



**IN THE INDUSTRIAL COURT OF APPEAL OF
SWAZILAND**

Appeal Case No. 1/2013

In the matter between:

BRIAN NGWENYA

APPELLANT

v

**SWAZILAND DEVELOPMENT AND
SAVINGS BANK**

RESPONDENT

Neutral Citation: *Brian Ngwenya v Swaziland Development and Savings Bank (1/2013) [2013] SZIC 8 (19th September 2013).*

CORAM : **M.M. RAMODIBEDI JP,
J.P. ANNANDALE AJA,
Q.M. MABUZA AJA.**

Heard : **12 September 2013**
Delivered : **19 September 2013**

Summary:

Dismissal of Bank teller — Loss of funds in his custody charged under article 5.1.2. of Disciplinary Code — Quære: Competency of charge under generic article vis.a.vis article 5.2.1.20: negligence, with predetermined ameliorated sanction. Effect of final written warning and zero tolerance policy. Onus of proof and rebuttal at disciplinary hearing.

Held: Procedurally and substantively fair hearing and dismissal. Appeal dismissed with costs.

JUDGMENT

THE COURT

- [1] Over the years, Swazibank struggled to be profitable. As part of a turnaround strategy under new management, it introduced a zero tolerance policy to put an end to an increasing incidence of cash shortages by bank tellers whose cash on hand did not balance with the ledger.
- [2] The appellant herein was employed as bank teller by the respondent, Swaziland Development and Savings Bank (Swazibank). He was dismissed because he lost funds in his custody. Following an internal disciplinary hearing which resulted in his dismissal, he unsuccessfully appealed to the Bank and thereafter, reported a dispute to the Conciliation Mediation and Arbitration Commission (CMAC). The conciliation process was again unsuccessful and certified as unresolved, with the Industrial Court as his next port of call.

[3] In the court below, Dlamini AJ, as he then was, sitting with two nominated members of the court, carefully and comprehensively considered his claims afresh. The court held that the termination of his services were both substantively and procedurally fair and further, that it was reasonable. His application for reinstatement or alternatively notice pay, additional notice pay, severance allowance and maximum compensation (E 365 879.27 in total) was dismissed, without any costs being ordered.

[4] In his appeal to this court, the appellant relies on ten grounds of appeal, stated thus:

“ 1. The Court a quo erred in law and in fact in holding that the appellant was negligent in any way in the performance of his duties as a teller.

2. The a quo erred in law and in fact in failing to hold that there was no evidence linking the appellant to any specific act of negligence [sic].

3. *The Court a quo erred in law [and] in fact in disregarding the requirement that the onus rested on the respondent to prove specific acts of negligence on the part of the appellant.*
4. *The Court a quo erred in law and in fact in not holding that the respondent failed to discharge the onus resting on it.*
5. *The Court a quo erred in law and in fact in holding that the appellant was the cause and/or responsible for the shortage resulting in the dismissal.*
6. *The Court a quo erred in law and in fact in failing to distinguish an act of counting money and recording a shortage and an act of actually causing the shortage.*
7. *The Court a quo erred in law and in fact in failing to hold that it was necessary and imperative for the respondent to give testimony on the exact amount given*

to the appellant which was later found to be short after processing transactions.

8. *The Court erred in law and in fact in holding that it was not necessary for the appellant to have acknowledged receipt of a particular sum of money which was later found to be short.*
9. *The Court a quo erred in law and in fact in holding that it was not necessary for the respondent to present testimony on how tellers are given money to work with for a particular period.*
10. *The Court erred in law and in fact in failing to hold that the sanction imposed on the appellant was not in accordance with the Disciplinary Code and/or Collective Agreement obtaining at the respondent's undertaking."*

[5] What is immediately obvious is that whereas appeals to the Industrial Court of Appeal are limited to only questions of law and not of fact,

as set out in Section 19 (1) of the Industrial Relations Act of 2000 (Act 1 of 2000), the grounds of appeal are liberally flavoured with factual issues.

[6] Nevertheless, when bared to the bone, there are two main contentious issues in this appeal, firstly, the evidentiary burden of proof to prove the commission of the offence with which the appellant was charged and secondly, the specifics of the charge itself, with its attendant sanctions.

