

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

CASE NO. 25/2022

In the matter between

**CAIPHAS NTSHALINTSHALI
ALFREAD NTSHALINTSHALI**

1ST APPLICANT

2ND APPLICANT

And

**ALEXINAH NKAMBULE N.O
THAMI NKAMBULE N.O
LINDIWE METFULA N.O
DUMSILE DLAMINI N.O
SIPHIWE DLAMINI N.O
MCWASHO MAGAGULA N.O
PETER DLAMINI N.O
BAMBANANI BALIMI FARMERS
ASSOCIATION LIMITED**

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

4TH RESPONDENT

5TH RESPONDENT

6TH RESPONDENT

7TH RESPONDENT

8TH RESPONDENT

In Re:

ALEXINAH NKAMBULE N.O
 THAMI NKAMBULE N.O
 LINDIWE METFULA N.O
 DUMSILE DLAMINI N.O
 SIPHIWE DLAMINI N.O
 MCWASHO MAGAGULA N.O
 PETER DLAMINI N.O
 BAMBANANI BALIMI FARMERS
 ASSOCIATION LIMITED

1ST APPELLANT
 2ND APPELLANT
 3RD APPELLANT
 4TH APPELLANT
 5TH APPELLANT
 6TH APPELLANT
 7TH APPELLANT

8TH APPELLANT

And

CAIPHAS NTSHALINTSHALI
 ALFREAD NTSHALINTSHALI

1ST RESPONDENT
 2ND RESPONDENT

Neutral Citation: CAIPHAS NTSHALINTSHALI & ANOTHER v ALEXINAH NKAMBULE & 7 OTHERS (25/2022) [2023] SZSC 20 (07 JUNE, 2023)

Coram : MAMBA JA:

Heard : 14 MARCH, 2023

Delivered : 07 JUNE, 2023

- [1] Civil Law and Procedure- Noting an appeal – Appellant to prepare and lodge record of proceedings with Registrar of High Court for certification as correct within 2 months of noting appeal – Rule 30 (1) of Court of Appeal Rules 74 of 1954.
- [2] Civil Procedure- Appellant unable to lodge complete record of appeal within prescribed period- Rule 16 (1) application for extension of time and Rule 17 allows application for condonation for late filing- both applications to be supported by affidavit showing good cause.
- [3] Civil Law and Procedure- Noting of appeal- failure to prepare and lodge record for certification- No application for either extension or condonation. Rule 30 (4) of the rules- Appeal to be deemed to have been abandoned-

Held: Appeal deemed abandoned and struck off the roll.

- [1] The two Applicants herein were the Applicants also in the Court *a quo*. The Applicants successfully sought an order, *inter alia*, compelling the 8th Respondent to hold its general or annual elections within 30 days from service of the Court Order on the 8th Respondent. This order was handed down on 29 March, 2022.
- [2] Dissatisfied with the above order, the Respondents noted an appeal against it on 03 May 2022. Following the said Notice of Appeal the Court record was subsequently filed but without the relevant judgment. It is common cause that without the Court judgment, the Court record is incomplete. It is common cause further that the Notice of Appeal was filed within the time for filing such notice in terms of rule 8 (1) of the rules of this Court. To date, the Respondents have not filed the said judgment and therefore the Court record is still incomplete.
- [3] In terms of Rule 30 (1) of the rules of this Court, an Appellant is required to prepare and lodge the record of appeal with the Registrar of the High Court for certification thereof as correct. This must be done within a period of 2 months of the date of noting of the appeal.

This has not been done. The Respondents have only stated that they made a request to the honourable judge *a quo*, through the Registrar of the High Court, to have the written judgment, to no avail. A copy of the said letter has been filed herein but there is, on the face of it, no indication that it was ever received by the intended recipients. The Applicants have, not without any justification, submitted that the authenticity of this document is doubtful. But even if such document was indeed sent to and received by the Registrar, this on its own would not exonerate or excuse the Respondents from regularising the situation.

- [4] In terms of Rule 16 of the rules of this Court, this Court may, on application, extend the time within which a party to the proceedings or appeal ought to do any act or file any document in Court. This application must be supported by an affidavit setting out good and substantial reasons in favour of the application. In other words, the applicant must show good cause why the extension ought to be granted. Additionally, it is settled law in this jurisdiction that such application for extension must be sought before the relevant period expires. Once it has expired or lapsed, there is nothing to extend. In

the present appeal, the Respondents have not applied for such relief or extension.

