

IN THE SUPREME COURT OF ESWATINI
JUDGMENT

Case No. 15/23

HELD AT MBABANE

In the matter between:

NOMSA DLAMINI obo 242

Appellant

and

**THE LIQUIDATOR ROYAL SWAZI SPA
AND SUBSIDIARIES N.O
THE MASTER OF THE HIGH COURT
THE ATTORNEY GENERAL**

**1st Respondent
2nd Respondent
3rd Respondent**

Neutral Citation: *Nomsa Dlamini obo 242 vs The Liquidator Royal Swazi Spa and Subsidiaries N.O (15/2023) [2023] SZSC 56 (06/12/2023)*

Coram: **J.M. CURRIE JA (sitting as a single Judge)**

Heard: 28 November, 2023.

Delivered: 06 December, 2023.

SUMMARY

:

Civil procedure – Appeal filed after expiry of dies in terms of Rule 8 (1) – Notice of appeal filed contemporaneously with application seeking (a) leave to “file” appeal and (b) condonation for late filing of notice of appeal – In terms of Rule 8(2) Registrar not to file any notice of appeal presented after such expiry unless leave to appeal out of time previously obtained – Rule 8(2) peremptory – Registrar erroneously accepting late notice of appeal with result that appeal not properly before court – Rules 8(2) and 17 juxtaposed and considered – Application measured against requirements vis-à-vis reasonable explanation for delay and prospects of success – Sufficient case not made out and application dismissed.

JUDGMENT

J.M. CURRIE – JA (sitting as a single Judge)

INTRODUCTION

- [1] This application arises as a result of a judgment of the Court *a quo* delivered on 10 November 2022.
- [2] From the outset it must be stated that the citation reads “*NOMSA DLAMINI obo 242.*”

2.1 The only applicant identified in the papers is NOMSA DLAMINI, who for the sake of convenience will be referred to herein as “*Ms ND.*”

2.2 The identities of the other “242” are not disclosed, either by way of express mention or confirmatory affidavits, hence they will be referred to herein as the “*anonymous persons.*”

2.3 Ms ND does not allege that she has any authority to bring the application on behalf of the anonymous persons and the Court will therefore treat Ms ND as a single applicant.

[3] The main prayers sought are framed as follows in the notice of motion, reproduced *verbatim*:

“1. Granting Appellant leave to file her appeal against the judgment issued on the 30th of November 2022 under High Court case No 411/2022.

2. Condoning the Applicant for the late filing of her notice of appeal.”

[4] Ms ND appeared in person before this Court and the papers filed of record were not filed by legal representatives. The Court takes into account that this is an instance of a lay person appearing before the highest Court in the land and in the circumstances, that some latitude as regards procedural and similar issues would be called for.

BACKGROUND

- [5] The matter revolves around the retrenchment of Ms ND and the anonymous persons by the Royal Swazi Spa in 1992.
- [6] Upon Ms ND and the anonymous persons being retrenched in 1992, some thirty years ago, they instituted proceedings in the Industrial Court. It appears that at some stage they were represented by attorney Mr P Dunseith. After institution of the proceedings, various negotiations took place and a deed of settlement was concluded between the retrenched employees and Royal Swazi Spa Holdings and made an order of Court on 19 September 1996, in terms of which the retrenched employees were paid in full and final settlement. Ms ND's complaint was that the agreement was entered into on their behalf by their erstwhile attorney Mr Dunseith, who did not have a mandate, nor authority to enter into such agreement. Although they were paid in terms of the agreement they wanted to be paid their terminal benefits in respect of unfair dismissal.
- [7] During or about 2021 it came to the notice of the retrenched employees that Royal Swazi Spa and subsidiaries were placed in liquidation whereupon they decided to submit their claims to the first and second respondents, being the liquidator of the Royal Swazi Spa and subsidiaries and the Master of the High Court, respectively, which claims were rejected on the basis that they had been paid in 1992.