[7] During the hearing of the appeal, we noted that Mr. Dlamini, counsel for the appellant, did not present his argument point by point in accordance with the stated grounds of appeal but rather generically as aforesaid. More pointedly, the real bones of contention throughout the matter focussed on the specific article in the Disciplinary Code which was allegedly contravened, but which was conspicuously omitted in the Notice of Appeal, as well as the purported misunderstanding of the law of evidence by the court *a quo*.

- [8] At the disciplinary hearing, the subsequent internal appeal, at CMAC and also in the Industrial Court, the crux of the quarrel between the litigants has all along been the question of whether the charge had to be formulated and prosecuted under the article of the disciplinary code as per the dictates of the Bank, or as adamantly insisted upon by the employee. We shall soon revert to this issue.
- [9] The brief background to the matter is that the appellant has been an employee of the Bank for virtually eighteen years. His final position was that of a teller, being a position of responsibility and trust as custodian of money belonging to the bank, receiving deposits and disbursement of cash. Over a period of time, he repeatedly was short of cash at the end of the day but in most instances, he was not taken to task.
- [10] In August 2006 the senior manager of banking operations issued a “Warning on teller differences”, which sought to address the problem of tellers whose cash on hand did not balance with the ledger. The Bank spelt it out that such shortages was a serious offence in terms of the disciplinary code and that it might well lead to dismissals. The

respondent adopted a “Zero Tolerance” policy on teller differences, and cautioned that disciplinary action would be taken against tellers who incur cash differences.

[11] In November 2007 the appellant could not account for a shortfall of E1900 and following a disciplinary hearing, he was found guilty and sanctioned with a “Final written warning in line with zero tolerance on Tellers Difference”, valid for six months.

[12] Unfortunately, the appellant again fell foul of being short of cash in April 2008, this time by an amount of E1 000. He was yet again subjected to a disciplinary enquiry but this time, the sanction upon being found guilty was dismissal. It is this dismissal, which was confirmed on internal appeal and which was the subject in the court *a quo* which is ultimately challenged in this court.

[13] We have already referred to the ten grounds of appeal which have been noted and observed that in effect and reality, over and above the sanction itself, the heart of the appeal is actually two-fold — the

question of proof and the article under which the appellant was disciplined.

[14] Before us, Mr. Dlamini strenuously and repeatedly argued that the employer did not discharge its burden of proof that the appellant actually lost money in the sum of E 1 000, and especially how he caused the loss.

[15] The short answer to this is that in fact, the appellant admitted that he could not balance his cash on the particular day and that he was short of E1 000.

[16] Mr. Dlamini argues that in order for the court to have been able to find that the appellant lost funds in his custody, it had to speculate on how he could have been either negligent or responsible for causing the loss, unless proof of the following aspects was required:

1. How much was given to the appellant to work with and for what period.

2. Whether the appellant signed any document when receiving the money to work with when paying out to customers of the bank.
3. Who gave the appellant the money to work [with].
4. The conditions under which the appellant was given the money.
5. Whether the appellant was given the opportunity to count the money and satisfy himself whether the amount was what it was alleged to be.

[17] That this would be appropriate evidentiary material where the occasioning of monetary loss was an issue in dispute bears no argument. However, when a fact has been properly admitted, there is no more controversy about it. The point that has been overlooked by the appellant is that once an onus of proof has been discharged by the employer, presently by way of admission, an onus of rebuttal shifted onto the appellant.

[18] In proceedings like this, the onus on the employer is on a balance or preponderance of the probabilities to establish that a loss of money has occurred. In the words of Lord Denning in Miller v Minister of Pensions 1947 2 ALL ER 372 at 3734-4 it means:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘we think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not.”

[19] It is common cause that the appellant admitted both in the court below and at his disciplinary hearing that he had lost funds in his possession. It has never been in dispute that he was short of E1 000 on the date of the incident. The *factum probandum* has accordingly been established without the need to prove it yet again, as the appellant wants it to be done.

