



**IN THE SUPREME COURT OF ESWATINI**

**JUDGMENT**

Held at Mbabane

Case No. 23/2023

In the matter between:

**LIMPOSIMTANJA INVESTMENTS**

**APPLICANT**

**AND**

**MANGINENI FARMERS ASSOCIATION**

**RESPONDENT**

**Neutral citation:** *Limposimtanja Investments vs Mangineni Farmers Association*  
*[31/22] [2023] SZSC 43 (18 October, 2023)*

**Coram:** FAKUDZE AJA

**Heard:** 9<sup>th</sup> August, 2023

**Delivered:** 18<sup>th</sup> October, 2023

**Summary:** *Civil Procedure – Application for condonation for late filing of the Record of Appeal in terms of Rule 17 of the Court of Rules - Applicant states that it had problems securing recording of evidence of the court a quo as wrong case number was entered - there was also a change of attorneys representing the Applicant. Respondent argued that the Applicant filed the Notice of Appeal outside the time period prescribed by Rule 8 of the Court of*

*Appeal Rules – Further the prayers by the Applicant are contradicting. In the Notice of Application, it is applying for condonation and in the Founding affidavit in support of the Notice, it is applying for extension of time - moreover, the Applicant has failed to prove that (a) it has a reasonable explanation for the default; (b) the Applicant has failed to demonstrate good prospects of success - Court finds in favour of the Respondent – The Applicant has said nothing on prospects of success in the Affidavit. Costs granted in favour of the Respondent.*

### **JUDGMENT**

#### **FAKUDZE A.J.A**

- [1] This is an Application in terms of Rule 17 of the Court of Appeal Rules, 1972 for the condonation for late filing of the Record of Appeal. In terms of Rule 30 (1) of the Rules, the Record of Appeal should be filed within two (2) months from the date of filing of the Notice of Appeal.
- [2] The Applicant has stated two reasons for failing to file the Record on time. The reasons are stated in the Founding Affidavit in support of the Application for condonation. First, the Applicant states that a different attorney handled the case for and on behalf of the Applicant during trial in the court *a quo*. Two days to expiry of the *dies*, the current attorney was instructed to handle the matter for and on behalf of the Applicant. There was no adequate time to prepare the Record.

- [3] The Applicant further alleges that the erstwhile attorney was not compliant because Applicant was owed fees for the High Court trial and could not release the file to the Appellants new attorneys.
- [4] The Applicant states that what compounded the non-filing was that the Appellant had a problem securing recordings of evidence of the court *a quo* as there was an error on the judgment; the case number was reflected as 908/2023 whereas the appropriate one ought to have been 1945/19. The confusion with the case number coupled with the non-availability of the original file and the Record of evidence was an unfortunate occurrence that was not caused by the Appellant. The error in the insertion of the wrong case number on the judgment was due to the Learned Judge's Secretary and not necessarily the Applicant.
- [5] Based, on the above, the Applicant finally states that it has established sufficient grounds upon which the court can exercise its discretion to grant the Application for condonation.
- [6] The Respondent avers that the Applicant is not clear about what it wants. It is confusing the Rules governing condonation and extension of time. In the Notice of Motion, the Applicant is seeking condonation and in the Founding Affidavit, it is seeking extension of time. When one applies for condonation it suggests that the Applicant must file the Record and seek the court's indulgence in filing same out of time together with the necessary documents. The Applicant by its own admission, failed to file the Record on time for the reasons stated in the Application.
- [7] On the issue of extension of time, the body of the supporting Affidavit urges this Honourable Court to grant extension of time to the Applicant within

which it promises to file the Record. See paragraph 7 of the Founding Affidavit. The reason advanced by the Applicant is that the transcribers have a lot in their hands. It will therefore take them one month to transcribe and compile the Record. That assertion is also repeated in paragraph 19. The Respondent therefore argues that there is no nexus between the Notice of Motion and the Supporting Affidavit. The prayer for condonation is not supported through the averments in the Affidavit. The Applicant should have filed by the 13<sup>th</sup> June, 2023 but filed on the 14<sup>th</sup> June 2023, a day after the *dies* had expired.

