

**IN THE SUPREME COURT OF ESWATINI**

**JUDGMENT**

HELD AT MBABANE

CIVIL CASE NO: 28/2020

In the matter between:

**MICHAEL THEMBA NSIBANDE**

1<sup>st</sup> Applicant

**MHLONISHW A MLUNGISI NSIBANDE**

2<sup>nd</sup> Applicant

And

**THE EXECUTOR N.O. -ESTATE LATE**

**PHILLIP LOBENGULA NSIBANDE**

1<sup>st</sup> Respondent

**IDA COSHIWE NSIBANDE (NEE KUNENE)**

2<sup>nd</sup> Respondent

**THE MASTER OF THE HIGH COURT**

3<sup>d</sup> Respondent

**THE ATTORNEY GENERAL'**

4<sup>th</sup> Respondent

In re:

**MICHAEL THEMBA NSIBANDE**

1<sup>st</sup> Appellant

**MHLONISHW A MLUNGISI NSIBANDE**

2<sup>nd</sup> Appellant

And

**THE EXECUTOR N.O. - ESTATE LATE**

**PHILLIP LOBENGULA NSIBANDE**

1<sup>st</sup> Respondent

**IDA COSHIWE NSIBANDE (NEE**

2<sup>nd</sup> Respondent

**KUNENE) THE MASTER OF THE HIGH**

3<sup>rd</sup> Respondent

**COURT THE ATTORNEY GENERAi),**

4<sup>th</sup> Respondent

**Neutral Citation:** *Michael Themba Nsibande and Another vs Ida Coshiwe Nsibande (Nee Kunene) (28/2020) [2020} SZSC 34 (06 October2021)*

**CORAM:** M. C. B. MAPHALALA CJ

S. P. DLAMINI JA

J.M. CURRIE AJA.

**DATE HEARD:** 06 October, 2021

**DATE DELIVERED:** 18 November, 2021

**SUMMARY:** *Civil procedure-'- Common among the parties is that the record of Appeal was filed out of time - In an attempt to regularize the appeal, the Applicants/ Appellants launched an application for condonation of the late filing of the record of Appeal - The Application/or condonation and the applicable law considered - Held that the Application/or Condonation does not meet the legal requirements and stands to be dismissed. - Held that in view of the fact that the matter relates to deceased persons ' estate, the parties to bear their respective costs.*

## JUDGMENT

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**S. P. DLAMINI - JA**

### **THE PARTIES**

[1] The First and Second Applicants are Appellants in the main appeal and the Respondents to the Application are Respondents in the Appeal. Therefore, the parties for the purposes of the application will be referred to as Applicants and Respondents respectively.

[2] It suffices to point out at the outset that the true contesting parties are on the one hand the First and Second Applicants and the Second Respondent. The rest of the Respondents have never participated in the proceedings (both before the High Court and this Court).

### **BRIEF BACKGROUND**

[3] The Applicants are the children of the late Lobengula Nsibande who was the husband of the Second Respondent making her the step mother of the Applicants.

[4] The central issues here are the legitimacy or otherwise of a joint Will executed by the said late Lobengula and the Second Respondent.

[5] The joint Will provided that should either of the spouses survive the other the surviving spouse he or she would become the sole beneficiary of the Estate; and in the event the spouses died simultaneously, one Dr. Reverend Bill would become a trustee in which all their properties would vest for specific beneficiaries. The Applicants were excluded from benefitting under the joint Will.

[6] The Applicants sought to challenge the validity of the joint Will and the resultant liquidation and distribution account. The effective relief sought by the Applicants was that the deceased died intestate and as his biological children they were entitled to benefit from his estate.

### **PROCEEDINGS BEFORE THE HIGH COURT**

[7] The Applicants instituted proceedings before the High Court to seek the relief as outlined above by way of Motion proceedings.

[8] At some point, the High Court referred the matter to oral evidence. Accordingly, evidence was led in support of the respective contentions of the Applicants and First Respondent.

[9] The High Court per Mamba J. dismissed with costs the Applicants' case in terms of its judgment dated 26 March 2020. The Learned Judge in paragraph 20 of the judgment concluded that;

*"{20] For the above reasons, the applicants have on a balance of probabilities, failed to prove that the Will was not executed as required in terms of Section 3(1) (b) of the Wills Act 12 of 1055. The application is accordingly dismissed with costs in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents".*

[10] The Applicants were dissatisfied with the said judgment of the High Court and launched the Appeal before this Court.