[20] What counsel seems to overlook is that an onus of rebuttal shifted onto the employee insofar as the loss of funds is concerned, once it

became an admitted fact. This is in contrast with the position where a loss is denied and requires to be proven by persuasive evidence to establish that fact. It is not a reverse onus on the appellant, to disprove anything, but to tender a reasonable explanation as to how the loss came about, to shift liability, blame any culpability away from himself.

[21] The admission of loss of money in the appellant's hands is *prima facie* proof thereof and it requires an answer: it is sufficient proof of the issue unless answered with evidence in rebuttal, something he failed to do. He did not tender any reasonable or plausible explanation at all – instead, he merely stated that he did not know how the loss came about. In ex parte Minister of Justice: in re R v Jacobson and Levy 1931 AD 466 at 478 Stratford JA said:

“If the party on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence “calls for an answer” then, in such case, he has produced prima facie proof, and, in the absence of an answer from the other side, it becomes conclusive proof...”

[22] In line with these *dictae* and the absolute failure of the appellant to provide an explanation, it remained wholly unnecessary to have required from the employer to follow the the line of argument as proposed by Mr. Dlamini. The unfounded criticism of the impugned judgment of the Industrial Court, in tandem with the initial findings by the disciplinary tribunal, could only have had substance in very different circumstances. Had it been a criminal charge of theft where no admissions have been made, it then would have required evidence to prove beyond a reasonable doubt to prove the crime. It then might have been necessary to follow the line of argument as advanced on behalf of the appellant.

[23] However, such is not the case. The appellant conceded and admitted the fact that he could not account for a shortage of E 1 000. This was sufficient proof on a balance of the probabilities that indeed he was short of cash, the offence he was charged with. He did not dispel the onus of rebuttal, the evidentiary burden that shifted onto his shoulders. The respondent was therefore absolved from providing the further litany of purported requirements as advanced by Mr. Dlamini.

[24] Accordingly, even though Mr. Sibandze correctly argued that most of the first nine grounds of appeal are questions of fact and not law, we nevertheless hold that the court *a quo* correctly analysed the evidence and dealt with it to be able to draw the conclusions in law as it did. We hold grounds 3 to 9 to be without merit.

[25] The contention in the first two grounds of appeal which relate to negligence are also wholly unfounded. Even a most cursory reading of the evidence of the appellant dispels the notion that he denies having been negligent.

[26] He unequivocally stated in his evidence that “In my case there was negligence”. Also, he said that he was supposed to have been charged with negligence, and that “I am not denying that I was negligent as a result of which I did not balance at the end of the day.”

[27] The learned Judge noted in paragraph 14 of his judgment that:

“ The court points out at the outset that it is difficult to comprehend what exactly the defence of the Applicant is [in] this case. On the one hand, under cross examination by Attorney Sibandze, he admitted — more than once — that he was negligent as a result of which money entrusted in his custody was lost. However his Attorney, Mr. Dlamini, on the other hand submitted that it cannot be said that the Applicant was negligent. Clearly it is not open to the Applicant to admit negligence on the one hand and then do a complete about turn through his Attorney.”

[28] We find it equally incongruous that the appeal could now be based on the ground that the court below “erred in law and in fact in holding that the appellant was negligent in any way in the performance of his duties as a teller.” It goes hand in hand with the second ground of appeal which has it that “(t)he [court] *a quo* erred in law and in fact in failing to hold that there was no evidence linking the appellant to any specific act of negligence.”

[29] Just as no litigant can approbate and reprobate at the same time, an appellant cannot come on appeal, as a question of law, blaming the court below for making factual findings exactly in line with accepted evidence by the applicant before it. Now, to criticise the court for doing as it did, with counsel formulating grounds of appeal in direct stark contradiction of his own client's evidence, smacks of frivolity.

[30] It was indeed the appellant's case that he was negligent. He simply now cannot seek to take issue with alleged factual findings of negligence. However, apart from the disparity between the appellants' evidence and the stated grounds of appeal relating to negligence, a careful reading of the judgment sought to be set aside contradicts these grounds. Nowhere did the court hold as contended. It did not find the appellant to have been negligent in the performance of his duties as a teller. It also did not fail to hold that there was no evidence linking the appellant to any specific act of negligence.