- [8] The Respondent further avers that the Applicant failed to file the Notice of Appeal within the period of 4 weeks as prescribed by the Rules. The High Court judgment was delivered on the 14<sup>th</sup> March, 2023 and the Applicant should have filed its Notice of Appeal not later than 11<sup>th</sup> April, 2023. Rule 8 provides that an appeal should be filed within 4 weeks; it naturally means 28 calendar days. Therefore the Notice of Appeal was filed out of time. That being the case the Appeal is non-existent.
- [9] The Respondent finally submits that the Applicant should show that it has prospects of success if the Application for condonation and or extension is granted by this court. This is a necessary requirement for an application for condonation of late filing to be granted by the court. The reason why the Applicant is appealing the decision of the court *a quo* is that the Applicant alleges that this court failed to summon an essential witness for and on behalf of the Applicant. The court should not only be an adjudicative body but should serve justice by making up for the gaps in the case of a party that has failed to do so. In this case the court should have summoned the person who received the goods on behalf of the Applicant at its place of operation. Mind

you this point (relating to prospects of success) was raised by the Applicant from the Bar and not in its papers filed of record.

### The Law

[10] Rule 8(1) states as follows:

*“(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.”*

Rule 8 (2) further states that:

*“(2) The Registrar shall not file any Notice of Appeal which is presented after the expiry of the period referred to in paragraph (1), unless leave of appeal out of time has previously been obtained.”*

[11] Following the Noting of an Appeal within the time prescribed by Rule 8, the Appellant is called upon to prepare the Record as stated in Rule 30 (1) which says that:

*“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.”*

[12] Rule 30 (4) continues to say 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.”*

[13] It is clear from Rule 30 that where an appellant fails to file the Notice of Appeal or Record timeously, the appeal shall be deemed to have been abandoned. However, the appellant may invoke Rule 16 as soon as it realises that it is not able to comply with the Rules. An application in terms of Rule 16 must be done prior to the lapse of the time limit prescribed by the Rules and not after the expiry of the prescribed time limits.

[14] Rule 16 (1) provides as follows:

*“(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.”*

[15] The litigant may, in addition, as soon as it realises that it is not able to comply with the Rules, remedy its default by applying for condonation for non-compliance with the Rules.

In this regard, Rule 17 provides as follows:

*“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 matters of practice and procedure as it considers just and expedient.”*

[16] The Courts in Eswatini, including this court, have pronounced themselves on the time limits that must be complied with in terms of the Rules. In **Tuntex Textile vs Eswatini Government and Others, Civil Appeal Case No. 86/2018** paragraph [14] the Supreme Court observed as follows on the issue of time limits:

*“[14] The word “day” should be relative to the court works, where it can accept court processes. In the Rules of the Court my opinion is that “day” should be used in reference to the institution and taking cognisance of how the institution works and on which days it works.”*

[17] The court further observed in paragraph [15] that:-

*“[15] On further consideration, I see no logic or reason why the Supreme Court should regard “day” having a different meaning from the High Court. Rule 2 of the High Court Rules defines “court day” as any day other than a Saturday, Sunday or Public Holiday, and only court days shall be included in the computation of any time expressed in days prescribed by these rules or fixed by any order of the court.”*

### **Findings of this Court**

[18] The legal requirements for the granting of an application for condonation are two: firstly, reasonable explanation for the delay in complying with the Rules of Court and secondly, the prospects of success on the merits. See **Floyd**

**Mlotshwa and Another v Chairperson Elections and Boundaries Commission and Others (96/2018) [2019] SZHC 3 (2019).** As far as the reasonable explanation is concerned, the Applicant states that it has shown sufficient cause for failing to file an application for condonation on time. The explanation is that the Applicant had a problem with securing the recordings of evidence of the court *a quo* as there was an error on the judgment; the case number was reflected to be 908/2023 whereas the appropriate one ought to have been 1945/19. The Applicant further contends that it noted the Appeal on the 14<sup>th</sup> April, 2023 and they filed the application for the condonation for the late filing on the 14<sup>th</sup> June, 2023 which application was made within the time period allowed by the Rules of Court for the lodging of the Record with the Registrar, being two months from the date of noting of the appeal. This application accords with Rule 17(1). The Applicant finally contends that it had difficulty securing the file from the erstwhile attorney because it was owing the attorney legal fees for handling the case in the court *a quo*. This compounded the Applicant's situation.

