



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: MTHATHA]**

CASE NO. 524/2011

In the matter between:

PUMELELE NTABA

Appellant

and

THE PREMIER: EASTERN CAPE PROVINCE

1st Respondent

**MEC FOR LOCAL GOVERNMENT AND
TRADITIONAL AFFAIRS**

2nd Respondent

**SUPERINTENDANT GENERAL FOR LOCAL
GOVERNMENT AND TRADITIONAL AFFAIRS**

3rd Respondent

**AMAMPONDOMISE ASENTSHONALANGA TRIBAL
AUTHORITY**

4th Respondent

EMBOLAND REGIONAL AUTHORITY

5th Respondent

JUDGMENT

JOLWANA J:

Introduction.

[1] This appeal concerns the court *a quo*'s dismissal of an application for the rescission of an order granted in favour of the fourth respondent which was an applicant in those proceedings in circumstances in which the appellant was not cited. He contends that he ought to have been cited as the effect of the order concerned was to take away his existing rights as a chief and head of the Ngxaza Hlubi Traditional Council which was similarly not cited. The order sought to be rescinded also resulted in the disestablishment of the Ngxaza Hlubi Traditional Council. However, the consideration and determination of the merits of the appeal hinge on the two condonation applications filed by the appellant relating to certain procedural aspects of the appeal. If the condonation applications do not succeed, the issues relating to the merits of the appeal may very well become moot. The converse also holds true in that if the appellant succeeds in the condonation applications, the merits of the appeal will have to be determined.

The impugned court order.

[2] The order that was sought to be rescinded is dated 14 July 2011 and the operative part thereof reads as follows:

- “1. The 1st Respondent's decision to disestablish and re-establish applicant's traditional council and establish a new traditional council called Ngxaza Hlubi Traditional Council, is hereby reviewed and set aside as a nullity and have no force and effect;
2. The purported Government Gazette No. 2336 issued by the 1st respondent on 25 March 2011 is hereby declared invalid and set aside as a nullity;
3. The 1st and 2nd respondents pay costs of this application jointly and severally, the one paying the other to be absolved from liability.”

[3] In or about March 2012 the appellant as applicant, launched an application seeking an order for the rescission of the above mentioned court order. The court *a quo* dismissed the said application hence this appeal.

The first condonation application.

[4] The appellant has applied for the condonation of his late filing of the power of attorney and security for costs as well as his failure to apply for a date of hearing within 60 days of the granting of the application for leave to appeal (the first condonation application). In his founding affidavit the appellant explains that he was required to file a power of attorney and security for costs. He further explains that he failed to file an application for a date of hearing within 60 days of the granting of the application for leave to appeal and was ultimately late in his prosecution of this appeal.

[5] The chronology of events that the appellant gives in his founding affidavit is the following. On 26 March 2012 he launched the rescission application seeking an order that the court order dated 14 July 2011 be rescinded. The rescission application was dismissed by means of an *ex tempore* order on 24 April 2014. He then requested his erstwhile attorneys to apply for reasons for the dismissal of his application. Those reasons were however, only furnished on 19 July 2018.

[6] Having been furnished with the reasons for judgment on 19 July 2018, the appellant does not indicate when he made an application for leave to appeal. It is therefore unclear at least in his founding affidavit when the application for leave to appeal was filed. However, it appears to have been served on the respondents on 9 September 2019 if regard is had to the service date stamp. This is more than a year from the date on which the reasons for the judgment or order were delivered. It

appears from the leave to appeal judgment that the application for leave to appeal was filed late together with an application for the condonation of its late filing. The matter was thereafter enrolled for hearing on 11 December 2019. That application for condonation and the application for leave to appeal were granted on 30 July 2020.

[7] Consequent upon the leave to appeal being granted, the appellant consulted with Mr Vika from the offices of the appellant's current attorneys of record who was handling this matter. He was told by Mr Vika that in order for him to prosecute the appeal he would need a transcribed record of the proceedings of the court *a quo*. In this regard it appears that a lot of correspondence was exchanged between appellant's attorneys and the transcribing company, Inlexso from about December 2020 concerning the transcription of those records. That correspondence went as far as Mr Kroqwana, who is said to be a senior official in the Department of Justice and Correctional Services, to no avail. The last of all that correspondence is an email from Mr Mhlana, a candidate attorney in the appellant's attorneys' offices, which is dated 8 March 2022. Attached to the said email is a letter also dated 8 March 2022 which is the letter addressed to Mr Kroqwana. That letter appears to have been signed by Mr Zilwa.

