificate required by sub-rule (1) hereof."

[14] It is apparent from Rule 30 that where the appellant fails to file the record timeously the appeal shall be deemed to have been abandoned. However, the appellant may invoke Rule 16 as soon as he realises that he will not comply with the Rules. Rule 16 allows the appellant to lodge an application for an extension of time prescribed by the Rules whenever he realises that he will not comply with the Rules; this should be done prior to the lapse of the time prescribed by the Rules.

[15] Rule 16 provides the following:

"(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 may if he thinks fit refer the application to the Court of Appeal for decision.

(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."

[16] It is well-settled in this jurisdiction that as soon as a litigant becomes aware that compliance with the Rules will not be possible, he should invoke Rule 16 without delay and lodge an application for extension of time, setting forth good and substantial reasons for the application.[7]

[7] Barrow v Dlamini and Another Criminal Appeal Case No. 9/2014 para 16; Usuthu Pulp Company v Swaziland Agricultural & Plantation Workers Union para 40 Civil Appeal Case No. 21/11 para 40 .

[17] Similarly, it is well-settled in this jurisdiction that an application for condonation should be made as soon as the litigant realises that the Rules of Court have not been complied with. Negligence on the part of the litigant's Attorney will not exonerate the litigant. The general principle of our law regarding condonation is that whenever a prospective appellant realises that he has not complied with the Rules of Court, he should, apart from remedying his default immediately also apply for condonation without delay.[8] Condonation is available to a litigant where the time prescribed by the Rules has lapsed. Rule 17 deals with condonation for non-compliance with the Rules, and, it provides the following:

> **"17. The Court of Appeal may on application and for sufficient cause shown, excuse any party from compliance with any of these Rules and may give such directions in**

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[8] Barrow v Dlamini and Another Civil Appeal Case No. 9/2014 para 16; Unitrans Swaziland Limited v Inyatsi Construction Civil Appeal Case No. 9/1996 para 10-11; Commissioner for Inland Revenue v Burger 1956(4) 446 SA at 449; Moraliswani v Mamili 1989(4) SA 1 at 9; Ferreira v Ntshingila 1990(4) SA 271 at 281; Saloojee and Another NNO v Minister of Community Development 1965(2) SA 135A at 138 .

matters of practice and procedure as it considers just and expedient."

[18] This Court has a discretion which it exercises judiciously to condone non-compliance with its own Rules upon 'sufficient cause' shown pursuant to an application for condonation. When the Court considers that sufficient cause exist in support of condonation, the Court may give directions in matters of practice and procedure as it considers just and expedient.

[19] One of the leading cases dealing with condonation in South Africa, and, which has since been followed with some modifications by this Court is Melane v. Santam Insurance Company Limited.[9] In Melane's case the applicant sought leave to appeal *in forma pauperis* against a judgment delivered in the Witwatersrand Local Division on the 19th February, 1962.

[9] Melane v Santam Insurance Limited 1962(4) SA 531(A) at 532; Unitrans Swaziland Ltd v Inyatsi Construction Ltd (supra) at para 10; The Swazi Observer (Pty) Ltd v Dr. Futhi Dlamini (2018) SZSC 26; Usuthu Pulp Company v Swaziland Agricultural and Plantation Workers Union 2012 SZHC 104; Madinda v Minister of Safety and Security 2008(4) SA 312 (SCA) at para 10; Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd 2010(4) SA 109 (SCA) at para 36; OKH Farm (Pty) Ltd v Cecil John Littler N.O and Four Others Appeal Case No. 56/2008; Chetty v Law Society Transvaal 1985(2) SA 756(A) at 765 .

He had noted an appeal on the 8th March, 1962. Rule 4(7)(a) of the Rules of the Court of Appeal of South Africa requires a petition for leave to appeal *in forma pauperis* to be lodged not later than twenty-one (21) days after the appeal has been noted. The petition was lodged out of time. Rule 13 of the South African Court of Appeal provides that the Court may, for 'sufficient cause' shown, excuse the parties from compliance with the Rules.

[20] Holmes JA when delivering the majority judgment in Melane's case and further refusing condonation had this to say:[10]

> **"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach**

[10] at 532 .

incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective "*conspectus*" of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interests in finality must not be overlooked."