- [19] In response to the Respondent's argument that the Applicant should have sought help from the Respondent in terms of Rule 30(5), the Applicant states that they failed to locate the court room where the trial took place so as to access the recordings.
- [20] The Respondent's case is that the Applicant filed the Notice of Appeal out of time because in terms of Rule 8 it filed it beyond 10<sup>th</sup> April, 2023 and this was beyond the four weeks; "Weeks" is defined in the dictionary as including Saturdays, Sundays and holidays. The Applicant should have filed the



Notice of Appeal on or before the 10<sup>th</sup> April 2023. It was filed on the 14<sup>th</sup> April, 2023.

- [21] On the issue of condonation, the Respondent alleges that the time for the filing of the Record after the filing of the Notice of Appeal should include Saturdays, Sundays and holidays. The Applicant should therefore have filed within sixty (60) calendar days. Finally there is a disconnect between the Notice of Motion and the Founding Affidavit. The Notice of Motion relates to condonation for non-filing and the Affidavit relates to extension of time.
- [22] It is this court's considered view that the Notice of Appeal was filed within the time prescribed by the Rules. The Respondent misconstrued the notion of "weeks" as prescribed in Rule 8. The **Tuntex Textile v Eswatini Government** (Supra) has settled the issue of how to compute time in terms of the Rules. This court interpreted "weeks" in the same fashion or vein as the High Court. It excludes Saturdays, Sundays and Holidays. If the judgment by the court *a quo* was delivered on the 14<sup>th</sup> March, 2023 and the Notice of Appeal was filed on the 14<sup>th</sup> April, 2023, the Applicant therefore filed the Notice within the time prescribed by Rule 8.
- [23] On the issue of condonation, the Applicant states that it filed the application on the 14<sup>th</sup> June, 2023 which is exactly two months as stipulated in Rule 30(1). The Respondent argues that the application was filed out of time because 2 months from the date of filing the notice of appeal takes us to 11<sup>th</sup> April, 2023 which is the 60<sup>th</sup> day because days and weeks are computed using a calendar month. Saturdays, Sundays and Holidays are counted as days for purpose of filing the Record. It is this court's considered view that the Applicant's

computation is correct. This is based on the very consideration this court took into account in agreeing with the Applicant that the Notice of Appeal was filed within the prescribed time in term of the Rules.

[24] Further, the explanation by the Applicant for failing to file the records on time is reasonable. The new Applicant's attorney was assigned the matter at the eleventh hour and definitely there was an error with regard to the wrong case number being assigned to the court *a quo*'s judgment. The Respondent has acknowledged this fact. The Applicant was therefore justified in seeking the extension of time for the filing of the Record in terms of Rule 17. Notwithstanding that the Applicant is entitled to the extension, it has left out a very important consideration in granting an application for condonation for late filing. This is the fact that it must allege that if the condonation is so granted, it has prospects of success on the merits. The Applicant has not alleged this in its Affidavit. In **Tuntex Textile v Eswatini Government and Others** (Supra) the Learned Justice Matsebula J. A. observed at paragraph [20] as follows:

*"[20] The Appellants in their Founding Affidavit made a bold and bare allegation that they have prospects of success. Mr. Watt Pringle SC submitted that detailing the prospects of success in the Founding Affidavit would burden the court and that the prospects of success are by reference in the heads of argument. He pointed out that the detailed prospects as per numerous decisions of this court, should be stated in the Founding Affidavit and nowhere else. Mr Watt Pringle SC said the court should take cognisance that the Founding Affidavit was drafted by a person who is a layman in law... .. Be that as it may, the condonation application fails to meet the second requirement for*

*condonation application as acceded to by Mr. Watt-Pringle when he referred to .....*”

[25] With reference to the case at hand the Applicant has not addressed the issue of prospects of success at all. Counsel for the Applicant only raised it from the Bar in reply to the Respondent’s submission. It is in **De Berry Anita v A.G. Thomas (Pty) Ltd (30/2015) [2016] SZSC 07 (30 June 2016)** at paragraph 12 where Justice Cloete A.J.A (as He then was) said:

*“..... 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 the Founding Affidavit, the court taken into confidence of the Applicant and such Applications brought in terms of the Rules of this court immediately upon a problem arising.”*

[26] Since there are no details on the prospects of success in the Founding Affidavit as is expected as a matter of law and practice, it is this court’s considered view that the Applicant has failed to make a case for condonation. The Application for extension of time and/or condonation fails with costs.

  
 FAKUDZE AJA