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### **PROCEEDINGS BEFORE THIS COURT ON APPEAL**

[11] The Applicants filed a Notice of Appeal dated 12 May 2020 and advanced a solitary ground of appeal namely;

*"That the Honourable Court a quo erred in law and in act dismissing (sic) as appellant's (sic) application to have the Will declared invalid."*

[12] It is apposite at this stage to state that in terms of Rule 30 (1) of the Rules of this Court, an Appellant is obligated in peremptory terms to file a record of appeal within 2 months of the date of notice of the appeal. It is not in dispute that the Appellants did not comply with Rule 30 (1).

[13] The Appellants were supposed to file the record in July 2020. In view of the admitted failure to file the record timeously, the Applicants launched the application for condonation for late filing of the record dated 15 February 2021 several months beyond the due date for the filing of the record.

[14] It is this Application for Condonation that is now falling for consideration by this court.

### **APPELLANTS' CASE FOR THE RELIEF SOUGHT**

[15] The Appellant in their Application sought an order in the following terms;

1. *Condoning Applicant's late filing of the Record of Appeal in terms of the Rules of this Honourable Court.*
2. *Costs of suit in the event only of opposition of this application.*

*Any further and/or alternative relief."*

[16] For the relief sought the Applicants relied on the Founding Affidavit disposed to by the First Appellant, Michael Themba Nsibande. In addition to the Founding Affidavit, Themba is also the deponent to Replying Affidavit.

[17] Michael advances the basis of the relief sought in paragraphs 10, 10.1, 10.2, 10.3 and 11 of the Founding Affidavit and states the following;

17.1 Firstly that the current Attorneys were appointed after their previous attorneys and did not have the file. He further states that the current Attorneys enlisted the help of the Registrar of the High Court in writing to get hold of the file without success.

17.2 Secondly, that they could not get the relevant documents from their erstwhile Attorneys, Manyatsi and Associates, due to outstanding fees.

17.3 Thirdly, that because of their impecunious state combined with the hardships due to the coronavirus they were not in a position to meet their legal obligations to process the appeal timeously.

17.4 Fourthly, that they were only able to settle the outstanding legal fees in February 2021 and only then did they get the file; m view

of this they were not in willful default; and that no prejudice would be suffered by the first Respondent if the relief sought were to be granted by the Court.

17.5 Fifth, that their appeal has good prospects of success in that the High Court erred in relying on the evidence of Dr. Bell when there was another witness by the name of Mcebo Ginindza. Michael contended that the High Court should have subpoenaed Ginindza hence their prayer that the court refers the matter back to the High Court so that the High Court subpoena Ginindza. The Appellants' Heads of Argument and Replying Affidavit do not take the matter beyond what is covered in the Founding Affidavit

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**THE OPPOSITION OF THE SECOND RESPONDENT TO THE RELIEF SOUGHT**

[18] As already stated above, the Appellants' Application for condonation is opposed by the Second Respondent

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[19] The Second Respondent deposed to the Answering Affidavit in opposition to the relief sought by the Appellants.



[20] The Second Respondent sums up her basis opposing the Application for Condonation in paragraph 4.1 of her answering Affidavit as follows;

*"4.J The opposition is based on the fact that I honestly believe that the applicants are abusing court process. The appeal was abandoned and should not be enrolled. The application ought to be dismissed with an appropriate order of costs. "*

[21] Furthermore, it is contended in the Respondents' Heads of Argument in support of the opposition of the Application for Condonation as follows:

21.1 That the Notice of Appeal was filed on 14 May 2020 and thereafter the Applicants did not take any step until 22 February 2021 (when the Application for Condonation was launched).

21.2 That the argument about the challenges regarding the record could have been avoided by the current Attorneys of the Applicants by requesting copies of the relevant documents from the Respondents' attorneys if they could not be assisted by Applicants erstwhile Attorneys or the office of the Registrar.

21.3 That the Court should reject the Applicants' claim of financial difficulties since, until recently, the Second Applicant was

employed as a member of the Umbutfo Eswatini Defence Force.

