IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 85/2021

HELD AT MBABANE
In the matter between:

SIKHUMBUZO NTSHALINTSHALI	**Applicant**
And	
BAMBANANI BALIMI FARMERS ASSOCIATION	**1st Respondent**
KIPILITI MASILELA	**2nd Respondent**
In re:	
BAMBANANI BALIMI FARMERS ASSOCIATION	**1st Appellant**
KIPILITI MASILELA	**2nd Appellant**
And	
SIKHUMBUZO NTSHALINTSHALI	**1st Respondent**
FLORA NTSHALINTSHALI	**2nd Respondent**
PHUMZILE NTSHALINTSHALI	**3rd Respondent**

Neutral Citation: *Bambanani Balimi Farmers Association and Another vs Sikhumbuzo Ntshalintshali and 2 Others* (85/2021) [2022] *SZSC* 40 (31/08/2022)

Coram: **R.J. CLOETE JA.**

Heard: 25 August, 2022.

Delivered: 31 August, 2022.

SUMMARY : *Application in terms of Rule 30(4) – Application for Condonation of late filing of Record – Non-compliance with Rules – Reliance on provisa to Rule 8 unsustainable – Appeal deemed abandoned and dismissed – Application for Condonation dismissed – Costs on ordinary scale in both applications.*

JUDGMENT

R.J. CLOETE – JA

[1] Serving before me as a single Judge are two applications. The first is by Sikhumbuzo Ntshalintshali (and by extension Flora Ntshalintshali and Phumzile Ntshalintshali) (for the simplification of the convoluted headings in the various documents filed before me, they will be referred to as *"Applicants"* throughout this Judgment). The second application is by Bambanani Balimi Farmers Association and Kipiliti Masilela (referred to as the *"Respondents"* throughout this Judgment).

[2] The chronological series of events is as follows:

1. On 9 December 2021 the Court *a quo* as per Fakudze J handed down an *ex tempore* Judgment in favour of the Applicants.

2. On 14 December 2021 the Respondents filed a Notice of Appeal against the Judgment on various grounds.

3. On 7 March 2022 the Applicants brought an application to this Court in the following terms:

   "1. Declaring the 1st and 2nd Respondents/Appellants' Appeal be deemed abandoned.

   2. Directing the Respondent/Appellants to pay the costs of this application."

4. The Respondents opposed the application and filed a Replying Affidavit and the Applicants filed an Answering Affidavit.

5. On 27 July 2022 the Respondents filed an application to this Court in the following terms:

   "1. That the Applicant is hereby condoned for late filing of the record of appeal.

2. *That the present matter be remitted back to the High Court for determination of the issue of the Applicants membership and its composition.*

3. *That the present application be consolidated with the Respondent's application seeking to have the appeal deemed to have been abandoned.*

4. *The costs of this application should be the costs in the main matter, save in the event of it being opposed in which event the costs of opposition are to be borne by any Respondent who opposes the application.*

5. *Granting the Applicant any further and/or alternative relief."*

6. The Applicants opposed the application and filed an Affidavit.

7. Both parties filed Heads of Argument and although there may have been some issue as to whether the heads were filed timeously or not, in the interests of justice, I have decided to ignore such a technicality which should not be seen as a precedent.

[3] For the purposes of this Judgment it seems to me that the case of the Respondents should be outlined first. The Respondents in their application for Condonation and in the papers responding to the application of the Applicants, and as argued by Counsel before me can best be summarised as follows:

1. They were unable to file the record of proceedings in compliance with the provisions of Rule 30 (1) because the Judge in the Court *a quo* had not handed down written reasons after the *ex tempore* Judgment was handed down by him on 9 December 2021.

2. That the provisions of Rule 26 of the High Court Rules which provides for the exclusion of days for calculating the *dies* in December and January similarly applied in this Court.

3. That the two month period set out in Rule 30 (1) did not mean calendar months and referred the Court to a Judgment in the matter of **Lucas Maziya v Eswatini Provident Fund (16/2020) [2020] SZSC 36 (12th November 2020)** in which Matsebula AJA in passing dealt with the issue of the definition of a calendar month. (Counsel subsequently conceded that the Judgment was not applicable as the outcome of the

Judgment relating to the concept of a calendar month was not in terms of his understanding. In fact the Court in that matter found that the period of two months referred to in Rule 30 (1) were calendar months.)

4. That no definite period is set out in the Rules for the delivery of the written reasons by a Judge handing down an *ex tempore* Judgment.

5. That in terms of section 33 of the Constitution of Eswatini any person before any *"administrative authority"* is entitled to be given reasons in writing for the decision of that authority.

6. Every party to legal proceedings **has to be furnished with reasons for the Judgment**. That accordingly it is a cumbersome tusk on the part of the Respondents to instruct Lawyers to remind a Judge to deliver the reasons for an *ex tempore* Judgment and that a letter was dispatched to the Registrar on 14 January 2022 requesting such reasons. (The authenticity of this letter is questioned by the Applicants on oath as it has no indication that it was received by the Registrar of the Supreme Court).

7. That the Respondents had good prospects of success because the proceedings in the Court *a quo* were by way of Motion and should have been by way of Action.

8. That the Respondents rely on the provisions of Rule 8 of the Rules of this Court which provides as follows:

"8 (1) The notice of appeal shall be filed within four weeks of the date of the judgment appealed against;

Provided that if there is a written judgment, such period shall run from the date of delivery of such written judgment..."