[8] The appellant explains that it was this process of seeking the transcribed records that consumed a lot of time and thus constituted the delay in prosecuting the appeal. He says that every time he would make a follow up with his attorneys, he would be told by Mr Vika that the transcription company was experiencing problems in retrieving court records dating back to 2014. Unfortunately, Mr Vika sadly passed away at the end of 2022 which led to the matter being taken up with Mr Zilwa, the director in the appellant's firm of attorneys. Mr Zilwa considered the matter and

realized that in fact there was no need for transcribed records. The appellant says that it was in February 2023 that Mr Zilwa got personally involved in the handling of this matter which was after the passing of Mr Vika. By this time a lot of delay had already occurred. Mr Zilwa perused the appellant's file and discovered further procedural irregularities. These were that the power of attorney, security for costs and an application for a date of hearing had not been filed.

[9] The above is more or less the sum total of the appellant's explanation for the delay contained in the first condonation application which, in its simplest formulation is that the late Mr Vika wasted a lot of time in pursuit of transcribed records which were not even necessary and failed to file a power of attorney, security for costs and to timeously apply for a date for the hearing of the appeal. I may mention, even if parenthetically, that in the condonation application there is no reference to any Rule of Court and the period provided for in any such rule for taking those procedural steps. No reference is made to the amount of the delay with reference to the required period and therefore an attempt being made to explain the extent of the delay. The court is left to its own devices to figure out the extent of the delay reckoned from a date which again the court must do its own calculations from the information that is provided. This matters because the extent of the delay is obviously an important consideration.

The second condonation application.

[10] This brings me to the second condonation application. This application was filed on 11 July 2023. In it the appellant seeks condonation for his late delivery of the notice of appeal, the revival and reinstatement of the appeal, the condonation for his late delivery of the replying affidavit to the first application for condonation and lastly,

condonation for the late delivery of the appeal record. It appears that just about everything was not done timeously. In the second condonation application the appellant says that the reasons for the late delivery of the notice of appeal are related to the reasons adumbrated in the first condonation application.

[11] He goes further to say that the main reason is that Mr Vika passed away and with his passing no one is able to give any better explanation for the delay to the extent that Mr Vika could have done if he was alive. He then requests that this Court, in considering the second condonation application, should have regard to the first one and read the appellant's contentions in that application as if they are traversed in the second condonation application. He explains that the late delivery of the record has been explained in his replying affidavit and therefore regard is to be had to his replying affidavit in that regard. The above is more or less the appellant's explanation to the extent that any is contained in the second condonation application.

[12] This now brings me to the replying affidavit in respect of the first condonation application. Other than denials and legal submissions, the replying affidavit does not add anything by way of an explanation save for the obvious reference to the unfortunate demise of Mr Vika which seems to be blamed at every turn. Nothing is said about why the replying affidavit itself in respect of the first condonation application was not filed timeously. The rule of thumb is that all the prayers sought in the notice of motion must be supported by factual averments contained in an affidavit. Glaringly, any mention of condonation in respect of the replying affidavit to the first application for condonation is made only once and that is in the notice of motion to the second condonation application. Nothing is said about the replying affidavit to the first condonation application by the appellant himself. Mr Zilwa who

deposed to the supporting affidavit in the condonation application does not deal with it either. Even in the replying affidavit to the second condonation application, nothing is said about the appellant's condonation application for the late filing of the appellant's replying affidavit in respect of the first condonation application which is foreshadowed in the notice of motion. I do not know how it is possible to grant the appellant's condonation application for his late filing of the replying affidavit, absent an explanation in an affidavit.

[13] In respect of the condonation application for the late delivery of the notice of appeal, foreshadowed in the notice of motion in respect of the second condonation application, nothing is said about it in the founding affidavit of the appellant. There is therefore no explanation for its lateness beyond an indication that the appellant is also applying for its condonation. This is of course save for reference to Mr Vika's passing. The condonation applications can best be described as being bereft of any serious attempt by the appellant or any of the deponents to the supporting affidavits and confirmatory affidavits, to give any meaningful explanation for any of the non-compliances with the Rules of Court. This of course, other than referring to Mr Vika's passing and a suggestion that nothing better, by way of an explanation could be done in light of Mr Vika's untimely passing on.

The passing on of Mr Vika.