[31] What the court did hold was that he was responsible for loss of funds in his custody. It was not required of the Industrial Court to hold that there was no evidence of negligence to any specific act of negligence. To the contrary, it held that there was evidence, sufficient to persuade

it on a balance of the probabilities, that the bank teller lost funds. It is the appellant who sought a finding of negligence, and also sought to be charged with negligence under article 5.2.1.20 instead of the offence of losing funds in his custody, formulated under article 5.1.2.

[32] It follows that the first two grounds of appeal equally have no merit and stand to be dismissed.

[33] The tenth and final ground of appeal is that the imposed sanction of dismissal was not in accordance with the disciplinary code, being a part of the collective agreement.

[34] It is trite that a collective agreement between an employer and its unionised employees is binding on both. It is also enforceable under Section 42 (8) of the Industrial Relations Act of 2000 (Act 1 of 2000). The collective agreement varies the contract of employment insofar as both employer and employees are concerned as both are covered by the collective agreement.

[35] It is common cause that the collective agreement signed on the 28th February 2006 also applies to the appellant and that termination of service by the employer may only occur after the incorporated disciplinary procedure has been followed, as provided for under article 5.4 of the agreement.

[36] Article 5.1.1 of the disciplinary code has it that:

“The severity of the disciplinary action will depend upon the circumstances of each case and any mitigating factors shall be taken into account by the employer”.

[37] It seems to us that the main reason why the appellant contends that he should have been charged under article 5.2.1.20 with neglect of duty instead of article 5.1.2 with an offence that has not been specified in the table of offences is to seek solace under the leniency provided by the former. A disciplinary finding of neglect of duty provides for two written warnings before dismissal becomes a consequence of an offence.

[38] On the other hand, the generic article 5.1.2 which provides for disciplinary action in respect of offences not tabled as examples in the code, with their attendant sanctions, reads:

“As the table of offences is not intended to be exhaustive the employer may exercise disciplinary action against an employee who has committed an offence even though the offence has not been mentioned in the table”.

Article 5.2.1 goes on to hold that:

“The following are examples of offences which may lead to disciplinary action such as summary dismissal, dismissal, written warning noted or verbal warning.”

[39] Accordingly, whereas the tabled examples of offences each has its own and specific sanctions, a non-listed offence is subject in severity of sanction dependant upon the circumstances of each case as well as any mitigating factors. For instance, neglect of duty under article 5.2.1.20 requires two written warnings prior to dismissal while “loss

of funds in an employee's custody", charged under article 5.1.2, has no prescribed or pre-determined sanctions.

[40] The Industrial Court agreed with the sanction imposed on the appellant by the disciplinary tribunal and which was confirmed on internal appeal. The chairperson of the disciplinary enquiry concluded that a lenient sanction was precluded due to the fact that a teller with more than three years experience should have been able to give a clue as to what happened to the money he was short of, but that he failed to do so. Also, he had a "final written warning" against him at the time of the loss of money, due to a prior similar occurrence, less than six months previously. Many other shortfalls were also recorded, but without disciplinary action having been taken.

[41] The chairperson further reasoned that:

"In view of the fact that the bank is in the business of taking deposits and making payments, any differences in cash handling sabotages/undermines the profitability of the institution. The sustainability and continuity of this bank is

embodied in accurate cash handling which makes cash losses unacceptable.

The charge laid against Brian is not theft, bribery or dishonesty therefore he can not be issued with summary dismissal.

It is therefore fair for the Bank to terminate the services of Brian because since the issuing of the last “Final Written Warning” he has committed a similar offence and more cash is being lost in his custody and the bank can not reasonably continue to employ him.

When all the above circumstances especially the contents of his personal file are taken into account, it is reasonable to terminate Brian’s services.”

[42] At the determination of the internal appeal, particular emphasis was placed on the fact that at the time when the last loss of funds occurred, the appellant still had the sword of Damocles hanging over his head,

so to speak, by way of a final written warning as a consequence of a previous similar offence.