- [8] As a result of this rejection, Ms ND instituted review proceedings in the court *a quo* seeking the review and setting aside of the decision of the first and second respondents. (No mandate authorizing her to act on behalf of the anonymous persons appears in those papers, an issue that was raised in those proceedings.)
- [9] The application for review was dismissed by the Court *a quo* on the 30th November 2022 on the basis that there had been an unreasonable delay in bringing the review application which delay was prejudicial to both sides; further, that the first and second respondents have no authority to overrule the order of the Industrial Court.
- [10] Dissatisfied with the latter judgment, some four months after the judgment was delivered, Ms ND decided to challenge the judgment before this Court by way of notice of appeal dated 14 March 2023. However, the *dies* for filing the notice had expired, hence the application now under consideration.

MS ND'S FOUNDING AFFIDAVIT AND ARGUMENT

- [11] The application was lodged on the same date as a notice of appeal, being 14 March 2023. There is no reference in the application as to in terms of which Rule/s of this Court the respective prayers are being sought. The application is signed by Ms ND personally but the address for service is stated to be S.M. Jele attorneys.

[12] In the founding affidavit Ms ND states *inter alia* that:

“10. I submit that upon receipt of the Judgment which is subject to appeal, our erstwhile attorney Mr Jele informed us that he would not be able to represent us at the appeal stage and advised to seek the services of another attorney.

11. Upon this advice we embarked on to secure legal counsel and unfortunately we were unable to obtain same mainly because we are unable to pay for same. I was later advised to pursue the appeal without legal representation and by the time we filed the appeal we were out of time.

12. I humbly submit that the late filing of the appeal is not due to disregard of the Court and Court process but was due to the culmination of events as I have mentioned above.

13. With that background I wish to state that the Appellant does have prospects of success in the matter on the basis that another Court would have found that the review application was against the decision of the 1st and 2nd Respondents of 2021 which rejected our claim and not to set aside the agreement of settlement entered into without our consent in 1993.

14. Further the Supreme Court might find that the 1st and 2nd Respondents failed to apply their minds in rejecting our claim for the reason we have documentation in which Royal Swazi Spa acknowledged their indebtedness to us.

15. I am advised and verily believe that the Application was determined based on technicalities at the Court a quo and the above Honourable Court may determine this matter on its merits and find in our favour.

16. Furthermore, it is my humble submission that the Respondents will not suffer any prejudice by considering our claim as the company in liquidation is well aware of the claim and acknowledged same."

[13] No heads of argument were filed on behalf of Ms ND, who stated that she had received assistance from various legal representatives in preparing the application but as she was unable to pay, she was unable to obtain legal representation to act on her behalf in pursuing the appeal.

[14] It soon became evident to the Court that Ms ND lacked the understanding that the matter in its current form before Court is procedural in nature, and not a hearing of the substance of the intended appeal.

[15] In essence, Ms ND stated that she was before this Court to pursue her and the anonymous persons claims for compensation for dismissal and that she had approached this Court as the highest Court in the land to come to her aid to set aside the order of the Industrial Court and order the first and second respondents to accept their claims for compensation for unfair dismissal.

[16] When it was pointed out to Ms ND that she had not named the anonymous persons she said that she had a list with her and could provide same to the Court. She clearly had no understanding at this was not possible in this Court.

OPPOSING AFFIDAVIT AND ARGUMENT BY COUNSEL FOR THE 1ST RESPONDENT

[17] The first respondent filed an opposing affidavit raising the following points of law:

(i) Locus Standi

The first respondent contends that the application is defective in that Ms ND has failed to provide the necessary proof of authority authorising her to act on behalf of the 242 anonymous persons, nor are any confirmatory affidavits attached. The first respondent claims that certain of those individuals have passed away and therefore only their executors may institute proceedings on their behalf. Therefore, Ms ND lacks the necessary *locus standi* to institute proceedings on their behalf and the application stands to be dismissed.

(ii) Unreasonable Delay

The first respondent submits that the claim has prescribed in that the appellant as well as the anonymous persons had been retrenched in 1992, almost 30 years ago. It is only now, that the first respondent is in liquidation, that the appellant and others are attempting to pursue claims which, in any event, had been paid in terms of the settlement agreement. As a result this application and the appeal cannot be entertained by this Court due to the lapse of time of approximately thirty years.