[14] Blaming any and everything on Mr Vika's passing appears to be extremely disingenuous as will become apparent hereinbelow. The theme in all the appellant's affidavits and the supporting and confirmatory affidavits is the misleading, if not fallacious idea that all that needed to be explained can simply be explained away with reference to the unfortunate passing of Mr Vika. Assuming that indeed that was

the case, the appellant does not say when Mr Vika passed away, nor does he say he does not know beyond saying that he passed away at the end of last year, whatever that means. Mr Mhlana, a candidate attorney at the appellant's firm of attorneys, like the appellant, does not say when Mr Vika passed away in his confirmatory affidavit. He also contents himself with saying that Mr Vika passed away at the end of last year.

[15] Mr Mhlana further says that the folly of the transcribed records being required for the purposes of the appeal which was Mr Vika's understanding which he says he also shared was only discovered after the file was brought to the attention of Mr Zilwa after the passing of Mr Vika. It was then that Mr Zilwa corrected that wrong impression that records were required. Most importantly, Mr Mhlana also does not indicate the date on which his own colleague, Mr Vika passed on. However, in his replying affidavit to the second condonation application, the appellant indicates that *"For what it is worth I should place it on record that Mr Vika passed away in October 2022."* This, only after the issue of the date of Mr Vika's passing is raised by the fourth respondent in its answering affidavit.

[16] I find it breath taking that the date on which Mr Vika passed away is stated for "what it is worth". I would have thought that those details are worth everything because the appellant's case on condonation is that all of the delay was occasioned by Mr Vika's procedural ineptitude and all of it had nothing to do with the appellant or anybody else. I also find it interesting that the appellant dismissively refers to Mr Vika's passing as having been published within the legal fraternity and that his passing is not in dispute. The appellant misses a very significant point. That point is totally unrelated to the attitude of the fourth respondent regarding Mr Vika's passing. That point is that if he is going to rely on Mr Vika's passing, he must then give all the

important details about it. Precisely for that reason, it was incumbent upon the appellant to give more details about the date on which Mr Vika passed and what happened subsequent to his passing. This is because his is an application for condonation for procedural non-compliances for which the blame is placed at the door of Mr Vika who unfortunately cannot speak for himself. This is more so that it is also the appellant's case that for the delay, he cannot do any better by way of an explanation as Mr Vika is not available to give a more insightful explanation as much as Mr Vika would have done.

[17] The appellant has a duty to explain, account and provide a proper and full explanation for the delay in respect of both the periods during which the matter was said to be solely handled by Mr Vika as well as for the periods starting immediately after his passing. Surprisingly, there is not even an attempt to deal with the period during which Mr Vika was no longer in the picture after he passed on. Rule 49 of the Uniform Rules of Court makes some detailed provisions about the process that must be followed by a litigant who desires to pursue an appeal. I deal with some of its provisions hereunder.

Rule 49.

[18] Rule 49 (1) (a)¹ provides that when leave to appeal is required, it may be requested at the time of the judgment or order. However, Rule 49 (1) (b) provides for a situation such as in this matter where leave to appeal was not requested on 14 July 2011. In that situation an application for leave to appeal, where it is required, shall be made within fifteen days. That did not happen in this case. Nothing is said about that period in the appellant's condonation applications even by way of context

¹ Rule 49 in part reads:

- (1) (a) When leave to appeal is required, it may on a statement of the grounds therefor be requested at the time of the judgment or order.
- (b) When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within 15 days after the date of the order appealed against:
Provided that when the reasons or the full reasons for the court's order are given on a later date: provided further that the court may, upon good cause shown, extend the aforementioned periods of 15 days.
- (c) When in giving an order the court declares that the reasons for the order will be furnished to any of the parties on application, such application shall be delivered within 10 days after the date of the order.
- (d) The application mentioned in paragraph (b) above shall be set down on a date arranged by the registrar who shall give written notice thereof to the parties.
- (e) Such application shall be heard by the judge who presided at the trial or, if he is not available, by another judge of the division of which the said judge, when he so presided, was a member.
- (2) If leave to appeal to the full court is granted the notice of appeal shall be delivered to all the parties within 20 days after the date upon which leave was granted or within such longer period as may upon good cause shown be permitted.
- ...
- (6) (a) Within 60 days after delivery of a notice of appeal, an appellant shall make written application to the registrar of the division where the appeal is to be heard for a date for the hearing of such appeal and shall at the same time furnish him with his full residential address and the name and address of every other party to the appeal and if the appellant fails to do so a respondent may within 10 days after the expiry of the said period of 60 days, as in the case of the appellant, apply for the set down of the appeal or cross-appeal which he may have noted. If no such application is made by either party the appeal and cross-appeal shall be deemed to have lapsed: Provided that a respondent shall have the right to apply for an order for his wasted costs.
- (b) The court to which the appeal is made may, on application of the appellant or cross-appellant, and upon good cause shown, reinstate an appeal or cross-appeal which has lapsed.
- (7) (a) At the same time as the application for a date for the hearing of an appeal in terms of subrule (6) (a) of this rule the appellant shall file with the registrar three copies of the record on appeal and shall furnish two copies to the respondent. The registrar shall further be provided with a complete index and copies of all papers, documents and exhibits in the case, except formal and immaterial documents: Provided that such omissions shall be referred to in the said index. If the necessary copies of the record are not ready at that stage, the registrar may accept an application for a date of hearing without the necessary copies if-
 - (i) the application is accompanied by a written agreement between the parties that the copies of the record may be handed in late; or
 - (ii) failing such agreement, the appellant delivers an application together with an affidavit in which the reasons for his omission to hand in the copies of the record in time are set out and in which is indicated that an application for condonation of the omission will be made at the hearing of the appeal.