[43] The “Final Written Warning” spells it out in particular that it is issued “in line with zero tolerance on Tellers Difference” (sic).

[44] The zero tolerance policy is contained in a memorandum of the 28th August 2008, issued more than a year before the appellant’s first conviction of the 30th November 2007. As indicated earlier it sets out the Bank’s concerns over teller differences at its various branches, leading to unsustainable losses of money. It warns tellers that in terms of the disciplinary code, losses may lead to dismissal. It also specifically states that the bank shall have zero tolerance to any teller differences, loss of money and that disciplinary action will be taken against tellers who incur cash differences.

[45] It is beyond dispute that the appellant was aware of both his final written warning as well as the zero tolerance policy of the bank. The policy specifically warns against loss of funds by bank tellers and emphatically warns that it is a serious offence in terms of the

disciplinary code which may result in dismissal. The final written warning was issued in line with this policy on teller's difference, or otherwise put, loss of funds in an employees' custody.

[46] It is precisely the reason why the appellant predicates his appeal on the assertion that he should have been charged with negligence under article 5.2.1.20 which requires a second written warning prior to dismissal. However, we are satisfied that indeed the employer was at liberty to institute disciplinary proceedings under article 5.1.2. of the code with the offence of "loss of funds in the appellants' custody" instead of "negligence."

[47] At the disciplinary hearing, the same point was argued, repeated at the internal appeal and also in the Industrial Court. There, the learned Judge reiterated that "an employer is perfectly entitled to set reasonable and achievable standards for its employees" and held that the zero tolerance standard is both reasonable and achievable. We do not find otherwise.

[48] Section 36 (a) of the Employment Act of 1980 provides that:

“... it shall be fair for an employer to terminate the services of an employee ... because the conduct or work performance of the employee has, after written warning, been such that the employer cannot reasonably be expected to continue to employ him.”

[49] The court below held that the dismissal of the appellant was both substantially and procedurally fair and reasonable. *Inter alia*, it relied on the dictum in De Beers Consolidated Mines v CCMA and Others [2000] 9 BLLR (LAC) where it was held that:

“Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the enterprise. That is why Supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society’s moral opprobrium of a minor theft; it has everything to do with operational requirements of the employer’s enterprise.”

[50] Applied to the matter at hand, the Bank explicitly sought to deal with its operational requirements by strict enforcement of the serious offence of tellers being short of funds entrusted to their custody. Tellers were warned that shortages may well lead to dismissal. The dismissal of the appellant followed a second conviction, the first of which was accompanied by a “Final Written Warning”, in line with the zero tolerance policy on losses, together with its warnings of dismissal.

[51] In Swaziland United Bakeries v Armstrong Dlamini, Appeal Case No. 117/ 94, the Industrial Court of Appeal held at page 11 that the crucial questions which are to be considered by the Industrial Court are whether the dismissal was unfair or not, and whether the dismissal was reasonable in all of the circumstances.

[52] The court *a quo* held that the dismissal of the bank teller was not unfair and also that it was reasonable under the circumstances. The appellant has it to the contrary, contending that the sanction was not in accordance with the disciplinary code, embodied in the collective

agreement between the Bank and the Swaziland Union of Financial Institutions and Allied Workers (SUFIAW).

[53] As already pointed out, termination of service by the bank may only occur after the disciplinary procedure has been followed. There is no contention by the appellant that this was not done, but rather that he was incorrectly charged with loss of funds in his custody, under the provisions of article 5.1.2, instead of negligence under article 5.2.1. 20. This point has been dealt with above, and rejected.

[54] The remaining aspect is to determine whether the sanction of dismissal was reasonable in all the circumstances. As also stated above, the severity of the disciplinary action must depend upon the circumstances of each case and mitigating factors shall be taken into account by the employer.

[55] A core duty of bank tellers is to ensure that at the end of the day, they can fully account for all monies entrusted to their care. Shortages can be as result of various causes, such as theft, fraud or negligence, but when funds are lost for whatever reason, it directly and most

adversely impacts upon the sustainability and profitability of banking institutions. It is therefore no surprise that the Respondent Bank tolerates no losses of money entrusted to tellers and that it has a specific policy in this regard. Tellers have been formally warned that dismissal may follow on the heels of losses of funds.