[21] Joubert JA in Blumenthal and Another v Thomson and Another[11] had this to say with regard to an application for condonation for non-compliance with the Rules of Court:-

"This Court has often said that in cases of flagrant breaches of the Rules, especially where there is no acceptable explanation therefore, the indulgence of condonation may be refused

[11] 1994(2) SA 118 at 121 .

whatever the merits of the appeal are; this applies even where the blame lies solely with the attorney."

[22] This Court has warned litigants and Attorneys over the years about the flagrant disregard of the Rules of Court. Steyn JA in Simon Musa Matsebula v Swaziland Building Society[12] decried the fragrant disregard of the Rules of Court in this jurisdiction by Legal Practitioners:[13]

"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 by this Court that non-compliance of a serious kind will henceforth

[12] Civil Appeal No. 11/1998 .

[13] Usuthu Pulp Company v Swaziland Agricultural and Plantation Workers Union Civil Appeal Case No. 21/2011 at para 42; Hlanganyelani Harvesting and Business Group (Pty) Ltd v Standard Bank Swaziland Ltd Civil Appeal Case No. 58/2013 at para 17 .

procedural orders being made such as striking matters off the roll or in appropriate orders for costs, including orders for costs *de bonis propriis.”*

[23] It is well-settled in this jurisdiction that the phrase ‘sufficient cause’, means that the applicant for condonation for failure to comply with the Rules of Court should furnish a reasonable explanation for his default. The test for determining a reasonable explanation is objective in nature. In addition he must show the existence of prospects of success in the merits of the appeal.

[24] This Court when dealing with the phrase “sufficient cause”[14] quoted with approval the judgment of Heher JA in Madinda v Minister of Safety and Security[15] where His Lordship had this to say:

“10. . . . . ‘Good cause’ looks at all those factors which bear on the fairness of granting the relief as between the

[14] Usuthu Pulp (*supra*) at para 42 and 43; Hlanganyelani (*supra*) at Para 17 .

[15] 2008(4) SA 312 SCA at 10 .

parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many such possible factors become relevant. These may include prospect of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the applicant, and, any contribution by other persons or parties to the delay and the applicant's responsibility therefore."

[25] Schreiner JA in Silber v Ozen Wholesalers (Pty) Ltd[16] in an application for condonation said the following with regards the phrase 'sufficient cause':

"The meaning of 'good cause'. . . like that of the practically synonymous expression 'sufficient cause' which was considered by this Court in Cairn's Executors v Gaarn, 1912 AD 1811 should not lightly be made the subject of further definition. For to do so may inconveniently interfere with the application of the provision to cases not at present in contemplation. There

[16] 1954(2) SA 345(A) at 352 – 353 .

are many decisions in which the same or similar expressions have been applied in the granting or refusal of different kinds of procedural relief. It is enough for present purposes to say that the defendant 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."

[26] Ebrahim JA delivering a unanimous judgment in OKH Farm (Pty) Ltd v Cecil John Littler NO and Four Others[17] held:

"As a result, an applicant who seeks condonation will need to satisfy the Court that the appeal has some chance of success on the merits . . . . A Court will not exercise its power of condonation if it comes to the conclusion that on the merits there is no prospect of success, or if there is one at all, the prospects of success are so slender that condonation would not be justified."

[27] An application for condonation for non-compliance with the Rules of Court is not a mere formality; notwithstanding that the respondent does

[17] *supra* at page 15 .

not oppose the application for condonation, the applicant should satisfy the Court that there is sufficient cause for excusing him from compliance with the Rules of Court. Steyn CJ in Saloojee & Another v Minister of Community Development[18] said the following:

> **"It is necessary once again to emphasise, as was done in Mentjies v H. D Combrinck (EDMS) BPK, 1961(1) SA 262 (AD) at p. 264, that condonation of the non-observance of the Rules of this Court is by no means a mere formality. It is for the applicant to satisfy this Court that there is sufficient cause for excusing him from compliance, and the fact that the respondent has no objection, although not irrelevant, is by no means an overriding consideration . . . .**
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> **What calls for some acceptable explanation, is not only the delay in noting an appeal and in lodging the record timeously, but also the delay in seeking condonation. As indicated, *inter alia*, in Commissioner for Inland Revenue v Burger, 1956(4) SA 446 (AD) at p. 449, and in Mentjies' case, *supra* at p. 264, an**

[18] (*supra*) at 138 .

appellant should, whenever, he realizes that he has not complied with a Rule of Court, apply for condonation without delay."