and background. It may be argued that that period did not matter anymore because ultimately an application for leave to appeal together with a condonation application were made before the court *a quo* which then granted them. I however, consider that period to be enlightening on how this matter has always been handled.

[19] If one has regard to the application for condonation for the late filing of the application for leave to appeal, the appellant explains that the *ex-tempore* judgment of Maseti AJ, was granted on 24 June 2014. However, the reasons therefor were only furnished to him more than four years later on 19 July 2018. There is a four year period that elapsed between the date of the order sought to be appealed against being granted and the furnishing of the reasons therefor. The appellant further explains that his then attorneys of record addressed letters to the Registrar of this Court requesting to be furnished with reasons for the judgment or order for purposes of launching an application for leave to appeal.

[20] It is rather concerning that appellant allowed a period of just over four years to elapse awaiting reasons for the judgment being content with his then attorneys of record writing letters to the registrar for four years. Interestingly, in his reasons for judgment, Maseti AJ says that those letters were simply never brought to his attention until about the beginning of July 2018 when the Judge President brought the matter to his attention and he promptly furnished his reasons on 19 July 2018. It is unclear what the appellant or his attorneys did when they were not getting the

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- (b) The two copies of the record to be served on the respondent shall be served at the same time as the filing of the aforementioned three copies with the registrar.
 - (c) After delivery of the copies of the record, the registrar of the court that is to hear the appeal or cross-appeal shall assign a date for the hearing of the appeal or for the application for condonation and appeal, as the case may be, and shall set the appeal down for hearing on the said date and shall give the parties at least 20 days' notice in writing of the date so assigned.
 - (d) If the party who applied for a date for the hearing of the appeal neglects or fails to file or deliver the said copies of the record within 40 days after the acceptance by the registrar of the application for a date of hearing in terms of subrule (7) (a) the other party may approach the court for an order that the application has lapsed.

reasons beyond writing letters to the registrar which evidently were not responded to. There is no indication of the matter having been escalated to the Judge President for his assistance until about July 2018.

[21] The reasons having been ultimately furnished to the appellant on 19 July 2018, the notice of application for leave to appeal was only filed together with a condonation application on 6 September 2019. Therefore, a period of more than a year elapsed between the furnishing of the reasons for the judgment by Maseti AJ and the actual filing of the notice of application for leave to appeal. The appellant's current attorneys of record filed a Notice of Acting on 9 January 2019. From that date until the 17 July 2019, a period of six months, it is unclear what they were doing during that entire period as it is not explained. Then on the 17 July 2019 they wrote a letter to the appellant's erstwhile attorneys in which they indicated that they were unsure whether an application for leave to appeal had been filed and requested that those attorneys, Nombambela Inc., should clarify.

[22] It took the appellant and his attorneys six months before they decided to do anything at all when it then dawned on them that they needed to write a letter and seek the clarification they said they needed from Nombambela Inc. What exactly was being done for six months is unclear. From July 2019 until the 6 September 2019 it appears that even more letters were written to Nombambela Inc. Only on 6 September 2019 was a notice of application for leave to appeal filed together with a condonation application for its late filing. It is unclear why the court file was not checked and the fourth respondent's attorneys were not asked for clarity regarding whether or not leave to appeal had been filed. Ultimately the application for leave to appeal and the application for the late filing of the application for leave to appeal

were heard on 11 December 2019 and judgment was only delivered on 30 July 2020 granting both applications.

