

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

CASE NO. 94/2022

In the matter between

**MADVUBADLE INVESTMENTS (PTY) LTD
t/a DLAMINI TRANSPORT**

1ST APPLICANT

THEMBI DLAMINI

2ND APPLICANT

AND

HEAVY PLANT CENTRE (PTY) LTD

RESPONDENT

In re:

HEAVY PLANT CENTRE (PTY) LTD

PLAINTIFF

AND

**MADVUBADLE INVESTMENTS (PTY) LTD
t/a DLAMINI TRANSPORT**

1ST DEFENDANT

THEMBI DLAMINI

2ND DEFENDANT

Neutral Citation: *MADVUBADLE INVESTMENTS (PTY) LTD v HEAVY PLANT CENTRE (PTY) LTD (94/2022) [2023] SZSC 48 (27 NOVEMBER, 2023).*

Coram : M. D. MAMBA JA, M. J. MANZINI et L. M. SIMELANE
AJJA.

Heard : 06 NOVEMBER, 2023

Delivered : 27 NOVEMBER, 2023

[1] *Civil law and Procedure- Application for Condonation of late filing of notice and grounds of appeal, Rule 17 of the Rules of Court. Applicant required to show good cause. Court has discretion to grant or refuse application.*

[2] *Civil law and Procedure- Application for Condonation of late filing of appeal- requirements thereof. Applicant to account for delay, extent and explanation for delay to be fully given. Reasonable prospects of success on appeal is but one of several factors to be established. Where delay and reasons thereof inadequately explained and no prospects of success stated, application refused.*

MAMBA JA:

[1] This is an application for the Condonation of the late filing of a Notice of Appeal by the applicant. It is made under rule 17 of the rules of this Court. Following a default judgment handed down by the Court *a quo* on 24 March 2022 against the applicants, they filed and served an application for the rescission of the said judgment. The second applicant was successful in the rescission application, whilst the first applicant was not. This judgment was delivered on 17 November, 2022. Being dissatisfied with the order of the Court *a quo* in the

rescission application, the first applicant successfully launched before this Court an application for leave to appeal against that judgment. The order of this Court is dated 20 March, 2023. (We note herein that this order erroneously records that the last order by the High Court is dated the 11th day of November, 2022 instead of the 17th day of November, 2022. Nothing turns on this error though).

- [2] The application for leave to appeal was filed with the Registrar of this Court on 16 December 2022 and the first applicant sought an order in the following terms:

‘1. Granting leave to the Appellants/Applicants (Defendants in the main action) to appeal the judgment of the High Court handed down on the 17th November 2022 . . . wherein he dismissed the first applicant’s rescission application.

2. Costs in the event of unsuccessful opposition.

3. Further and/or alternative relief’.

(See pages 74 and 75 of the Book of Pleadings).

This application was, it is common cause, made in terms of rule 9(1) of the rules of this Court. Rule 10 of the rules of this Court lays down that where

the Court grants an applicant leave to appeal, it shall not be necessary for the Appellant/Applicant to file or serve a Notice of Appeal as the Notice of Motion shall constitute sufficient Notice of Appeal. It is important, however, to note here that this may be the case only where the Notice of Motion for leave to appeal is filed on the terms stated in Civ. Form 3 of the rules of this Court. Where the notice for leave to appeal is in accordance with the said Form, the actual grounds of appeal are stated therein and therefore it becomes unnecessary to repeat these in a separate Notice of Appeal. In the present matter, it was necessary for the applicant to file and serve its Notice of Appeal.

[3] This Court did not stipulate the time within which the applicant had to file its Notice of Appeal. The result is that as a matter of law and logic, resort must be had to Rule 8 (1) of the Rules which provides that a Notice of Appeal shall be filed within four weeks of the date of the judgment appealed against, which in this case is the 20 March, 2023.

