# THE SUPREME COURT OF SWAZILAND

## RULING

**CIVIL CASE NO.: 64/2015**

In the matter between:

**MVUSELELO FAKUDZE** **APPELLANT**

**AND**

**MILLICENT NOMALUNGELO FAKUDZE**
**(NEE NGWEKAZI)** **RESPONDENT**

**Neutral Citation:** *Mvuselelo Fakudze v Millicent Nomalungelo Fakudze (nee Ngwekazi) (64/2015) [2016] SZSC 69 (30th June 2016)*

**CORAM**: **K. M. NXUMALO**
**Z. MAGAGULA**
**M. LANGWENYA**

Heard: **17th May 2016**

Delivered: **30th June 2016**

Summary: *Civil procedure - application for condonation for late filing of the record – notice of appeal not served on the Respondent's attorneys – no application for extension of the application for condonation of late service of the Heads of Argument – best interest of minor children takes precedence to violation of rules if there are good prospects of success on appeal – costs a thorny issue – application for condonation granted – costs to be costs in the appeal.*

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**RULING**

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**K. M. NXUMALO A.J.A**

[1] This is an application for condonation supplemented by a further notice of condonation in terms of which the Appellant is seeking:

1.1 condonation for late filing of the record of appeal;

1.2 the late filing of the notice of appeal on Respondent's Attorneys

1.3 granting the Appellant leave to file the record; and

1.4 costs against the Respondent only if the matter is opposed.

The application for condonation is vigorously opposed by the Respondent.

## BACKGROUND

[2] The Appellant has filed has an appeal against a judgment issued on the 30th September 2015 by the *court a quo*. The judgment arises out of an action instructed by the Respondent against the Appellant for an order declaring that the marriage between the parties solemnized in terms of Swazi law and customs was still in subsistence. The action was instituted after the Appellant and his family had terminated the marriage in terms of the process of Swazi law and custom which had been done in December 2006. The *court a quo* found in favour of the Appellant in so far as the *court a quo* ordered the marriage between the parties had been lawfully dissolved in accordance with Swazi law and custom. The *court a quo* awarded custody of the minor children of the marriage to the Respondent with the Appellant granted reasonable access to the minor children during school holidays. The Appellant was ordered to pay all school related expenses in respect of the minor children, an amount of E2,000-00 per month for the medical aid of the two children and E10,000-00 to cover the reasonable

accommodation, groceries, clothing and other necessities for the minor children. It is against this latter part of the judgment that the Appellant is appealing.

[3] The Appellant noted the appeal with the Registrar of the High Court on the 29th October 2015. The judgment that is appealed against is a judgment which was delivered on 30th September 2015. The Notice of Appeal was timeously lodged and issued out by the Registrar of the above Honourable Court within the four week period provided for. Appellant's attorneys mistakenly omitted to serve the notice of appeal on the Respondent's attorneys. Appellant avers that the non service was an oversight on the part of the Appellant's attorneys.

[4] In terms of the rules, the Appellant should have prepared and filed the record within two months of the date of noting the appeal. The Appellant submits that the filing of the record timeously not possible due to circumstances beyond his control being:-

4.1 Appellant's attorneys could only transcribe the record with assistance of transcribers of the High Court. However, this was

not possible because dates and information from 2013 to 2014 was not available on the hard drive on the recording system.

4.2 Retrieving the information from the hard drive was unsuccessful. Appellant's attorneys resorted to transcribing the record from the Judge's notes.

4.3 The Record for the appeal was only lodged with the Registrar of the above Honourable Court on 29 April 2016.

4.4 The Appellant desired that counsel be involved in the appeal and also in the application for condonation. The Counsel who was identified was reluctant to get involved without having read the Record.

4.5 At that time the Appellant's Attorneys were not in possession of the of the record and when they secured a consultation with the Counsel it was just to go through documents in hand and discuss the case in general. The Appellant's Attorneys were

only able to forward the record to the Counsel on the 29th April 2016.

4.6 Counsel had other court engagements and could only attend to the matter on the 5th and 6 May 2016 when he prepared the Heads of Argument.

