IN THE SUPREME COURT OF ESWATINI

JUDGMENT V 2.0

HELD AT MBABANE **CIVIL APPEAL CASE NO. 17/2022**

In the matter between:

Vusani Rodwell Nsibandze	**Appellant**
And	
Estate late Benjamin [M] Nsibandze	**First Respondent**
Phumzile Esther Mdladla N. O.	**Second Respondent**
Busisiwe Mavis Simelane N.O.	**Third Respondent**
The Master of the High Court	**Fourth Respondent**
Attorney- General	**Fifth Respondent**

Neutral Citation: *Vusani Rodwell Nsibandze VS Estate late Benjamin Nsibandze and 4 Others (17/2023) [2023] SZSC53 (30th November, 2023)*

Coram: MJ Dlamini JA, JP Annandale JA and MJ Manzini AJA.

Heard: 14th November 2023

Delivered: 30th November 2023

CASE SUMMARY

Deceased Estate: Action in High Court – Claim by appellant that joint will of deceased is invalid – Claims that will is invalid due to (A) Not signed by testatrix– forged signatures, (B) Witnesses and testators have not signed in presence of testator/s and each other, and (C) That appellant was not called by Master to attend crucial meetings. Prayer for setting aside of will and to proceed through of intestate succession.

Exception taken by respondents – alleged lack of averments to sustain cause of action – Exception upheld and summons set aside by the high Court.

Appeal noted. Late filing of record. Unspecified application under either Rule 16 or 17, for either condonation of late filing, or extension of time. Woefully inadequate contents of application. Total ignorance displayed of the plethora of case law concerning condonation applications and what is required of the applicant to demonstrate to the Court.

Appellant's counsel unprepared to argue application filed by erstwhile attorneys. Request for deferral to prepare declined. Hardly a week of session time remaining at the time of the request.

Application to condone late filing of record refused, with costs. Matter removed from the roll.

JUDGMENT

Annandale JA

[1] After the demise of the late Benjamin Mshamdane Nsibandze, the joint estate was administered by the Master of the High Court in accordance with the dictates of a joint last will and testament with the testatrix named as the surviving spouse, one Glory Nsibandze. She is not a party to the proceedings. A major bone of contention is an argument by the now appellant that her signature has been forged as well as that she was not in the presence of the testator and the witnesses when the will was signed. Particulars to substantiate such serious averments are very scant and scarce of details.

[2] Seeking invalidation of the will, which by the time the matter was taken to court had already been taken through the various steps by the Master's Office, is akin to closing the stable door after the horse had already bolted. It is unknown as to whether such serious allegations of fraud and forgery were raised before the Master, but seemingly the appellant was not present at the relevant meetings.

[3] An exception to the particulars of claim was successfully argued before Langwenya J in the court below. She then set aside the summons and particulars of claim, with costs. It is against that order that an appeal was promptly noted.

[4] However, the appellant failed to file the record of proceedings *a quo* in time. He only did so on the 16th June 2023 after filing his Notice of Appeal on the 4th April 2023. He did not avail himself of the remedy under Rule 16 to seek extension of time, probably because of "...the belief that we were still on time".

[5] Ignorance of the Rules of Court do not provide the excuse of non-obedience or observation of the requirements and stipulation of time limits as to when and how a record of proceedings is to be prepared and filed.

[6] It would be chaotic if appellants can choose for themselves as to when they see fit to lodge the papers needed in the course of an appeal. I do not need to spell out the result of such a scenario. The appellant must have been aware that the late filing of a record on appeal is not acceptable, without any further ado.

[7] Simultaneously with the record, he caused to be filed a Notice of Application. The Notice does not, on the face of it, state what purpose it was to achieve. Presumably, it might have been intended to be an application for the condonation of the late filing of the record and heads of argument under the wings of Rule 17.

[8] Astonishingly, no heads of argument have been filed by the appellant on the issue of condonation and late filing of the record. It was only in the month of October that his heads were filed, but this has caused the respondents considerable apprehension. The contents of advocate

Maziya's heads of arguments are exclusively focussed on the merits of the appeal itself. It then caused the respondents to react by the unnecessary precaution and filing of Heads and Authorities, on the apprehension that the merits might be argued at the same time as the preliminary issue of condonation.