[23] From the 30 July 2020 nothing happened until the 8 September 2020 when a notice of appeal was filed. This is more than a month (26 court days) from the date on which the application for leave to appeal was granted. When the notice of appeal was filed, it was not filed with a condonation application. In the notice of motion and the founding affidavit in respect of the first condonation application, the application for condonation for the late filing of the notice of appeal is conspicuous by its absence. Only when the fourth respondent's attorneys raised the issue of the late filing of the notice of appeal did the appellant deal with it by launching the second condonation application. The appellant only dealt with it in the replying affidavit in which he says that he cannot explain why the notice of appeal was not filed within 20 days as required by the rules because Mr Vika who handled the matter was no more.

[24] This assertion is repeated in the founding affidavit in respect of the second condonation application which was for the late filing of the notice of appeal which was only ultimately filed on 11 July 2023. In that affidavit there is an indication that Mr Zilwa only concentrated on other non-compliances that were dealt with in the first condonation application. There is however, no explanation as to why he did not satisfy himself that the notice of appeal had been filed timeously so that if not he would then deal with it as well when he was making an application for the condonation of the other non-compliances.

[25] There is yet another troubling feature of the appellant's case on condonation. The issue of the notice of appeal is raised by the fourth respondent in its answering affidavit filed on 11 April 2023. The replying affidavit is only filed on 11 July 2023,

exactly three months after the filing of the answering affidavit. That replying affidavit was also obviously filed very late like everything else and outside of the time frames set in the rules. Most importantly, only on 11 July 2023 was a condonation application filed for the late delivery of the replying affidavit and the late delivery of the notice of appeal. The unavoidable question therefore is what is the explanation for the late delivery of the replying affidavit? The replying affidavit itself contains no explanation for its late delivery. There is no explanation why it was not filed on time. Nor is there an explanation why the notice of appeal was not attended to and filed shortly after the fourth respondent's answering affidavit was filed on 11 April 2023 which alerted appellant's attorneys to the notice of appeal having been filed late.

[26] In the second condonation application, Mr Zilwa also filed a supporting affidavit. In that affidavit Mr Zilwa makes a number of points. The first one is that he was not directly involved in this matter initially although he would sometimes write some letters where necessary. He, however, does not explain when it would be necessary for letters to be written by him sometimes in respect of a matter he did not handle. He does not explain how, having applied his mind for the purposes of writing those letters, he would not have realized that something was clearly amiss and ask the attorneys in his firm who were handling the matter to brief him about the state of affairs in this matter. He explains that this matter was handled by Mr Nomkusane and Mr Vika both of whom he says were admitted attorneys. The second point he makes is that he became directly involved in this matter at the end of 2022 subsequent to the passing on of Mr Vika. He, like both, the appellant and Mr Mhlana also does not say when Mr Vika passed away. He says when he got involved, he perused the matter and discovered that the power of attorney, security for costs and an application for a date of hearing were filed late. That led to the filing of the first

condonation application. He however, did not notice that even the notice of appeal was also filed late which he says was an oversight on his part. He only realized the issue of the late filing of the notice of appeal when he went through the fifth (sic) respondent's answering affidavit to the first condonation application. That answering affidavit only came to his attention on 5 July 2023 when his diary reminded him about the filing of the heads of argument.

[27] The above set of facts asserted by Mr Zilwa is not without difficulty and raises more questions than answers. If he had been handling or had been directly involved in this matter since the end of last year, what did he do from the end of last year until the first condonation application was filed at the end of March 2023, some three months later from 31 December 2022? Under what circumstances did he not realize that the notice of appeal was filed late? On perusing the matter, he noticed that the power of attorney, security for costs and an application for a hearing date were filed late. He does not explain how he did not or could not have noticed that the notice of appeal was also filed late. One would have thought that the notice of appeal is one of the most important documents of all the others. This is so because it is specifically provided for in the Uniform Rules of Court and has a prescribed period during which it must be filed. This called for a more detailed explanation than a passing comment that he just did not notice that it was filed late.

[28] The fourth respondent's answering affidavit to the first condonation application was filed on 11 April 2023 as earlier indicated. How it only came to Mr Zilwa's attention on 5 July 2023 remains up in the air as it is not explained beyond a bald averment that it came to his attention on 5 July 2023.