(iii) Prospects of Success

Ms ND has failed to demonstrate any prospects of success and cannot demonstrate that the order of court has been set aside. The first respondent submits that the relevant deed of settlement in term of which they were paid their claims was made an order of court on 19 September 1996. Whilst Ms ND contends that they never gave instructions to their erstwhile attorney Mr Dunseith to agree to the settlement, the court order was made an order of court which still remains, until and unless, it is set aside. No steps have been taken to set aside this court order.

The liquidators and the Master do not have legal capacity to set aside the order of the Industrial Court made three decades ago and are obliged to abide the terms of the court order. Therefore the Master and the liquidators cannot accept the claim of Ms ND and others unless this order of court is rescinded, from which it follows that Ms ND and for

that matter, the anonymous persons have no prospects of success, wherefore the application stands to be dismissed.

THE LAW AND FINDINGS OF THIS COURT

[18] As highlighted above, Ms ND did not identify in terms of which Rule/s the application was being made. The Rules relating to filing of a notice of appeal on the one hand, and condonation on the other hand, are contained in Rules 8 and 17 respectively, which read as follows:

18.1. Rule 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:

.....

(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 to appeal out of time has previously been obtained.”

18.2. I pause to mention, despite being cautioned by this Court on numerous occasion not to accept any court process filed out of time, the Registrar accepted and filed the late notice of appeal *in casu*.

18.2.1 In the matter of **Maduna And Others v Junior Achievement Swaziland (105 of 2017) [2018] SZSC 31 (18 September 2018)** the Court stated:

“Rule 8 (2) directs the Registrar in clear peremptory terms that he or she “shall not” file any notice of appeal which is presented after the expiry of the 4 weeks period without leave to appeal out of time sought and granted by the Court first.

[19] There was no such leave sought and granted in this matter. Therefore, the Registrar ought not to have accepted and filed a notice of appeal that was out of time without an application being heard and granted by this Court and allowing the appeal to proceed.

[20] It follows that the matter is not properly before Court and therefore there is no appeal pending and falling for consideration by this Court.”

18.2.2 This dictum was confirmed in **United General Insurance Limited vs Didak Parmer In re: Didak Parmer vs**

**United Insurance Limited (07/2023) [2023] SZSC 44
(19/10/2023)**

[19] Rule 17 provides as follows:

“Rule 17

***The Court of Appeal may on application and for sufficient cause shown, excuse any party from compliance with any of these Rules and any give such directions in matters of practice and procedure as it considers just and expedient.*”** (my underlining in all of the above)

[20] There are a plethora of judgments of this Court prescribing the requirements to be contained in an application for condonation. An applicant seeking condonation, in order to succeed, must meet the following requirements:

- (a) as soon as the applicant becomes aware of the issue requiring condonation, the application for condonation must be made;
- (b) the applicant must give a full and detailed reasonable explanation for the delay;
- (c) the applicant is required to set out sufficient information to enable the Court to assess whether prospects of success exist in substance and merits of the application before court. See Maria

**Ntombi Simelane and Nompumelelo Prudence Dlamini and
Three Others in the Supreme Court Civil Appeal 42/2015.**

- 20.1 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 any delay.”* (my underlining)
- 20.2 In the matter of **Mabuza And Another v Director Of Public Prosecution (19 of 2021) [2022] SZSC 10 (12 May 2022)** the Court Justice Annandale stated the following:

“[21]] It is of particular and fundamental importance and consequence that the motivation for leave depends in the main on the prospects of success, in the event that a judicial discretion is sought to be exercised in favour of the applicant. It is fundamentally important that the prospects of success must be pointed out and enumerated upon, and that it be an integral part of the suppoiling affidavit. It does not suffice to attempt to incorporate it by reference to any other documentation.

“[26]The prospects of success in an intended appeal are of paramount importance in an application to condone the late filing

of the very same intended appeal. A bold and unsubstantiated statement of anyone's belief that there are reasonable prospects that another Court would have come to a different conclusion or that the facts do not support the judgment, simply does not suffice. The prospects of success must be spelled out and accompanied by what and how it is intended to demonstrate on appeal that there exists at least a "sporting chance" or having success on appeal. It is that which could persuade the Court to indeed open the door and allow the appeal to be heard on its merits."