4.7 The Heads of Argument were received from the Counsel on the 09 May 2016, and were issued out of the Registrar's office and served on the Respondent.

4.8 In the light of the above facts, the Appellant request the Honourable Court to grant the amendment to the Notice of Condonation, condone the late filing of the record and accept the late filing of the record and the Heads of Argument.

[5] The Appellant submits that Respondent will not suffer any prejudice if condonation is granted and advances the following reasons:-

5.1 the matter has a long history between the parties;

5.2 problems encountered to transcribe is a problem that is encountered by any party faced with the task of preparing the record and cannot be avoided;

5.3 the delay of the record would not severely handicap the Respondent to deal with the merits of the appeal.

[6] On the prospects of success on appeal, Appellant submits that:-

6.1 the socio-economic report clearly shows that the best interest of the children would be best served if custody is awarded to him;

6.2 the socio-economic report does not take into account amongst other factors, the wishes of the children, means of support, failure to account for maintenance money by the Respondent, and as such not taken into consideration by the *court a quo*;

6.3 the Respondent has been absolved from her legal duty to contribute towards the maintenance and school fees of the children without any legal basis;

6.4 Appellant is ordered to pay costs for the whole action despite the fact that Appellant won the main action;

6.5 determination of maintenance was not based on any evidence led before the *court a quo*.

[7] In the answering affidavit the Respondent made the following submissions before answering the allegation made by the Appellant:

7.1 The main relief sought by the appellant is, condonation for late filing of the record of appeal, and not condonation for failing to note the appeal within the allowed time periods. The notice of appeal has not been served on her nor on her attorneys. The notice of appeal was only served through attorneys of the Respondent on or about the 5th of April 2016, approximately 7 (seven) months from the date of judgment.

7.2 The relief sought by the Appellant is incompetent of being granted because the appeal lapsed at the end of the 4 (four) week period from the date of the delivery of judgment. Before the court condones the late filing of the record of appeal, it must

first condone the late noting of the appeal. Therefore, the court is not in a position to grant such relief when it has not been called upon to do so.

7.3 The Appellant has failed to present a compelling case so to allow the court to grant the condonation sought. All the factors which prevented the Appellant from abiding with the timelines were all occasioned by the Appellant's negligence and the negligence of his Attorneys.

[8] In response to the allegations made by the Appellant in his affidavit the Respondent states that:

8.1 The evidence in support of the rule 43 maintenance was already before court, and the court could not have disregarded it. The evidence was presented before court, in relation to the same parties, for the maintenance of the very same children whose custody was in contention. The appellant's insinuation that the evidence relating to rule 43 application should not have been considered is mischievous.

8.2 The *court a quo* had every power to order that a social report be compiled and the attorneys file supplementary heads of argument. It therefore follows that when the judgment was arrived at the *court a quo* had taken the socio-economic report into account.

8.3 By the Appellant's own admission, the failure to comply with the requisite timelines in noting of the appeal was occasioned by the negligence of the Appellant or that of his attorneys.

8.4 The process of noting an appeal is only completed once the notice of appeal has been signed and stamped by the Registrar of the Supreme Court, served on the Respondent all within the requisite four weeks. The appellant has not even prayed for the condonation of the late noting of the appeal.

8.5 On or about 6th December 2015, a meeting was convened at the appellant's attorneys' offices. The purpose of the meeting was to discuss the judgment of the *court a quo*, among of which the issue of costs was discussed, since the appellant holds the view that he should not be made to pay the full costs of the matter

since the judgment was partially in his favour. At this meeting the Appellant failed to mention its intention to appeal although the Appellant was out of time to do so.

8.6 The appellant's contention that, the notice of appeal was mistakenly not served by their messenger is devoid of the truth.

8.7 If the noting of the appeal was raised during the meeting of the 6th of December 2015, the difficulty of the record would also have been raised and the Appellant's Attorneys would have realised that the notice of appeal had not been served on the Respondent's Attorneys.