[29] This brings me to the other point that he makes in his supporting affidavit. That point is that during the month of April 2023 he was serving his acting stint in this Division. If regard is had to the second term roster of Judges, it is indeed so that from the 10 April 2023 to the 6 May 2023 Mr Zilwa's name appears as one of the acting Judges during that period.

[30] However, there is no explanation at all as to why on any day from 07 May 2023 to the 5 July 2023 the fourth respondent's answering affidavit did not come to his attention, he being the one who was handling the matter. That is a period of about two months that is not accounted for nor is there any attempt to provide an explanation dealing with that period. There is no explanation relating to whom he entrusted this matter.

[31] Another matter of concern is the appellant himself who, in his founding affidavit in the first condonation application, makes an assertion that is difficult to understand. He says:

“7.5 Whilst my attorneys were still busy doing follow ups about [the transcribed record], after the passing away of Mr Vika at the end of last year, this issue was taken up to Mr Zilwa who, after considering the matter, directed that there was no need for the transcribed record in proceedings of this nature and that was mid-February 2023.

7.6 It was very unfortunate for me to learn that what delayed the prosecution of this matter was not even a requirement to take this matter further.

8.1 On 20 February 2023 Mr Zilwa called me for consultation and explained to me that the appeal will be prosecuted and that now that there has been such a delay, it will have to be explained through an application for condonation. I was very much delighted and relieved to hear such news and I instructed them accordingly.”

[32] The suggestion by the appellant is that Mr Zilwa started getting involved in this matter during the middle of February 2023. On the appellant's submission, it was at that stage that Mr Zilwa discovered that the power of attorney, security for costs and

an application for a date of hearing have not been prepared and are not part of the record. However, in his confirmatory affidavit in respect of the first condonation application, Mr Zilwa, says that *“I only started being directly involved in the matter on or about November 2022 when I discovered the omissions that existed in the file. I confirm that I never noticed the late delivery of the Notice of Appeal until July 2023.”*

[33] As Mr Zilwa discovered the omissions that existed in the file in November 2022 as he says he did, there is no explanation for the delay in launching the first condonation application which was only filed at the end of March 2023, some four months after he would have discovered the omissions or he started being directly involved in this matter. To deal with the condonation application having been filed at the end of March 2023, the appellant misleadingly claims that Mr Zilwa only started getting involved in this matter in the middle of February 2023 which directly contradicts Mr Zilwa’s own assertion that he started getting involved in November 2022. All the appellant’s affidavits and those filed in support of his are silent about what was done from about November 2022 to the 29 March 2023 when the first condonation application was filed.

[34] Even in the second condonation application, the appellant continues to blame everything on the late Mr Vika. In his own words in his replying affidavit in respect of the second condonation application, the appellant belatedly discloses that Mr Vika passed away in October 2022. Still, the exact date of Mr Vika’s passing is omitted. He also says that culturally, it would have been insensitive for him to exert pressure on his attorneys whilst they were still trying to come to terms with Mr Vika’s demise. The problem with this submission is that Mr Zilwa says he got involved in the matter on or about November 2022 which was after Mr Vika’s passing which is when he discovered the omissions. It is unclear how much mourning period the appellant

allowed his attorneys following the regrettable and unfortunate passing of a member of that firm of attorneys, Mr Vika. He does not indicate when he then tried to contact them so that his matter may be progressed. In his founding affidavit in respect of the first condonation application the appellant indicates that in fact it was Mr Zilwa who called him for consultation on 20 February 2023 and explained to him that the appeal would be prosecuted as there was no need for the transcribed court records of the proceedings.

[35] Therefore, it appears that from October 2022 when Mr Vika unfortunately passed to the 20 February 2023 when Mr Zilwa contacted the appellant, a period of about four months or so depending on the undisclosed date of Mr Vika's passing, nothing was done to progress the matter. The appellant himself did not follow up or seek to establish who would be dealing with his matter as Mr Vika had passed on. He suggests that he did not want to be insensitive while his attorneys were still trying to come to terms with Mr Vika's passing. However, on his own showing, he did not contact them when he considered it would be appropriate to do so. Similarly, there is no record of anything having been done since the 08 March 2022 when Mr Zilwa himself wrote a letter to Mr Kroqwana concerning the transcription of the court records. It would therefore be fair to say that for the entire year in 2022 very little of significance was done by the appellant or his attorneys to ensure that his appeal was progressed. The bulk of the letters were written in 2021. None of these huge gaps have been explained by the appellant and Mr Zilwa with any degree of cogency and candour. Everything that went wrong seems to be laid at the door of the late Mr Vika.