[9] At commencement of the hearing before us, advocate Maziya initially wanted to have the matter "deferred" to a later date in the current session, in order to prepare for argument on the condonation application, and possibly to file his Heads and Authorities. At this time, there are very few remaining court days prior to the end of the current session. It transpired that he did not even know about the application filed on the 6th June 2023 until "…two or three weeks after we filed heads…" which was done on the 5th October, again far too late to comply with time limits under the rules, unless condoned.

[10] All that the appellant has before this Court to consider whether the late filing of the record is to be condoned or not, is his application of the 16th June. It purports to be supported by an affidavit of his former instructed attorney. In passing, it is noted that this attorney did not file a Notice of Withdrawal as Attorneys of Record. I quote "extensively" from it, more than one half of its wording: -

> "3. We were however unable to file the record of proceedings on time. Among other causes, my ill health, the unavailability of the appellant at times and the belief that we were still on time caused the delay.

We humbly apologise for the delay and pray for the condonation for late filing and extension of the time.

4. The respondents suffer no prejudice with view of the fact that the record was served less than two weeks late. Also, the session for appeals has not yet begun".

[11] From all the motivational speeches and explanations filed in this jurisdiction to seek condonation for late filing of papers, this one sticks out like a very sore thumb. Its brevity is remarkable, so is the lack of details and explanations. It is utterly devoid of the rationale behind it and it certainly does not persuade any favourable conclusion from its mediocre contents.

[12] This jurisdiction labours under numerous condonation applications. More often than not, matters on appeal have the focus moved away from the merits of appeal, and instead embark on laborious and tedious evaluation of applications to condone the non-compliance with the rules of court. It comes with an additional burden of costs, time and frustration to the parties whose appeals are not heard on the allocated dates. Consequently, there are numerous reported judgments of this court wherein this very same matter is addressed. Multiple warnings of adverse costs orders have apparently fallen on deaf ears. I do not propose to collate and deal with the authorities at any length, but only briefly refer to it.

[13] Rule 17 provides as follows, in its present but long established form:

"Condonation.

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".

[14] In the Supreme Court case of Johannes Hlatshwayo v Swaziland Development and Savings Bank, Case No. 21/2016 at paragraph 7, the requirements apposite to this issue are aptly summarised thus:

"It required to be stressed that the whole purpose behind Rule 17 of the Rules of this Court on condonation is to enable the court to gauge such factors as (1) the degree of delay involved in the matter, (2) the adequacy of the reasons given for the delay, (3) the prospects of success on appeal and (4) the respondent's interest in the finality of the matter".

[15] It must be noted that the record is required to be prepared and filed with the Registrar within two months of the date of noting the appeal. The appellant did not comply, hence his attempt at obtaining condonation. Failure to do so may well lead to a finding that the appeal shall be deemed to have been abandoned (see Rule 30(4).

[16] Importantly, however much the relevant factors are intertwined with each other, the ultimate object of the exercise is to have the merits of the proposed appeal to be favourably adjudicated by the court. Paramount is an evaluation of the chances that in law, there is a reasonable chance that

the appellant could possibly be favoured with a judgment as he wanted all along. Otherwise put, the prospects of success on appeal takes a lion's share of consideration: meritoriously demonstrated prospects of success can elevate the other factors to a great extent. The contrary is also true. In Court, and having had to argue his client's case without the benefit of Heads of Argument, authorities or even diligent preparation, counsel had to choose between a rock and a hard place: to have the appeal deemed as abandoned under Rule 30(4) and quite possibly have it dismissed as well (see Cleopas Sipho Dlamini vs Cynthia Mpho Dlamini (65/2018) [2019] SZSC 48 where it was held that "...if an appeal is deemed to be abandoned it has the same effect of it having been dismissed", or to have it struck off the roll. This option would then leave the door open for litigation afresh, if so advised. It could also be that leave of the court is obtained to re-instate the matter.