[28] Plewman JA in Darries v Sheriff, Magistrate's Court, Wynberg, and Another[19] had this to say:-

"Condonation of the non-compliance of the Rules of this Court is not a mere formality (see Mentjies v H. D. Combrinck (EDMS) BPK 1961(1) SA 262(A) at 263H – 264B; Saloojee and Another NNO v Minister of Community Development 1956(2) SA 135(A) at 138 E-F). In all cases some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a Rule of Court apply for condonation as soon as possible. See Commissioner for Inland Revenue v Burger 1956(4) SA 446(A) at 449 F-H; Mentjies' case *supra* at 264 B Saloojee's case *supra* at 138 H. Nor should it simply be assumed that, where non-compliance was due

[19] 1998(3) SA 34 (AD) at 40-41 .

entirely to the neglect of the appellant's attorney, condonation will be granted. See Saloojee's case *supra* at 141B-G. In application of this sort the appellant's prospects of success are in general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success. See Mentjies' case *supra* at 265 C-E*;* Rennie v Kambly Farms (Pty) Ltd 1989(2) SA 124(A) at 131 E-F; Moraliswani v Mamili 1989(4) SA 1(A) at 10E. But appellant's prospects of success is but one of the factors relevant to the exercise of the Court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be."

[29] The failure to comply with the Rules of Court and the need to apply for condonation timeously upon realising non-compliance applies equally to the litigant as it does when non-compliance is caused by the negligence of the Attorney.[20] Steyn CJ in Saloojee and Another v Minister of Community Development[21] emphasized the legal principle applicable to condonation applications succinctly as follows:-

> **" . . . . it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's 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 Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of**

[20] Saloojee & Another v Minister of Community Development (*supra)* at 141 .

[21] Saloojee & Another v Minister of Community Development (*supra)* at 141; Barrow v Dlamini and Another (*supra*) at para 16; Usuthu Pulp Company v Swaziland Agricultural & Plantation Workers Union (*supra*) at para 40 .

the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are . . . . A litigant, moreover, who knows, as the applicants did, that the prescribed period has lapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by without so much as directing any reminder or enquiry to his attorney . . . and expect to be exonerated of all blame; and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself."

[30] Notwithstanding the legal position in South African law, it would seem that the preponderance of legal authorities in this jurisdiction hold the view that a party seeking condonation for non-compliance with the Rules of Court should satisfy two essential requirements.[22] Firstly, he must give a reasonable explanation for the delay. This encompasses the degree of delay involved in the matter as well as the adequacy of the reasons given for the delay. Secondly, he must show on a balance of probabilities that there are reasonable prospects of success on the merits. Accordingly, it is trite law that a litigant seeking condonation for non-compliance with the Rules of Court cannot rely solely on prospects of success,[23] without giving a reasonable explanation for the delay. The two essential requirements for 'sufficient cause' should be satisfied before condonation is granted.

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[22] Zama Joseph Gama v Swaziland Building Society and Four Others Civil Appeal No. 85/2012 at para 9; Ferreira v Ntshingila 1990(4) SA 271(A) at page 281; Johannes Hlatshwako v Swaziland Development and Savings Bank and Others Civil Appeal Case No. 21/2001 at para 17; Chetty v Law Society, Transvaal Works 1985(2) SA 756(A) at 765; Jabulani Patrick Tibane v Alfred Sipho Dlamini Case No. 17/2013 .

[23] P.E Bosman Transport Committee & ORS v Piet Bosman Transport (Pty) Ltd 1980(4) SA 794(A) at 799; Commissioner: SARS, Gauteng West v Lercie Investments [2007] 3 All SA 109 SCA .

[31] I will proceed with this judgment on the basis of my conclusion in the preceding paragraphs that in this jurisdiction a party seeking condonation has to satisfy the two essential requirements on a balance of probabilities, namely, a reasonable explanation for the delay as well as showing the existence of prospects of success on the merits.

[32] It is common cause that the appellant filed an incomplete record of proceedings on the 9th November 2020 which did not have the transcript of evidence led at the trial before the court *a quo.* The complete record ought to have been filed by 21st December 2020; however, it was not filed until 2nd February, 2021. Apparently the transcript of evidence, which is part of the record, was filed out of time.