21.4 That the challenges that the Applicants now seek to rely on if honestly held, ought to have been foreseeable to them hence they should have approached the Court for extension of time.

21.5 That the Judgment of Mamba J cannot be faulted thus there are no prospects of success of the appeal.

21.6 That the Respondents have an interest in the finality of the matter and that in the circumstances they could suffer prejudice if the matter is allowed to continue.

## **ANALYSIS AND APPLICATION LAW**

### **Was the appeal abandoned?**

[22] The Second Respondent contends that the Appeal was abandoned due to failure to file the Record timeously. Rules 30 (4) and 16 (1) are relevant to the enquiry.

[23] Rule 16 (1) provides that; ..

**"The Judge President or any judge of appeal designated by him may on application extend any time limit prescribed by these rules:**

**Provide 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.)"**

[24] Rule 30 (4) provides that:

**"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 own underlining)

[25] The Applicants did not approach this Court as envisaged on Rule 16 (1) for an extension of time therefore, the issue of Rule 16 (1) falls by the wayside.

[26] Rule 30 (4) is undoubtedly couched in peremptory terms. That is to say when a litigant fails to submit the record of appeal within the prescribed period of 2 months, the appeal is deemed abandoned. The only way for litigant to escape the consequences of the operation of Rule 30 (4) is seek the protection provided by Rule 16 (1).

[27] In the circumstances of this case Rule 30 (4) applies and the appeal must be deemed to have been abandoned, hence standing to be dismissed.

[28] This Court previously had occasion to consider the operation and the consequences of Rule 30 (4). In this regard to mention but a few, see;

**NHLANHLA MACINGWANE vs FAMILY OF GOD CHURCH AND 2 OTHERS (60/2018) [2019] SZSC 56 (26/11/2019); THE PUB AND GRILL (PTY) LIMITED AND ANOTHER vs THE GABLES (PTY) LIMITED (102/2018 [2019] SZSC 17 (20/05/2019); AND ABEL MPHILE SIBANDZE vs MAGAGULA HLOPHE ATTORNEYS (86/2019) [2020] SZSC 25 (24/08/2020).**

[29] In the cases referred to above, the Court came to the conclusion that the court finds that Rule 30 (4) applies and, an appeal is deemed abandoned and as such dismissed. In several of the cases the *dictum* has been applied by the full Bench of this Supreme Court hence binding until set aside by the full Bench.

[30] In the **NHLANHLA MACINGWANE CASE** (*supra*) this Court at paragraph 2, of judgment stated that:

" [21] In the matter of **Cleo has Sipho Dlamini versus Cynthia Mpho Dlamini** (65/2018) [2019] SZSC 48, in a unanimous judgment penned by J.P. Annandale JA and agreed to by M.C.B. Maphalala CJ and J.M. Currie AJA, it was held that if an appeal is deemed to be abandoned it has the same effect of it having been dismissed. By specific reference to the provisions of Rule 30 (4), it is stated as follows at paragraph [26] thereof;

By operation of law, rule 30 (4) provides for such closure when an Appeal is not prosecuted in accordance with the Rules of Court.

In *Thandie Motsa and 4 other v. 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.

At paragraph 17 of the judgment Dlamini JA state 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)."

## **CONDONATION**

[31] Notwithstanding the Court's conclusion above that the appeal is deemed abandoned and stands to be dismissed and for the sake of completeness of the issues raised, I will now consider the application for condonation.

[32] The legal principles governing applications in our law. In several cases, this Court has had occasion to pronounce of itself on the applicable legal principles.

[33] In this regard, see the following cases to mention a few; **UNITRANS CONSTRUCTION LIMITED vs INYATSI CONSTRUCTION LIMITED APPEAL Case No: 9 of 1996, DR. SIFISO BARROW versus DR. PRISCILLA DLAMINI and THE UNIVERSITY OF**

**SWAZILAND (09/2014) f[2015] SZSC 09 (09/12/2015), DR. BARRY ANITA BELINDA versus A.G. THOMAS (PTY) LTD (30/2015) [2016] SZSC 07 (30 JUNE 2016) AND NOKUTHULA MTHEMBU AND FOUR OTHERS versus MINISTRY OF HOUSING AND ANOTHER (94/2017) [2018] SZSC 15 (30/05/2018).**