[21] The effect of Rule 8(2) is that, absent leave to appeal out of time, there is nothing before the Court to consider, i.e. there is no appeal before the Court since an appeal can only come into being by virtue of a duly filed notice of appeal.

[22] It is my considered opinion that Rule 17 only apply to an appeal duly before Court by way of a duly filed notice of appeal, be same be saddled with deficiencies or not.

[23] Had this not been the case then there would have been no need for Rule 8(2), which is couched in peremptory terms as regards filing of the notice of appeal by the Registrar. Put differently, late filing of the notice of appeal is not capable of being condoned *via* Rule 17. If Rule 17 was applicable to late filing of notices of appeal, it would render Rule 8(2) nugatory.

[24] Further, Rule 17 pertains to default by parties and cannot be utilised to address erroneous filing by the registrar, who generally is not a party to proceedings.

[25] I was unable to locate any authorities dealing expressly with the requirements for an application in terms of Rule 8(2).

[26] However, where the Rules are silent on particular issue, the Court in the exercise of its inherent powers, may regulate its own processes and procedures in a manner which would enable practical justice to be administered and matters to be handled along practical lines - see **Sikhumbuzo Matsebula v Mbabane Municipal Council (84/2022) [2023] SZSC 14 (17 May 2023)**.

[27] It seems to me that the tried and tested requirements for condonation are apposite for purposes of leave in terms of Rule 8(2) from which it would follow, if I were to be wrong in holding that Rule 17 does not find application *in casu*, identical requirements and considerations would operate *mutatis mutandis* in either scenario.

[28] In the premises the case *in casu* shall be measured against the trite requirements for condonation set out above.

[29] In my view the application falls dismally short of what is required of an applicant in a condonation application. Although Ms ND is a lay person and the Court was at pains to afford Ms ND some leeway, the Court cannot

overlook the substantial defects in the application and grant relief when same is not justified, as this would set an undesirable precedent in the future.

[30] Condonation is not to be had purely for the asking; a full detailed and accurate account of the reasons for the delay must be furnished to the Court. Ms ND has failed to provide reasons justifying the delay of some four months in filing a notice of appeal. She states that she was advised by her legal representatives on receipt of the judgment in November 2022 that they would not be able to represent her in any appeal proceedings. As she was therefore going to represent herself, there appears to be no reason for the delay of four months and therefore a reasonable and acceptable explanation for the delay has not been provided to this Court.

[31] With regard to prospects of success, the contentions of Ms ND are not clearly articulated. MS ND merely states that another court may well come to another conclusion regarding her claims filed in 2021 and may find that the first and second respondents had not applied their minds in rejecting their claims.

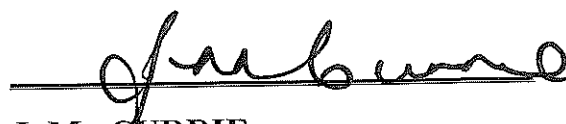
[32] Not only would this constitute a ground for review, and not appeal, but unless and until the original judgment incorporating the deed of settlement (which issued some 30 years ago) is rescinded or otherwise set aside, the issue of entitlement to payment cannot be reopened and all persons, including the respondents, remain bound by that judgment. In the circumstances, Ms ND's prospects of success are remote in the extreme.

[33] On the issue of costs, one is dealing with an unemployed litigant representing herself in respect of a matter emanating from the Industrial Court and the first respondent, commendably, is not pursuing a costs order in the circumstances.

ORDER

[34] In view of the foregoing the following order is made:

1. The application is dismissed and the notice of appeal filed on 14 March 2023 is struck out.
2. No order as to costs.


J. M. CURRIE
JUSTICE OF APPEAL

For the Appellant: NOMSA DLAMINI in person
For the 1st Respondent: DYNASTY INC. ATTORNEYS
For the 2nd and 3rd Respondents: ATTORNEY GENERAL'S CHAMBERS