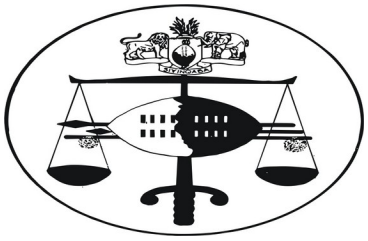

IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 788/08

In the matter between

MVUSELELO FAKUDZE **Applicant**

and

MCOLISI MDLULI **1st Respondent**

MILLICENT NOMALUNGELO FAKUDZE (NEE NGWEKAZI) **2nd Respondent**

In re:

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

And

MVUSELELO FAKUDZE **Respondent**

Neutral Citation: *Mvuselelo Fakudze v Mcolisi Mdluli N.O.* (788/08) [2012] SZHC 73 (05 April 2012)

Coram: **Mamba J**

Heard: **5 April 2012**

Delivered: **5 April 2012**
Written Reasons Handed Down: 16 April 2012

[1] Whether this is a family war between the applicant and the 2nd respondent, or it is just a tiff between them, I do not know. What I do know though is that it found its way into the court records in 2008 and it is still raging on un-remitting or relentlessly. In the past, battles or skirmishes have been fought and concluded but it appears that such conclusions have not brought an end to most of the issues in this unpleasant soap opera. The conclusion of one episode or stanza has, it seems, brought about a new one. The present application is one such resultant episode. It follows a notice of appeal filed or noted by the applicant against a judgment of this court.

[2] It is common cause that on 19th December 2011 this court (Sey J) granted an order for maintenance pendente lite in favour of the 2nd Defendant. The applicant has since appealed this judgment (to the Supreme Court). The appeal was noted on 21st December 2011.

[3] It is common ground further that on 28th February 2012, a Deputy sheriff of this court, armed with a writ of execution against the applicant, sought to attach a Toyota Fortuner Motor Vehicle that was in the possession of the applicant. This occurred within the precincts of this court. The writ was in respect of costs recovered by the 2nd respondent in the judgment by Sey J on 19th December, 2011. The applicant and his attorney protested against the

attachment and pointed out to the said Deputy Sheriff that since an appeal had been lodged against that judgment, in law, execution thereof was suspended pending the appeal. The Deputy sheriff, it is also common cause relented and did not attach the said motor vehicle. That was not the end of the matter though. On 5th April, 2012 the 1st respondent this time, acting in his capacity as a Deputy Sheriff, actually attached and took possession of the said motor vehicle. This attachment has triggered this urgent application wherein the applicant seeks, inter alia, for an order for the release from attachment and return of the relevant motor vehicle to him.

[4] In justifying the attachment, the second respondent states that the appeal noted by the applicant has since lapse as on the day of the attachment ie 5th April 2012, the applicant had failed to file or lodge the record of the proceedings before the Registrar of this court and had also not filed or made an application before the Supreme Court for the condonation of his failure to file the court record within the time stipulated in the rules of court.

[5] I hope and trust that I am not being disrespectful to the applicant in saying that his only serious or meaningful response to the second respondent's contention is that contained in paragraphs 6.3 and 6.4 of his founding affidavit where he states that:

‘6.3 I am advised and verily believe that a record of proceedings is being prepared and will be filed shortly with the Supreme Court that will decide my fate on the 1st May, 2012 during roll call;

6.4 The record will be accompanied by an application for condonation for the late filing of the record.’

(The underlining is mine).

[6] From the aforequoted paragraphs, it is clear that the applicant concedes that:

(a) he has failed to file the record of the proceedings of appeal with the Registrar of this court;

(b) the period within which to file such record has lapsed;

(c) an application before the Supreme Court is necessary to condone such failure and

(d) No such application has been filed yet.

But inspite of these facts and or concessions by the applicant, applicant’s counsel was advised in court by his instructing attorney that an application for condonation had already been filed with the Supreme Court. This put a totally different and new gloss to the application as indeed this was a weighty factor in the equation in favour of the application. Before Mr Maziya could conclude his submissions in reply, I again raised the matter of the application for condonation and its relevance in this case. Counsel

requested and was granted a period of twenty minutes to find and exhibit a copy of such application in court. When the court resumed its business, Mr Maziya informed the court that contrary to his earlier instructions, in fact no such application had been filed. It was still being prepared or drafted. The court had been lied to or an attempt to mislead it had been made. (yet another justification against hearsay evidence)!

[7] The relevant rules of court here are rule 30(1) and 30(4) which provide that:

'30(1) The appellant shall prepare the record on appeal in accordance with sub-rules (5) and (6) hereof 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.

. . . .

30(4) 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 appeal shall be deemed to have been abandoned.'

Section 16(1) refers to the power of the Judge President or any judge of appeal designated by the Judge President to extend any of the time periods prescribed by the rules.

[8] In the instant case, there is no allegation by the applicant that he has sought and or been granted an extension within which to file the record as provided

in section 16(1) of the rules. Nor is there an allegation that the record that was filed with the Registrar on the 5th April, 2012 has been certified as correct by the Registrar of this court. I note that the record should have been lodged with the Registrar of this court two months after noting the appeal. The record should have been lodged around the 21st of February, 2012. Its lodgement in April 2012 was clearly way out of time. Because of this failure, the deeming provisions of rule 30(4) kicked in and the appeal is deemed, viewed or taken to have been abandoned. It remains in this state until and unless otherwise resurrected, condoned or revived by an order of the Supreme Court or in accordance with the provisions of rule 16(1) referred to above.

[9] Mr Maziya, Counsel for the applicant, and indeed the applicant himself in his founding affidavit stated that by deeming the appeal as having been abandoned, the 2nd respondent was resorting to self-help as it was only the Supreme Court that had to interpret and make pronouncement on its own rules. This submission is plainly incorrect. The rules of court are there for the smooth prosecution of cases before the courts. They are there to guide, in the main, litigants rather than the courts. Litigants and legal practitioners are enjoined to read, understand and act or conduct their court businesses in accordance with these rules. That the court may at any time upon good cause shown, condone a failure to comply with any of the rules, does not

detract from this central or fundamental application and function of the rules of court. Therefore when this court or for that matter a litigant says an appeal is deemed to have been abandoned, it is merely interpreting the relevant rules. It is neither taking the law into its own hands-nor usurping the powers and functions of the Supreme Court. Far from it.

[10] From the above facts and analyses of the rules of court; the record of the proceedings having been lodged out of time and without there being an extension granted per rule 16(1), the appeal being deemed to have been abandoned; there being no application for condonation pending before the Supreme Court, the edifice upon which the case by the applicant rests crumbles and disappears. The applicant has failed to satisfy the court that he is entitled to the relief he seeks herein. The application was thus dismissed with costs.

MAMBA J

For Applicant: **Adv. L. Maziya**

For 2nd Respondent: **Mr. B. Magagula**