(my underlining)

[4] The case of the Applicants and the response to the application of the Respondents can best be summarised as follows:

1. Rule 30 (1) reads as follows;

"...the Appellant shall prepare the record on appeal in accordance with sub rules (5) and (6) thereof and shall within 2 months of the date of noting the appeal lodge a copy thereof with the Registrar of the High Court for certification as correct"

(my underlining for the reasons set out below)

2. That the Respondents failed to comply with those provisions and that accordingly the appeal of the Respondents is deemed to have been abandoned in terms of the provisions of Rule 30 (4).

3. That the provisions of Rule 26 of the High Court Rules are not binding on this Court in any way. In addition, even if the High Court Rules did apply, and even the computation by the Respondents that the record only had to be filed by 31 March 2022 was correct, as of the date of hearing of this matter no such record has been filed.

4. Rule 16 of this Court provides a method through which a party is given the opportunity to apply for an extension of time within which to file documents in the event that the time limits set out in the Rules cannot be complied with for any good reason.

5. That the purported letter written by the Attorneys for the Respondents to the Registrar on 14 January 2022 is disputed in that there is no evidence of delivery to the Registrar of the Supreme Court and in any event the Respondents were required to be pro-active in obtaining the reasons from the Judge in the Court *a quo* and they failed to do that and

there is no evidence that there was any subsequent follow up with the Registrar.

[5] I was referred to various Judgments and where necessary will refer to same in my findings below.

[6] As regards the provisions of Rule 8 on which the Respondents rely, the wording of the *provisa* is absolutely crystal clear. It refers to a written Judgment. In this case it is common cause that there was an *ex tempore* Judgment and not a written Judgment and as such the *provisa* does not apply.

[7] The notion that this Court is bound by the provisions of Rule 26 of the High Court Rules is, with respect, without any merit. The fact of the matter is that this Court has its own Rules and there is no reference in such Rules to this Court being subservient to or bound by any provisions of the High Court Act or its Rules. No authority was given for the mistaken notion.

[8] The provisions of Rule 16 of this Court have been referred to in countless Judgments of this Court. In the matter of **Anita Belinda De Barry v A.G. Thomas 2016 SZSC 07 (30 June 2016).**

"All these Rules are clear and unambiguous and set out the obligation of a party who is obliged to submit a Record of Appeal in the fashion set out in Rule 30...and failing that, as provided for in the case law which will be referred to below, to bring applications as set out in Rules 16 and 17 above. Contrary to what the Appellant alleged about shared responsibility, the onus is squarely on the Appellant to prepare and file the record "in consultation with the Respondent."

[9] In addition the following decisions were quoted in the **De Barry** Judgment with approval and it is recorded that the **De Barry** Judgment was confirmed on review by a Full Bench of this Court.

1. 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, to **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.**"

2. In **Dr. Sifiso Barrow v Dr. Priscilla Dlamini and the University of Swaziland (09/2014) [2015] SZSC09 (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 delay."**

3. *"12 Despite numerous Judgments, circulars, warnings from Judges, practitioners in this Court nevertheless continue to fail to abide by the Rules of this Court with seeming impunity and we hope that this Judgment will demonstrate that this Court will no longer tolerate non-compliance of the Rules of this Court nor the flagrant abuse of such Rules. Having said that, this Court will always consider genuine, well documented Applications in terms of the Rules provided that full acceptable details are set out in Founding Affidavits, the*

Court taken into the confidence of the Applicant and such Applications brought in terms of the Rules of this Court immediately upon a problem arising."

[10] As indicated above, the argument relating to the notion that the two months period envisaged in Rule 30(1) cannot be interpreted as being calendar month has no merit in terms of the **Maziya Judgment** (*supra*). In that Judgment the Court also stated the following:

1. "[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 Sipho 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."

2. "[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."

3. **"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."

[11] In this matter the Respondents have dismally failed to either adhere to the peremptory provisions of Rule 30 and sadly did not use the provisions of the Rules which would have come to their rescue relating to extension of time and/or Condonation in terms of the provisions of Rules 16 and 17. After opposing the application of the Applicants for an Order in terms of Rule 30(4), they, a few months later, clearly as an afterthought, brought an application for Condonation which regrettably for them did not pass muster in terms of the many decisions referred to above and in many other Judgments.

[12] At the hearing of this matter, Counsel for the Applicants sought an Order for costs on the ordinary scale in respect of the application in terms of Rule 30(4) and for punitive costs in respect of the application for Condonation made by the Respondents.

[13] I have to say that I gave serious consideration to the issue of punitive costs and gave Counsel for the Respondents the opportunity to address me in that regard but at the end of the day I decided that it would be unfair to punish the Respondents themselves in the matter. I also place on record that I have taken into consideration the fact that Counsel for the Respondents inherited the file

at a late stage and as such to blame him in person entirely would also be unfair. Under the circumstances I had deemed it fair to grant costs on the ordinary scale relating to both applications.

[14] Accordingly I make the following Order:

1. The Appeal of the Respondents (as they are referred to in this Judgment) is deemed to have been abandoned in terms of Rule 30(4) and is hereby dismissed and the Judgment of the Court *a quo* is confirmed.

2. The application for Condonation by the Respondents is hereby dismissed.

3. Costs on the ordinary scale in both the matters referred to in Orders 1 and 2 above are awarded to the Applicants (as they are referred to in this Judgment).

R.J. CLOETE
JUSTICE OF APPEAL

For the Appellants:	ZONKE MAGAGULA & COMPANY ATTORNEYS
For the Respondents:	SITHOLE & MAGAGULA ATTORNEYS