IN THE HIGH COURT OF ESWATINI

Held at Mbabane

Appeal Case No.: 1228/2017

In the matter between

LASHELENI INVESTMENTS (PTY) LTD **Appellant**

AND

MASTER HOUSE (PTY) LTD **Respondent**

Neutral Citation: *Lasheleni Investments (pty) ltd Vs Master House (PTY) LTd (1228/2017) [2018] SZHC 179(1st August 2018)*

Coram: Hlophe J.

For the Applicant: Miss S. Matsebula

For the Respondent: Mr S.C. Dlamini

Dates Heard: 10th November 2017

Date Judgement Handed Down: 01st August 2018

Summary

Civil Procedure – Appeal of a Magistrate's Court Judgement –Meaning and effect of Rule 50 (1),(4),(5) and (7) of the Rules of this court – When an appeal from the subordinate court is deemed to have been prosecuted – When a record of proceedings should be filed –Whether or not there is an appeal pending before the Court.

JUDGMENT

[1] The Senior Magistrate sitting in Manzini, Miss N. Dlamini, issued a judgement in an application serving before her where the current Respondents, sought inter-alia an order ejecting the current Appellant from certain premises leased to it. Given that the judgement was against the current Appellant as a Respondent then and in as much as it ordered her ejectment from the said premises, it noted an appeal to this court as an appellate structure on matters decided by the Subordinate Court. The current proceedings are a sequel to that exercise.

[2] Owing to the fact that the current proceedings are about the adherence or non-adherence by the appellant to the time limits provided by the rules of this court, it is important for this court to give an over view of the said time lines.

The judgement was handed down on the 27th August 2017. On the same day, the appellant noted an appeal to this court. On the 8th September 2017 the appellant filed and served a noticed titled Appellant Additional Grounds of Appeal. On the same day, and from the consideration of the documents concerned and simultaneously with the notice of the additional grounds of appeal, the appellant filed a document tittled "Notice of Application for a Date of Hearing" in Terms of Rule 50 (4). In terms of this latter notice, the Appellant applied for a date of hearing the appeal referred to above from the Registrar of this court.

[3] The noting of an appeal from the Magistrate's Court together with the application for a hearing date to the Registrar are respectively governed by Rule 50(1) and 50(4) of the Rules of this Court. These Rules read as follows verbatim:-

> "*50(1) An appeal to the Court against the decision of a subordinate Court in a civil matter shall be prosecuted within six weeks, or within such extended period as the Court on due application by any of the parties may allow, after noting of such*

appeal, and unless so prosecuted it shall be deemed to have lapsed.

50(4) The Appellant may, within four weeks after noting the appeal, apply in writing to the Registrar on notice to all other parties for a date of hearing and shall at the same time make available to the Registrar in writing his full residential and postal addresses and the address of his attorney, if he is represented. If he fails to do so, the respondent may at anytime before the expiry of the period of six weeks apply for a date of hearing in like manner. Upon such application, an appeal or cross-appeal shall be deemed to have duly prosecuted."

[4] The subsequent Notice by the appellant to that in terms of Rule 54 (4) was one of set down bearing the Registrar's stamp of the 12th October 2017. On its face it inter alia sought to have the appeal noted by the appellant declared to have lapsed "due to the appellant's failure to prosecute" it. On the 17th October 2017, the Appellant filed a notice titled on its face; Appellants' Notice in terms of the Provisions of Rule 30." The purpose of this notice was to apply that the Notice of Set Down dated the 12th October 2017,

seeking to have the appeal declared as having lapsed to, be declared to be irregular proceedings allegedly because whilst purporting to be an application it was not supported by an affidavit contrary to the provisions of Rule 6(1) and 6(9) of the Rules of this Court and also because it was founded upon a misreading of Rule 50(4) of this Court's Rules.

[5] This Notice stated further that in so far as the said rule required that a date for hearing be applied for within four weeks by the appellant, same was done when the notice in terms of Rule 50(4) was filed on the 8th September 2018, which was only two weeks or so after the noting of the appeal. In so far as there was sought to insinuate that a record had not been filed, it was argued, Rule 50(7)(a) provided that such should be lodged not less than 14 days prior to the date of hearing. The hearing date had obviously not yet been provided by the Registrar which made the insinuation about a failure to file the record to be improper as that did not yet arise.

[6] This Notice in terms of Rule 30 also argued that Rule 50(4) provided on its face that once a date of hearing was applied for, such application amounted to the prosecution of an appeal. This meant that there was therefore no basis

at all for the contention that the appeal had not been prosecuted given that the notice for the provision for a trial date by the Registrar had actually been made, which in law meant that the appeal had been prosecuted.

[7] The Notices that followed after the one in terms of Rule 30 dated the 17th October 2017, were not of much significance in the scheme of things. They were notices of reinstatement of the notice of set down aimed at having the appeal declared to have lapsed. These notices are, from the Court file I have, the dates of the 26th October 2017 and the 3rd November 2017 all of which were meant to have the application to declare the appeal as having lapsed heard on the 3rd November 2017 whilst that of the 3rd November 2017 meant to have the same application heard on the 10th November 2017. It was on this latter date that I heard argument in the matter.

[8] The case in simple terms is whether a case has been or has not been made for an order declaring the appeal to have lapsed or whether or not the appeal should be dismissed on account of failure to prosecute same.