(34) In its pronouncements of<sup>1</sup>the relevant principles, this Court h'.1s made reference to judgments of other jurisdictions particularly the Republic of South Africa. In this regard, see but a few of these cases; **MELANE versus SANTAM INSURANCE COMPANY LTD 1962 (4) SA 531 (A), COMMISSIONER OF INLAND REVENUE versus BURGER 1956 (4) SA 446 (A)** and <sup>1:</sup>**THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE versus CANDICE JEAN VAN DER MERWE (20152/2015) [2014] ZASCA 86 (28/05/2015).**

[35] In **MARIA NTOMBI . SIMELANE and NOMPUMELELO PRUDENCE DLAMINI land THREE OTHERS** Supreme Court Civil Appeal NJ 42/2015, the Court cited with approval the *dictum* in the Supreme Court case of **JOHANNES HLATSHW AYO** versus

**SWAZILAND** and **SAVINGS BANK** case No. 21/06 at paragraph 7,

namely that;

"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."

[36] In the Commissioner of the South African Revenue Case (*supra*), the Court had this to say;

"Factors which usually weigh with this Court in considering an application for condonation include the degree of non-compliance, the explanation thereof, the importance of the case, a Respondent's interest in the finality of the judgment of the Court below, the convenience of this Court and the avoidance of unnecessary delay in the administration of justice....."

[37] In the matter of MELANE vs SANTAM INSURANCE (*supra*) 532 C F the court held that;

"Without a reasonable 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."



[38] In my view, the Applicant's application does not meet the principles adumbrated in the cases mentioned above for the following reasons;

As contended for, the Notice of Appeal was filed on 14 May 2020

and there was no meaningful step taken by the Applicants until 22 February 2021 when their application for condonation was launched. There is absolutely no good cause shown for the delay. It is even more so, since the Applicants could have adopted the procedure envisaged by Rule 16 for extension of time which is not cumbersome at all. **Herbstein and Van Winsen, The Fifth Edition** at page 72, 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. The circumstances or 'cause' must be such that a valid and justifiable reason exists why compliance did not occur and why non-compliance can be condoned." (my underlining)**

38.2 Similarly, I accept what is contended on behalf of the Second Respondent regarding the failure of the Applicants to secure the record timeously. 1. The effort made was insufficient. The documents were never requested from the Respondents Attorneys.

38.3 The financial challenges on the part of the Applicants has not been demonstrated to have been of such a scale as to impede them against the pursuit of justice.

38.4 Finally, the assertion by the Applicants that they have good prospects of success on the basis that a certain key witness was not called by the Court does not hold water. It is the duty of each litigant to call witnesses to testify in his or her cause and not an obligation of the Court.

[39] In view of the above I am not satisfied that a case for the relief sought by the Applicants has been made on the papers before this Court.

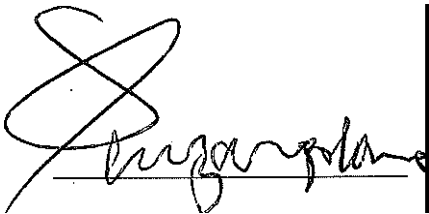
## **COSTS**

[40] This being an issue connected with an estate of a deceased person, I am inclined to depart from the normal legal posture that costs follow the cause.

[41] Accordingly, the Court makes the following order;

The Application for Condonation is dismissed.

2. The Appeal is deemed abandoned thus dismissed.
3. The parties to bear their respective costs.



**S. P. DLAMINI**

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**JUSTICE OF APPEAL**

I agree

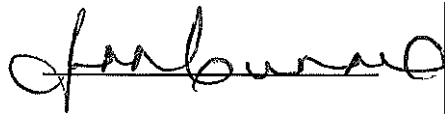


**M. C. B.**

**MAPHALALA**

**CHIEF JUSTICE**

I agree

A handwritten signature in black ink, appearing to read 'J.M. Currie', written over a horizontal line. The signature is cursive and ends with a vertical line on the right side.

**J.M. CURRIE**

**ACTING JUSTICE OF**

**APPEAL**

**FOR THE APPLICANT:** H. Mdladla

(S. V. Mdladla and Associates)

**FOR THE RESPONDENT:** B. Ngcamphalala

(Mtshali Ngcamphalala Thwala Attorneys)