The analysis.

[36] The legal position on condonation applications has recently been restated by the Supreme Court of Appeal, with reference to previous cases, in *Sun International*². Because of the conclusion that I reach on the issue of condonation, I consider it instructive that I quote copiously from the exposition of the law in that matter. Therein the court articulated our principles on condonation as follows:

“In order to obtain condonation, several factors come into play. As Ponnann JA stated in *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others*, such factors:

‘... include the degree of non-compliance, the explanation therefore, the importance of the case, a respondent’s interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice (per Holmes JA in *Federated Employers Fire & General Insurance Co Ltd & Another v McKenzie* 1969 (3) SA 360 (A) at 362 F – G).’

In the present case, the major delay can be laid at the door of the Board itself. And it is in any event responsible for the delay caused by its attorneys. In *Saloojee and Another, NNO v Minister of Community Development*, after considering the explanation given for the delay, and concluding that it was not even ‘remotely satisfactory’, Steyn CJ held:

‘I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. 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. To hold otherwise might have a disastrous effect upon the observance of the Rules of Court.’

In *SA Express v Bagport (Pty) Ltd*, Plasket JA referred to various authorities dealing with this issue. He cited Plewmen JA’s comments in *Darries v Sheriff, Magistrate’s Court, Wynberg & Another*, where it was stated:

‘Condonation of the non-observance of the Rules of this Court is not a mere formality. In all cases, some acceptable explanation, not only of, for example,

² The Chairperson of the North West Gambling Board and Another v Sun International (SA) Limited (2014/2019) [2021] ZASCA 176 (14 December 2021) paras 21-23.

the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a Rule of Court apply for condonation as soon as possible. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. In applications of this sort the appellant's prospects of success are in general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set fourth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success. But appellant's prospects of success is but one of the factors relevant to the exercise of the Court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted whatever the prospects of success might be. (Footnotes omitted)."

[37] The appellant's explanation for the numerous delays at various times throughout the history of this matter since 2011 have been inadequate to say the least. There were delays even in launching the condonation applications themselves. However, there is no explanation for the condonation applications themselves being filed so very late. Just by way of a few examples, the failure to file a notice of appeal within the twenty days provided for in the Rules of Court is not explained at all in the first condonation application nor is a condonation sought for it. That is, until the issue is raised by the fourth respondent in the answering affidavit to the first condonation application. Thereafter, a replying affidavit is filed late with no explanation or condonation application, only for both, the notice of appeal and the replying affidavit to be dealt with in a second condonation application that, had compliance with the Rules of Court been a serious consideration, should never have become necessary.

[38] The failure to file a notice of appeal timeously, should have had its condonation application dealt with in the first condonation application. The first condonation application should have been filed in 2020 together with the notice of appeal and at the very latest, at the end of 2022 after Mr Vika's passing. The replying affidavit to the first condonation application should have been filed timeously. It was not. While in the notice of motion to the second condonation application a prayer for the condonation of the appellant's late delivery of his replying affidavit is made, there is no explanation at all why the replying affidavit was delivered late. A prayer being sought without any basis being laid why the court should exercise its discretion in favour of the litigant is conceptually incorrect.

[39] The late delivery of the notice of appeal for which condonation is sought is explained away, again predictably, to the unfortunate passing of Mr Vika which appears to be a scapegoat for all the failures that have occurred throughout the handling of this matter. Then came the period in which Mr Vika was no more, from October / November 2022 to 29 March 2023 or 11 July 2023, a period of five or eight months. The only explanation from the appellant is that *"[i]t is unfortunate that Mr Zilwa only concentrated in other non-compliances in a form of power of attorney, security for costs and application for a date of hearing but did not notice that the notice of appeal was delivered late."*

[40] Mr Zilwa says nothing at all about why he did not notice that the notice of appeal was delivered out of time. He contents himself with merely saying that he did not notice it. One would have thought that if perusal of the file did take place, it would have been the very first thing to ascertain especially after realising that the whole process was mishandled for years with time being wasted on what he later established, were unnecessary transcribed records and other inexplicable omissions.

[41] The notice of appeal could not possibly escape being noticed, for the simple reason that it embodies the *raison d'être* for the very appeal process and without it, I may make bold to say there is no appeal to speak of really. The whole explanation becomes immersed in perplexity when regard is had to the fact that on an unspecified date in November 2022, Mr Zilwa signed a certificate of correctness of the appeal record. This, like many other things is neither explained nor dealt with. The facts of this matter on the issue of condonation clearly militate against the granting of the condonation applications.