[4] The Applicants failed to file and serve their Notice of Appeal within the requisite period. The said Notice was eventually filed and served on 06 June, 2023. The four weeks within which it ought to have been filed expired on or about the 18th day of April, 2023. This Notice of Appeal is accompanied by this application for Condonation wherein the Applicants seek the following prayers:

- ‘1. The Applicants are condoned for filing or delivery of their Notice [of Appeal] out of time;
2. The Applicants are granted leave to file this Notice of Appeal out of time;
3. The Respondents are ordered to pay the costs of this application on opposition.’

The application is opposed by the Respondent.

[5] As already stated above, the second Applicant was successful in the rescission application and it has not been explained in the papers herein why he is cited as an Applicant or Appellant in the proceedings for leave to appeal and in this Condonation application.

[6] Rule 17 of the rules of this Court has been the subject of numerous judgments by this Court. All these judgments are consistent on the requirements and applicability of the provisions of the Rule. This is a procedural rule rather than one of substantive law. It is perhaps because of this characterisation that the Court is given a very wide discretion, to be exercised judiciously and judicially upon a consideration of the relevant facts in a given case. Ultimately, it is a discretion grounded on fairness and justice. In deciding whether to condone non-compliance with the rules, the Court would take into consideration issues including, the degree or extent of non-compliance, the excuse or explanation proffered for such lack of compliance, the importance of the case to the parties and to the general scheme of the law, the respondent's interest in having the matter finalised, the prospects of success on appeal, the avoidance of any unnecessary delay in the administration of justice and the functioning of the Court in general. The Courts have always emphasized that the list is not exhaustive and that these factors are interrelated and do not have to be considered and weighed individually. The Applicant must satisfy that Court that good cause exists to allow or permit the Court to grant the indulgence sought. Vide *The Prime Minister and 2 Others*

v Michael Vusane Masilela (100/2018) [2023] SZSC 38 (13 September, 2023) at para 6 and 14. Thus the application is not a mere formality, as invariably applicants allege that where the application is not opposed, it must *ipso facto* be granted. (See *Feldman v Feldman, 1986 (1) SA 449 (T) United Plant Hire (Pty) Ltd v Hills 1976 (1) SA 71 (A) at 720.*

- [7] In the present application the Notice of Appeal was filed about three months out of time. The explanation given for this lateness is as follows:

‘3. This is an application for Condonation . . .for the late filing of the Applicants [Notice of Appeal]. It is my submission that, the late filing was not due to disregard of the Rules of Court but was due to the fact that Applicant was out of the country for personal safety and was also busy in Courts.

4. In essence, the Condonation is based on the fact that it was practically impossible to file the Notice of Appeal in time . . . and for that, we profusely apologise to the Court and the other side.

...

9. I submit that a proper case has been made out for the Applicants to be granted Condonation *moreso* because there is no prejudice that will be suffered by the respondent as the estate has still not been wound up.

10. The Applicants have good prospects of success in the main matter and I submit that reasonable grounds have been set out for the grant of the relief sought in the Notice of Motion’.

The Applicants aver that the second Applicant was also busy attending meetings associated with the winding up of the estate of her late father and therefore had insufficient time to attend to the filing of the Notice of Appeal. Again, no specifics are given on this.

[8] I have quoted *verbatim* the contents of the Applicants’ Founding Affidavit to lay bare the inadequacy of its contents. First, the deponent does not state at all what were the personal safety concerns that forced Counsel to be outside the country. Secondly, no material or information is given on when these safety concerns arose and how long they lasted. Thirdly, Counsel also states that he ‘was also busy in Courts’. He neither gives any detail on his busy Court schedule nor

does he explain why he devoted his attention to his other Court matters at the expense of this one. Fourthly, the Notice of Appeal had to be filed after the grant of leave to appeal and one would have expected that when judgment was granted for leave to appeal, the Applicants would have been ready with the formulation of the grounds of appeal. The Notice of Appeal filed is also very short or brief. It is barely two pages and could, I dare say, have been drafted within thirty minutes. Fifthly, the Applicants contend themselves by just glibly stating that they 'have good prospects of success in the main matter.' which I think refers to the appeal. The reason or reasons for such belief is or are not stated at all. That the Applicant was engaged in meetings pertaining to the winding up of her father's Estate is not material in this application. Infact, her involvement in this application and in the appeal has not been explained. Her rescission application was granted in her favour in the Court *a quo*. Lastly, the Applicants do not say when they became aware that they were out of time in filing the Notice of Appeal.