[9] The reality is that the matter for determination is whether or not the appellant has or has not complied with Rule 50(1) to (7) of the Rules of the Court so as to necessitate the dismissal of the appeal or its declaration to have lapsed. Given that I have already captured rule 50(1) and rule 50(4), I find it imperative for me to capture the verbatim provisions of Rule 50(5) and 50(7)(a) as they are also pivotal in the decision of this matter in, I do this herein below:-

> *"50(5) Upon receipt of such an application for a date of hearing for an appeal or a cross-appeal, the Registrar shall allocate a date for hearing and thereafter it shall be set down as provided in rule 57.*
>
> *50(7)(a)The party who has applied for a date of hearing shall prepare and lodge with the Registrar two copies of the Record as soon as is reasonably possible after applying for a date but in any event not less than fourteen days prior to the date of the hearing, except with the leave of a judge."*

[10] According to Rule 50(1) an appeal shall be deemed to have lapsed in a case where it shall not have been prosecuted within a total of 6 weeks of its noting or within such extended period as the court may on due application by either of the parties, have allowed. According to Rule 50(4), once an appeal shall have been noted, the appellant shall be required to apply in writing for a hearing date from the Registrar, within four weeks of the noting of such an appeal. Should the appellant fail to apply for a hearing date within the four weeks, the Respondent may apply for the hearing date within six weeks of the noting of the appeal. The application by either party, for the hearing date of an appeal shall result in such an appeal being deemed to have been prosecuted. The upshot of these provisions is that before an application of the nature brought by the Respondent can even be contemplated, it must itself appreciate that it has itself a duty to apply for a hearing date after the appellant has not done so within four weeks. This makes the application by the Respondent inconceivable if it has itself not applied for the said hearing date after the lapse of four weeks of the noting of the appeal but within the lapse of six weeks of the noting of the appeal.

[11] Otherwise the Registrar is according to Rule 50(5), obliged upon receipt of the application for a hearing date of the appeal, to allocate it such a date,

pursuant to which it shall be set down for hearing. Whereas the party who has applied for the trial date is required to file the copies of the record with the Registrar as soon as possible after applying for a trial date, this shall be mandatory to file in any case, at least 14 days before the hearing date. So before the Record can be filed, the Registrar should have granted a hearing date prior, which it is common cause the Registrar had not yet done here.

[12] It is clear in this matter that after an appeal was noted on the 27th August 2017, there was within at least three weeks of its noting filed a request for a hearing date which was done on the 8th September 2017. In the provisions of rule 50(4), the filing of this request amounted to the prosecution of the appeal by the Appellant. This is to say that the appeal noted by the Appellant was, for purposes of the Rules deemed to have been prosecuted by the Appellant when it applied for hearing date within the stipulated period. That the Registrar was obliged to allocate a date in terms of which he failed to do so cannot, in terms of the rules, be visited on the appellant. The date for the filing of the records would only be determined once the hearing date of the appeal shall have been allocated by the Registrar, as it should at least be some 14 days before the appeal hearing but after the allocation of a hearing date.

[13] One cannot help but agree with the Appellant's Counsel that the Respondent appears to have misread Rule 50 and its relevant sub rules. It is clear upon a closer reading of the relevant parts of Rule 50 that a case has not been made for an order declaring the appeal to have lapsed on the grounds that it has not been prosecuted because in reality the appellant has prosecuted the appeal. It appears that the hearing of the appeal has not been stalled by the appellant but by the failure by the Registrar to allocate the appeal a hearing date that would enable at least 14 days in between for the filing of the record.

[14] Clearly, if the Respondent is eager to have the appeal heard, it is up to it to liaise with the Registrar to allocate the appeal a hearing date so that the record can be filled some fourteen days prior to the hearing date. The allocation of a hearing date shall also enable the appellant as the party who sought the hearing date herein to also set the matter down for hearing on the date allocated for that purpose.

[15] There was also the contention by the appellant that the Notice of set down by the Respondent should have been in compliance with Rule 6(1) and 6 (9) of

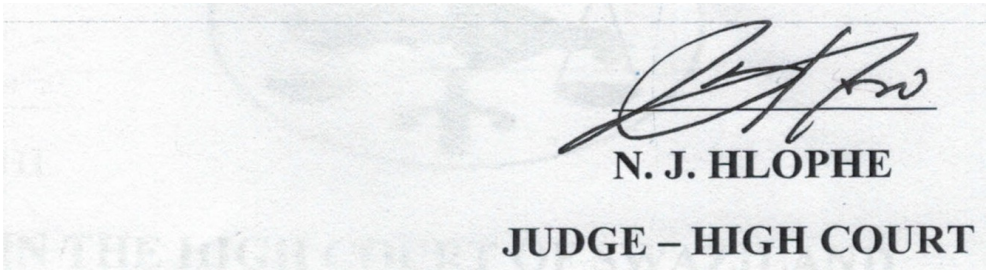
the High Court Rules. In view of the decision I have arrived at, it seems to me to be unnecessary for me to decide this question. I can only mention in passing that it would no doubt have made good practice for the Respondent to have complied with Rule 6 (1) and 6 (9) as she would have made herself very clear including her being able to place all the information she required to do so before Court for it to decide the matter much easier. Having said that, I agree that the facts supporting the current application were very clear before court as they could be found ex facie the documents relied upon which are all contained on record.

[16] On the overall I have come to the conclusion that the Appellant's application for the declaration of the Respondent's Notice of set down to be an irregularly step and therefore that it should be set aside, succeeds with the following result:-

1. The Rule 30 application by the Appellant be and is hereby upheld.

2, The Respondent's prayer that the appeal by the appellant be declared to have lapsed or that it be dismissed be and is hereby dismissed.

3. In view of this aspect of the matter not being determinative of the appeal itself including the prima facie strength of the appeal itself, each party is to bear its own costs.



N. J. HLOPHE

JUDGE – HIGH COURT