8.8 The appellant deliberately omitted to serve the notice of appeal because he realized that there were no or very minimal prospects of success in the appeal.

8.9 The failure to file the record of appeal within the two months entitles the Respondent to regard the appeal abandoned.

[9] The Respondent denies that granting of the condonation will not cause her any prejudice and states that the prejudice which the

Respondent will suffer is that the matter will be unnecessarily be dragged thereby preventing the Respondent from enforcing her rights.

[10] The Respondent raises other issues which are relevant to the merits but not to application for condonation.

[11] Respondent submits that the court should dismiss the appellant's condonation application with an order of costs at a punitive scale. The court should severely punish the appellant for taking the court system for a joyride, by failing to abide by the rules of the court and further, abusing the court process by applying for condonation where no prospects of success exists both for the condonation application and the appeal.

[12] In this fiercely contested matter the Appellant has replied to the Respondent's answering disputing the allegations of the Respondent and raising issues relating to the merits but not very relevant to the application for condonation.

[13] The Appellant reiterated the contents of his Founding Affidavit in particular that there is no prejudice that will be suffered by the Respondent if the Orders sought in the Application are granted.

[14] The Appellant disputes that there is legal basis for an Order for punitive costs against the Appellant who has clearly demonstrated that the appeal in question was noted and or registered in time and the delay in filing the record was due to circumstances beyond my control.

[15] The Appellant reiterated that it has high prospects of success in the appeal due to the misdirections of the *Court a quo* relating to the issues of custody, legal costs and maintenance.

[16] The next question to be decided is whether the Appellant has shown good cause or sufficient cause to be excused or granted condonation for non compliance with the Rules. In terms of rule 17 and section 146 (3) of the Constitution the Supreme Court has inherent jurisdiction to condone non compliance with time limits and / or non compliance with the rules.

[17] The rules with which the Appellant has not complied with are:-

17.1 Rule 8 (1) which provides that:

*"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 date of delivery of such written judgment."*

17.2 *In casu* the judgment against which the appeal is filed was delivered by the High Court on 30th September 2015. The notice of appeal was served and issued out by the Registrar on the 29th October 2015 well within the four week period stipulated by the rule. However, the notice was "mistakenly not served upon the Respondent's Attorneys." Such none service was an oversight on the part of the messengers of the Appellant's Attorney. The Appellants Attorneys have not given the circumstances that led to the oversight of service of the notice of appeal. The Appellant's Attorney contend themselves with an affidavit confirming the Appellant's statement and regard this as having "*fully dealt with the reason for not having served the notice of appeal on the Respondent's Attorneys*." There is no affidavit or explanation from the messenger of the

Appellant's Attorneys. I do not consider this to be "something which entitles him to ask for the indulgence to the court" referred to by **Innes JA** in **Cairns v Gaarn 1912 AD** at page **181** who quotes with approval the words of **Cotton L.J**. in re **Manchester Economic Building Society (24 Ch. D at 498**). In my considered judgment the conduct of the Appellant's Attorneys constitutes negligence.

17.3 Rule 30 (1) which reads:

> "*The appellant shall prepare the record on appeal in accordance with sub-rules (5) and (6) and shall within 2 months of the date of noting of the appeal lodge a copy thereof with the Registrar of the High Court for certification as correct*."

17.4 The Appellant has given an explanation that this was not possible because of non unavailability of the information of the record from the hard drive of the recording system. The transcriber failed because she was waiting for a technician. The Appellant's Attorneys eventually transcribed the record from the Judge's notes. The record was eventually lodged with the

Registrar and served on the Respondent's Attorneys on the 29th April 2016. This was five (5) months from the date of judgment. The malfunction of the recording system seems to be a frequent problem which affects the transcription of many cases. I find that this amounts to circumstances beyond the control of the Appellant. I do not agree with the submission of the Respondent that the Appellant has failed to present a compelling case, to demonstrate that there were prevailing external circumstances and that failure to comply was occasioned by negligence. However, the conduct of the Appellant is not without blemish in so far as when he was in this predicament the Appellant failed to notify the Respondent of the challenges he was exonerating. This was even more important in the light of the oversight of the messenger of the Appellant's Attorneys to serve the notice of appeal on the Respondent.