- [9] In the Notice of Appeal, the Applicant complains that the Court *a quo* erred in rejecting the plea of non-joinder and holding that the estate of the deceased, who was the sole shareholder and director of the first

applicant had only a financial interest in the litigation. The second ground of appeal is that the Court *a quo* was in error in rejecting the rescission application. This is a general yet vague ground of appeal and says very little as a cogent legal ground of appeal. Lastly, the third ground of appeal is that the Court should not have considered the notice of bar because it called upon the Applicants to file their plea within a period of two days instead of the three days stipulated under Rule 26 of the Rules of the High Court.

- [10] Again, I have enumerated in the preceding paragraph the grounds of appeal stated in the Notice of Appeal to illustrate the brevity of the grounds and lack of complexity thereof. These grounds of appeal, as they stand, do not indicate to me that the Appellants have good or reasonable prospects of success in the appeal or that this appeal is at least arguable. This is of course not to say that because of this deficiency, the application ought to fail. The cumulative effect of the several factors considered herein must be weighed or assessed. As stated by *Holmes JA in Melane v Santam Insurance Co. Ltd 1962 (4) SA 531 (AD) at 532*, that:

‘Ordinarily these facts are interrelated: they are not individually decisive for that would be a piecemeal approach 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 would be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may also 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 interest in finality must not be overlooked’.

(See *Masilela (supra)* at para 14).

- [11] An Applicant in a case such as the present has a duty to explain every factor that is relevant or material for the Court in the exercise of its discretion. The Applicant must account for every period in which he was in default and also he must succinctly and briefly motivate his assertion that he believes he has good prospects of success in the appeal. The Applicants have not even attempted to do this in this

application. Objectively, assessed or considered, I cannot say that the delay of about two months was in the circumstances, too long. But, the rest of the important factors herein have either not been addressed by the Applicants or at best for them, not been adequately addressed. In *PE Bosman Transport Wes Com v Piet Bosman Transport* 1980 (4) SA 794 at 799 the Court concluded that:

‘In the present case the breaches of the rules were of such a nature, and the explanation offered in many respects so unacceptable or wanting, that , even if virtually all the blame can be attributed to the Applicant’s attorneys, Condonation ought not, in my view, to be granted’.

Similarly in *Ferreira v Ntshingila* 1990 (4) SA 271 at 281 the Court stated the principle as follows:

‘An application for Condonation is required to be made as soon as the party concerned realises that the rules have not been complied with. See *De Beer en’n Ander v Western Bank Ltd* 1981 (4) SA 255 (A) at 257; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 129G. Negligence on the part of a litigant’s attorney will not necessarily exonerate the litigant. See *Saloojee and Another NNO v Minister of*

Community Development 1965 (2) SA 135 (A) at 141. See also *Finbro Furnitures (Pty) Ltd v Registrar of Deeds, Bloemfontein, and Others 1985 (4) SA 773 (A) at 787G – H*, where Hoexter JA referred to the “oft – repeated judicial warning that 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.”

An attorney instructed to note an appeal is in duty bound to acquaint himself with the rules of the Court in which the appeal is to be prosecuted. See *Moaki v Reckitt and Coleman (Africa) Ltd and Another 1968 (3) SA 98 (A) at 101*; *Mbuthuma v Xhosa Development Corporation Ltd 1978 (1) SA 681 (A) at 685A – B*. Inasmuch as an applicant for Condonation is seeking an indulgence from the Court, he is required to give a full and satisfactory explanation for whatever delays have occurred. The explanation given in the present case was neither full nor satisfactory. . . .