[33] It is not in dispute that the appellant did not lodge timeously the application for extension of time to file the transcript prior to the lapse of time in accordance with Rule 16. The appellant filed the application on the 15th January, 2021 seeking extension of time to file the transcript; the appellant further sought condonation for the late filing of the transcript. The application was opposed by the respondent.

[34] It is apparent that the application for extension of time is incompetent under the circumstances on the basis that the time for compliance with the Rules of Court had lapsed on the 21st December 2020; the general principle of our law is that as soon as a litigant becomes aware that compliance with the Rules of Court will not be possible, he should invoke Rule 16 without delay and lodge an application for extension of time setting forth good and substantial reasons for the application. Accordingly, the application for extension of time cannot succeed because the time for compliance with the Rules of Court had lapsed. It was illogical and disingenuous for the appellant to seek an extension of time and condonation for non-compliance with the Rules of Court in the same application because the legal principles applicable to Rule 16 and Rule 17 are different though complimentary. If the appellant had applied for extension of time prior to the lapse of time allowed in terms of Rule 30, the need to apply for condonation would not have been necessary.

[35] Now I turn to deal with the application for condonation for non-compliance with Rule 30(1) requiring that the record of proceedings should be filed within two months of noting the appeal. The general principle of our law regarding condonation is that whenever a litigant

realises that he has not complied with the Rules of Court, he should, apart from remedying his default immediately, also apply for condonation without delay.[24]

[36] The explanation proffered by the appellant for the delay in complying with Rule 30(1) was allegedly the difficulty in obtaining tape recordings of the trial, and, when the tapes were found, his chosen transcriber was on holiday. However, the appellant does not take the Court into his confidence and disclose the nature of the difficulty in obtaining the tapes, the steps he took to obtain the services of another transcriber as well as the reason he did not apply for an extension of time when it became evident that he would not comply with the Rules of Court on the 21st December, 2020. Accordingly the explanation given by the appellant is not reasonable as contemplated by law.

[37] The appellant has also failed to show the existence of reasonable prospects of success on the merits of the appeal. The appellant merely

[24] Barrow v Dlamini & Another (*supra*) at para 16; Unitrans Swaziland Limited v Inyatsi Construction (*supra*) at para 10 – 11 .

summarises the grounds of appeal. In his affidavit he says the following:[25]

> **"13. I have good prospects of success on the appeal as set out in the Notice of Appeal. The Court erred when it ruled that the suit was not directed to the police. The Court erred when it held that the evidence on what was found in my possession was immaterial to the claim. It was material. The Court erred in not making a finding on whether or not there was reasonable grounds for my arrest. The Court erred in not holding that my prosecution was malicious and for not awarding me damages."**

[38] Paragraph 13 of the founding affidavit to the condonation application is merely a summary of the grounds of appeal lodged by the appellant in his Notice of Appeal on the 20th October, 2020. In order to demonstrate the existence of prospects of success on the merits of the appeal the appellant should have shown a material misdirection in the findings of the court *a quo* which would entitle this Court to overturn the decision of the trial

[25] Paragraph 13 .

court. It was incumbent upon the appellant to demonstrate that the trial court failed to exercise its discretion judiciously and that consequently this Court should interfere with its judgment and reach a different conclusion.

[39] I agree fully with the reasoning in Smith v S[26] where the Court defines reasonable prospects of success as follows:

> **"7. What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a Court of Appeal could reasonably arrive at a conclusion different to that of the trial Court. In order to succeed, therefore, the appellant must convince this Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless.**

[26] 2012(1) SACR 567 (SCA) at para 7 .

There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[40] I have come to the conclusion that the appellant has failed to establish "sufficient cause" which is the basis of condonation for non-compliance with the Rules of Court. However, in view of the financial circumstances of the appellant which became apparent in the court *a quo,* it is in the interest of justice that each party should bear his own costs.

[41] Accordingly, I make the following order:

(a) The application for condonation in terms of Rule 17 for non-compliance with Rule 30(1) is dismissed for want of 'sufficient cause'.

(b) The application for extension of time in terms of Rule 16 is dismissed as being incompetent in the circumstances.

(c) No order as to costs.

For Appellant : Attorney N. D. Jele

For Respondent : Assistant Attorney General M. Shabalala

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MCB MAPHALALA, CJ

I agree _____

JP ANNANDALE, JA

I agree _____

MJ MANZINI, AJA