[17] In a nutshell, the requirements to obtain an indulgence by the Court to condone the late filing of papers, as has been adumbrated in numerous judgements by this Court, have been concisely abstracted by His Lordship, the Hon. Dr Justice BJ Odoki in Nokuthula Mthembu and Four others vs Ministry of Housing and Another (94/2017) [2018] SZSC 15 (30/05/2018) as follows:

a) That as soon as a party becomes aware of non-compliance with the Rules, she or he must immediately take steps to remedy such by way of application;
b) That in such an application the Applicant must provide a reasonable explanation for default;
c) That in the application the Applicant must demonstrate good prospects of success; and

d) That the Court in granting or denying the relief sought ought to consider prejudice likely to be suffered by the innocent party and the importance of the case.

[18] *In casu*, the Court is left in the dark and must speculate for itself as to just what exactly the degree of delay is. As said above, it is known when judgment was handed down *a quo*, and also when the appeal was noted, but the applicant fails to confess or openly disclose as to just when the *dies* to file have expired, according to himself, and when did he become aware of the impeding or present time limits, or to show how long he took to deal with the mistake or oversight or adverse situation.

[20] The reasons for delay were hardly even perfunctory dealt with. We appreciate sensitivities surrounding personal medical information which are made public, even if furnished by order of a competent court, but the applicant is merely referring to "my ill health". No more than just that. If he wanted to keep his own medical information private and confidential, at least he could have said so. He does not.

[21] I cannot fathom the extent of just what this court would now be enjoined to do – to guess or speculate as to what is to be understood by "my ill health"? How serious, acute or chronic is it? How long has this condition existed? Curable or not? Does it adversely impact on the professional career of a lawyer? And so on.

[22] The appellant himself was said to be unavailable "at times". It is akin to "as wide as the sky". How often and at what times was he unavailable? Was he in or out of the country? How was he sought to be contacted? And so forth.

[23] But the invisible jewel in the crown remains the "Prospects of Success".

This concept was entirely obliterated from the vocabulary of the deponent to the application. With no mention having been made about the prospects of succeeding in his appeal by the applicant at all, his counsel had the audacity to lecture this court on the subject. *Inter alia,* it was suggested that it falls onto the members of the court to scrutinise the record and elsewhere, then to see for itself that there are indeed good chances to successfully prosecute the appeal!

[24] This Court is duty bound to follow the dictates of law itself, inclusive of *stare decisis*. We do follow and apply legal precedent. An applicant for condonation must persuade the bench to indulge him, to condone a mistake, oversight, mishap or whatever. Lay litigants by necessity have to rely upon advice by legal counsel, officers of the court. However, they cannot always hide behind the ineptitude of counsel. It is nothing new.

[25] In conclusion, I yet again refer to the sage words of Steyn CJ (Ogilvie Thompson JA Holmes JA Wessels JA and Van Winsen AJA concurring) as long ago as 1965 and referred to in a host of local cases, where in Salojee and Another NNO v. Minister Community Development 1965 (2) SA 135

(A), making reference to Regal v African Superslate (Pty) Ltd., 1962 (3) SA 18 (AD) at p.23, he said that:

> "There is limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstance of the failure are".

[26] In view of the entire inadequacy of the attempt to obtain condonation, further fortified by the persuasive argument as presented by counsel for the involved respondents, there is no choice other than to dismiss the application filed on the 16th June 2023.

[27] It is my considered view that the appellant shall not be condoned for the late filing of the Record on appeal.

[28] Consequently, I would order that the appeal be struck off the roll with costs in favour of the second and third respondents. It is further ordered that the appeal shall not be re-instated without leave of the Court. It is also ordered that no costs arising from this appeal shall be borne by the Estate herein.

JP ANNANDALE
Justice of Appeal

I agree

MJ DLAMINI JA
Justice of Appeal

I agree

MJ MANZINI AJA
Justice of Appeal

For the Appellants: Adv. L Maziya, instructed by Nzima and Associates.

For the First Respondent: Mr T. Hlanze, G.Reid Attorneys.

For the Second Respondent: Mr M Magagula