17.5 Rule 16 which states that:

> *"16.1 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 of appeal may if he thinks fit refer the application to the Court of Appeal for decision.”*

16.2 *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 ground of appeal which prima facie show good cause for leave to be granted*.”

17.6 In his affidavit the Appellant has not addressed the failure to utilize this provision. The Appellant contends himself bymoving the condonation application albeit very late to avoid the formation of an impression that “*the appeal has been abandoned*”. The Appellant failed to deal with this omission on its Heads of Argument. Even the Appellant’s counsel failed to explain why the Appellant failed to avail itself of the provisions of this rule

17.7 Rule 31 (1) which states:

*"31.1 In every civil appeal and in every criminal appeal the appellant shall, not later than 28 days before the hearing of the appeal, file with the Registrar six copies of the main heads of argument to be presented on appeal, together with a list of the main authorities to be quoted in support of each head."*

17.8 The failure to comply with this rule is attributed to the involvement of Appellant's counsel who:-

(i) could not draft the Heads of Argument without having read the record;

(ii) could not be consulted until the 27th April 2016 although the record was then available; and

(iii) had other engagements and could not deal with the matter of the Appellant until the 5th and 6th May 2016.

17.9 In its Heads of Argument the Counsel of the Appellant does not address the failure to comply with this rule. This is a case where the conduct of the legal advisers of a litigant are to blame. I have referred to **Louw v Louw 1965 (3) SA 750**

which quotes with approval a statement in the case of **Saloojee and Another NN.O. v Minister of Community Development 1965 (2) S. A. 135 AD** to the effect that "*the court is reluctant to penalize a litigant on account of the conduct of his legal advisors and would therefore give an application for condonation more favourable consideration if there is a strong prospect of success on appeal.*" This statement is confirmed in the appeal of **Louw v Louw 1965 (2) SA** at **854 A**.

17.10 Rule 30 (4) which provides that:

> "*30 (4) Subject to rule 16 (1) if an appellant fail 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.*"

17.11 In **Tasty Treats (Pty) Ltd t/a T.T. Trusscon v K. S. Distributors (Pty) Ltd t/a Build Plus Hardware Civil Appeal No.34/2013**, **Ota JA** dealing with condonation states on paragraph 24 and 25 states:

*"24. The consequences of failure to file the record of appeal in terms of Rule 30 (1) and failure to invoke Rule 16 (1) for an extension of time within which to file same, flow from the uncompromising language of Rule 30 (4) which is as follows:*

> *'**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 <u>appeal shall be deemed to have been abandoned</u>**.'*

*25. It seems to me from the aforegoing, that in the face of the obvious shortcomings of this "**appeal**" in terms of the time limits set by the Rules regarding its record, the Respondent was well within its rights to launch the application of the 28th of October 2013 for an order declaring the appeal abandoned, a dismissal of same, as well as costs."*

[18] The Appellant has made a good submissions on the merits of the appeal based on:

1) the court order calling on the socio-economic report on 2nd October 2014

2) the *court a quo* allowing the amended summons dated September 2014'

3) the *court a quo* failed to take into account charged circumstances like eldest son on his own volition decided to come and stay permanently with the Appellant when he is not in boarding school;

4) the *court a quo* failed to consider the dicta in the case of **McCall v McCall 1994 (3) S.A. 201** and other cases on the best interest of a child. **King J** in the case of **McCall v McCall 1994 (3) S.A. 201 CPD at 204-205** had this to say with regard to custody.