[42] With all these conclusions this should be the end of this matter with the appeal reaching its logical destiny of being dismissed without further ado. However, for the sake of completeness as prospect of success are a relevant consideration, I deal with these briefly hereinbelow. The starting point in examining the prospects of success is the appellant's pleaded case. Having failed to give "[a] full, detailed and accurate account of the causes of the delay and their effects [which] must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility³, the appellant raises procedural irregularities in how the court order whose rescission is sought was obtained. He raises the fact that he was not cited in the proceedings that led to that court order being obtained. He contends that that denied him of his *audi alteram partem* right and as such undermined his constitutional rights. Thereafter he asks for the matter to be re-opened because of the public importance of the matter for him and his subjects. That is more or less the summary of his contentious on the prospects of success. It is unclear what it is that is of general public importance about this matter. This is because the appellant himself does not say why the matter is of public importance.

³ Mulaudzi v Old Mutual Life Assurance Company South Africa Ltd [2017] 3 All SA 520 (SCA) para 26.

[43] In what has been said there is very little, if anything at all, that has been said that deals with the actual merits of the appellant's case. I am of the view that for the purposes of determining prospects of success, the merits of the appellant's case must surely go beyond the technical or procedural issues he raises even when there is merit in those procedural issues. They must go to the actual merits of the appellant's case not in the failure to join him but in the contentions in brief, which make the case worthy of being reopened. It surely cannot be that in all the cases in which a party who should have been cited was not, it must automatically follow that that matter must be reopened regardless of how hopeless the merits of his or her case are. For instance, the appellant merely says that the case is important to him and his subjects without saying why or how.

[44] However, after he was removed from office in 2011, he no longer has any subjects nor does he have a Traditional Council. This is despite his assertion in his founding affidavit that he is the chief of the Amahlubi Tribe and the head of Ngxaza Hlubi Traditional Council. He says nothing about what became of Amahlubi Tribe since he was removed from office in 2011, more than a decade ago. Even the statement that he is the chief is made in 2023 and yet on his own showing he was removed from his position of chieftainship in 2011. There is no indication that the Ngxaza Hlubi Traditional Council still exists which he claims to be still its head.

[45] Interestingly, and assuming that the Ngxaza Hlubi Traditional Council is still in existence, it was, for some reason, not cited as a co-applicant in the court *a quo* when the rescission application was instituted nor does the appellant claim to be acting also on its behalf. It is therefore unclear whether this whole case is about the appellant and his demotion or about the nation of Amahlubi who are indigenous to that area as he seems to vacillate on that issue. There is no indication or suggestion

that Amahlubi as a nation are troubled by his demotion and absence or that their nationhood is somehow detrimentally affected. His bald assertions without more some ten years later do not help him either. It is unknown what his real case is again assuming the appellant were to be successful in rescinding the court order of the 14 July 2011.

[46] The point being made is simply this. It would make no sense to rescind a court order on the basis that he was not cited, assuming he ought to have been cited, unless there was some merit, not in the procedural issues he raises but in the main case in which he wants to be heard. There is no indication that Amahlubi are clamouring for his return to chieftainship. There is therefore no possibility of having any idea whether he would have a case at all against the relevant respondents and therefore his prospects of success in that case are not only unknown but also unknowable. With all that being said, and taking into account the flagrant disregard of most of the appeal rules and court procedures, which have not been explained with the necessary depth and candour, the principle of finality calls for the dismissal of the appeal. If his salary has been wrongly reduced, I would imagine that he would have other relief that he could pursue to obtain redress in that regard.

The result.

[47] The result of all of this is that the appellant's condonation applications must fail as should the appeal itself as a consequence, regardless of the view one takes on the merits of the appeal.

[48] In the result the following order shall issue.

1. The appellant's applications for condonation are dismissed.
2. The appeal is dismissed.

3. The appellant is ordered to pay the costs of appeal including the costs of the application for leave to appeal.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

I agree:

M.J. LOWE

JUDGE OF THE HIGH COURT

I agree:

N. MOLONY

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the appellant: Z.Z. MATEBESE SC

Instructed by: ZILWA ATTORNEYS

MTHATHA

Counsel for the respondent: M. NOTYESI

Instructed by: MVUZO NOTYESI INC.

MTHATHA

Date heard: 31 July 2023

Date delivered: 26 September 2023