The respondent’s interest in the finality of his judgment is a factor which weighs with the Court. The fact that the time for noting an appeal has elapsed, *prima facie* entitles him to adjust his affairs on

that footing. See *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie (supra at 363).*

See also *Swaziland Electricity Company v Gideon Gwebu and Municipality of Mbabane (36/2018) [2018] SZSC 25 (29 May 2019)*

[12] In *Kgobane and Another v Minister of Justice and Another 1969 (3) SA 365 (A) at 369*, where as in this case, counsel for the applicant claimed that he was working under pressure or ‘busy in Courts’ and absent from his office, this was viewed as an unreasonable excuse or explanation. The Court stated;

‘The attorney for the applicants attributed his neglect to observe the rules of this Court and to ensure that his instructions were carried out, to his working under pressure and being away from his office. When an attorney tells this Court, in effect, that he is too busy to study the rules of this Court and to supervise the prosecution of an appeal, his explanation is quite unacceptable.’

(See also *Hall v Van Tonder and Another 1980 (1) SA 908 (CPD).*)

[13] In the present application, the Applicants have dismally failed to adequately explain their default in filing the Notice of Appeal or that they have good prospects of success in the appeal. This Court dealt with a similar issue in *Vusani Manqoba Mhlanga v Rex* [01/2019] [2019] SZSC 44 (17 October, 2019). There, the applicant merely stated that the prospects of success on appeal “may be seen from the record of proceedings’. The Court noted and held that: ‘the prospects are not spelled out what they are, [but] just a bold statement without anything to substantiate it.

...

Since there are no detailed prospects of success in this application it is bound to fail and it fails’. (para 20)

The present application must, in my judgment, suffer the same fate. For these reasons, the application ought to fail and is hereby dismissed.

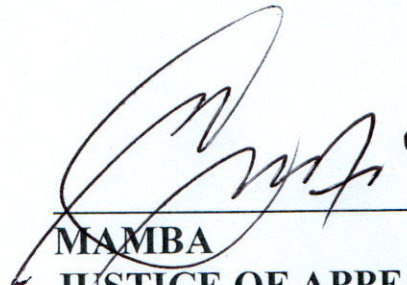
[14] The Respondent has applied that a punitive order for costs be granted against the Applicants. The only motivation or justification for such a prayer is that the Applicants were, from the beginning of the litigation in the Court *a quo*, constantly failing to comply with the rules of the

Court and the late filing of the appeal is one such failure. I do not think that this is sufficient justification for such an order for costs in this case. Whatever failures to comply with the rules in the Court *a quo*, were, I believe, adequately dealt with by that Court. It is not necessary for this Court to revisit the infractions of those rules. For this reason I hold that costs be granted on the ordinary scale.

- [15] One further point bears mention in this application and it is this: it would appear to me that the judgment dismissing the rescission application filed by the first applicant is final in effect and therefore appealable without leave of Court. The effect and nature of that order is that the first applicant is to pay the amount claimed in the summons. There is nothing interim about that. The only unfinished matter is between the second applicant, whose rescission application was successful, and the respondent. Because of this, the first applicant ought to have appealed that judgment rather than seek leave of Court to do so. No doubt the appeal would have been filed and served timeously and this unmeritorious application would not have been there at all. This point was of course not in issue or argued before us in these proceedings. My observations thereon are therefore *obiter*.

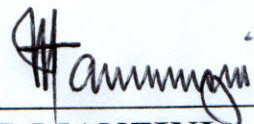
[16] For the above reasons, I would make the following order:

- (a) The application for Condonation is dismissed.
- (b) The Applicants are ordered to pay the costs of this application at the ordinary scale, jointly and severally one paying the other to be absolved.



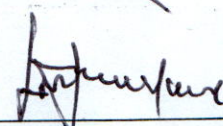
MAMBA
JUSTICE OF APPEAL

I AGREE



M. J. MANZINI
ACTING JUSTICE OF APPEAL

I ALSO AGREE



L.M. SIMELANE
ACTING JUSTICE OF APPEAL

FOR THE APPLICANTS:

MR. M. MABUZA

FOR THE RESPONDENT:

MR. L.B.NKAMBULE
(With him, Mr. S.A. Dlamini)