> *"In determining what is in the best interest of the child, the Court must decide which of the parents is better able to promote and ensure his physical, moral, emotional and spiritual welfare. This can be assessed by reference to certain factors or criteria which are set out hereunder, not in order of importance, and also bearing in mind that there is a measure of unavoidable overlapping and that*

*some of the listed criteria may differ only as to nuance. The criteria are the following:*

a) *The love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;*

b) *The capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;*

c) *The ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings;*

d) *The capacity and disposition of the parent to give the child the guidance which he requires;*

e) *The ability of the parent to provide for the basic physical needs of the child, the so-called 'creatue comforts', such as food, clothing, housing and the other material needs – generally speaking, the provisions of economic security;*

f) *The ability of the parent to provide for the educational well-being and security of the child, both religious and secular;*

g) *The ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;*

h) *The mental and physical health and moral fitness of the parents;*

i) *The stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status quo;*

j) *The desirability or otherwise of keeping siblings together;*

k) *The child's preference, if the court is satisfied that in the particular circumstances, the child's preferences should be taken into consideration;*

l) *The desirability or otherwise of applying the doctrine of same sex matching, particularly here, whether a boy of 12 (and Rowan is almost 12) should be placed in the custody of his father; and*

m) *Any other factor which is relevant to the particular case with which the court is concerned."*

5) the *court a quo* failed to consider the provision of section 200 and 2001 of the Children's Protection and Welfare Act No.6 of 2012. Section 200 and 2001 of the Children's Protection and Welfare Act provide the following:

*"200. (1) A parent, family member or any other person may apply to a Children's Court for custody of a child.*

*(2) A parent, family member or any other person may apply to a Children's Court for a periodic access to the child.*

*(3) The Children's Court shall consider the best interest of the child and the importance of*

*the child being with his mother when making an order for custody or access.*

*(4) Subject to subsection (3), a Children's Court shall also consider:-*

*a) the age of the child;*

*b) that it is preferable for a child to be with his parents except if his rights are persistently being abused by his parents;*

*c) the views of the child;*

*d) that it is desirable to keep siblings together;*

*e) the need for the continuity in the care and control of the child; and*

*f) any other matter that the Children's Court may consider relevant.*

*201. A non custodial parent in respect of whom an application is made to the Children's Court for an*

*order of parentage or custody under this Part shall have access to the child who is the subject of the parentage or custody order."*

[19] In my considered opinion it is not the merits of appeal or the prospects of success on appeal that should be considered in matters of children. It is the best interest of the children as laid out in the judgments of relevant cases and the spirit behind the Children's Protection and Welfare Act that should, if prime consideration. The concept of the best interest of children is very dynamic. The children are constantly growing not just in age but also in education. The environment of the children has been changed by the parents who brought them into this world who have now decided to separate. The children have to chose between the parent which is not an easy exercise for a young mind to do. The situation of the parents is not stagnant but also dynamic as their individual social, professional and economical situations which are also changing. In this volatile situation the court as upper guardian of interests of children should avail itself of every opportunity to examine and determine the best interest of the children.

[20] I have considered the very persuasive authorities relevant to condonation application and the factors to be taken into account in exercising the desertion whether or not to grant the condonation. I am of the view that whilst in other cases the condonation could justifiably be refused however in the case of children the best interest of the children should take precedence. The Court should seize every opportunity to examine and determine whether the best interest of children are catered for in the light of what is said in the case of **McCall v McCall** above and the provisions of sections 200 and 201 of the Children's Protection and Welfare Act.

[21] The Respondent in its Heads of Argument has argued very strongly that the Appellant should pay costs on a punitive scale for the late filing of the record, failure to apply for extension and to serve the notice of appeal on the Respondent. The question of costs is a thorny issue to both parties. I consider that there should be no order as to costs and the costs be costs of the appeal.

[22] For the aforegoing reasons it is ordered as follows:

1. The application for condonation for late filing of the record of appeal, the late filing of the notice of appeal on Respondent's Attorneys and the Heads of Argument is allowed;

2. There is no order as to costs, the costs to be costs of the appeal;

**K. M. NXUMALO**
**ACTNG JUDGE OF APPEAL**

I agree

**Z. MAGAGULA**
**ACTNG JUDGE OF APPEAL**

I agree

**M. LANGWENYA**
**ACTING JUDGE OF APPEAL**

For the Appellant: **Mr. S. Dlamini**

For the Respondent: **Mr. S. Masuku**