- [5] Again, in terms of Rule 17, this Court may, on application and upon good cause being shown, excuse any party from compliance with any of the rules of Court. This is another avenue that was open to the Respondents in the event they were so advised or minded. They have, however, not utilized any of these two routes; namely Rule 16 and 17. This, in my view, is a clear sign to indicate that the Respondents have no intention of prosecuting this appeal. This conclusion is fortified in my opinion by the fact that the Respondents have always had the service and benefit of Counsel from inception of this matter.
- [6] Following the above steps or lack thereof, the Appellants have filed this application for the Court to declare that the appeal noted by the Respondents be declared to be deemed to have been abandoned as dictated by the provisions of Rule 30 (4) of the rules. This rule provides that if an Appellant fails to submit or resubmit the record for certification by the Registrar within the prescribed period, the appeal

noted shall be deemed to have been abandoned. This is of course subject to the provisions of Rule 16 (1) already stated above.

- [7] This Court had occasion to deal with a similar matter in *Shongwe, Jessie v Shongwe Samuel*, 1987-1995 (4) SLR 220 at 223b-g, where it stated as follows:

‘Rule 16 provides a procedure for seeking an extension of the time prescribed in the rules for carrying out certain specified procedures. Rule 17, on the other hand, deals with an application for condonation for the failure to have compliance with the provisions of any rule including that laid down in Rule 16. It is necessary, however, in either case to furnish good and substantial reasons for the indulgence being sought by the applicant.

In the present case, there has been no application in terms of Rule 16 and no substantive application for condonation of the failure to comply with the provisions of Rule 30. The Court has discretion, to be exercised judicially, as to whether it will grant condonation of a breach of the rules.

There must be some basis for it so to do. There has been no explanation for the delay in filing the record. It is contended that a "set of pleadings" was filed on 30 August 1993 but that does not explain why a certified copy of the record was only filed and served on 16 February 1994.

On behalf of the Appellant it was contended that there was a general ineptitude amongst practitioners in complying with the rules and that strict compliance with the rules was not regarded as essential. This comes as a surprise to me and it is in fact so, it is practice which must cease forthwith. The rules of this Court are intended to introduce certainty and facilitate the speedy administration of justice. Non-compliance, therefore, will introduce uncertainty and frustrate the administration of justice. It encourages negligence amongst practitioners and, in the absence of good and sufficient reason, will not be condoned.

In the present instance there has been no application in terms of Rule 16 nor has any basis been advanced for the grant of condonation for the late filing of the record.'

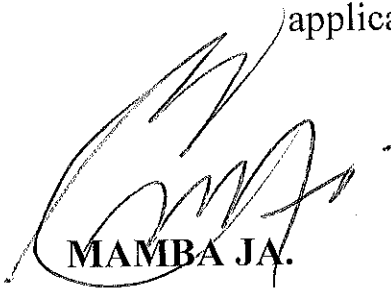
See also *Nonhlanhla Shongwe v Jabulani M. Mndzebele* (32/2020) [2021] SZSC 24 (13 September, 2021) and the cases cited therein.

[8] Whilst the Respondents have filed an opposing affidavit essentially explaining that they wrote to the Registrar of the High Court requesting for the written judgment, they did not file any Heads of argument in support of their case. Infact, Counsel for the Respondents, very properly in my view, informed the Court that the Respondents did not have any ground to oppose the application and they would abide the decision of the Court.

[9] After hearing submissions from Counsel for the Applicants and after considering all the relevant facts and the applicable legal principles, I immediately granted an order in the following terms:

- (a) The appeal filed by the Respondents on 03 May 2022 is deemed to have been abandoned and is hereby struck off the roll.

(b) The Respondents/Appellants are to bear the costs of this application.



MAMBA JA.

FOR THE APPLICANTS:

MR. M. MAGAGULA
(Zonke Magagula & Co.)

FOR THE RESPONDENT:

MR. S. GUMEDZE
(V. Z. Dlamini Attorneys)