[56] This is in line with the collective agreement, the Employment Act, fairness and reasonableness. Accordingly, we hold that the sanction of dismissal is not unfair or unreasonable and that the Industrial Court did not err in law or in fact with its finding that the sanction imposed on the appellant was indeed in accordance with the collective agreement and its disciplinary code within the meaning of section 36 (a) of the Employment Act 1980.

[57] In weighing up the appropriate sanction for a disciplinary offence, consideration must be given to the seriousness of the particular act of misconduct, the length of service and disciplinary history of the employee, whether the employee has shown remorse, the likelihood of the misconduct being repeated, and any other factors that might aggravate or diminish the seriousness of the misconduct. (See:

Mhlongo v AECI (1999) 20 ILJ 1129 (CCHA) at 1138 and Orange Toyota (Kimberley) v Van Der Walt and Others (2000) 21 ILJ 2294 (LC) at 2299.

[58] In addition, the Code of Good Practice: Termination of Employment issued under section 109 of the Industrial Relations Act 2000 (as amended) emphasizes that discipline should be corrective, and dismissal should be reserved for cases of serious misconduct or repeated offences. The Code states that dismissal may be justified if the misconduct is “of such gravity that it makes a continued employment relationship intolerable” – see paragraph 5 and 6 of the Code.

“Intolerability is, of course, a wide and flexible notion. Generally, the courts accept that an employment relationship becomes intolerable when the relationship of trust between employer and employee is irreparably destroyed” – per Grogan: Workplace Law (9th Ed) p 167. (See also: Mana v Vilakati and Another v Ngwenya Glass (Pty) Ltd, (unreported)

Industrial Court Case No. 139/2004 at page 15, para. 42, per Dunseith JP).

[59] This ground of appeal therefore also stands to be dismissed. The dismissal of the appellant, under the prevailing circumstances is reasonable and fair. It is also procedurally sound.

[60] In the ordinary course of events, the trend in this court has generally been to refrain from making costs orders. This is in line with the same practise in the Industrial Court, with the objective being to not discourage meritorious industrial or labour issues to be brought for adjudication. Employees with real grievances, unresolved at the workplace and with CMAC also being unsuccessful, should not be deterred from pursuing their legitimate rights through fear of adverse costs orders in the event that they litigate without achieving their goals.

[61] However, there is no bar or prohibition on adverse costs orders in either the Industrial Court or the Industrial Court of Appeal. Spurious and frivolous cases often attract costs orders against unsuccessful

parties and it is oftentimes on a punitive scale. In appropriate matters, costs may also be ordered *de bonis propriis*, on whichever scale.

[62] The matter before us is an appeal without merit, a matter which should not have been prosecuted at all. In the court *a quo*, where no costs were ordered, the learned Judge and nominated members correctly and comprehensively dealt with all of the issues taken on appeal. A majority of the ten grounds of appeal are not questions of law but of fact. In addition, the Respondent highlighted a number of irregularities occasioned by the appellant, relating to the record.

[63] An incomplete record of evidence was initially filed of record, notably the evidence of the appellant himself. No leave for condonation of late filing thereof was sought, nor was it granted. The same applies to the collective agreement, which was also filed at the eleventh hour, without the batting of an eyelid. Nor were the pleadings as used in the Industrial Court filed together with the record. This trend again manifested itself in relation to the bundles of documents which were referred to in the course of the application in the court *a quo*, but not filed as part of the record.

[64] Had it not been for the conciliatory approach taken by the respondents' attorney, Mr. Sibandze, the appeal could well have been considered as abandoned. However, it does not excuse the behaviour of the appellant with regard to the record. The unmeritorious grounds of appeal do not help either.

[65] In a recent judgment by a full bench of the Supreme Court in case number 29 of 2013 – Siphamandla Ginindza v Mangaliso Clinton Msibi and 4 Others – similar shortcomings with the record manifested themselves. The full court held at paragraph 16:-

“Shockingly, for that matter, the applicant also failed to file the record of proceedings within two (2) months of the date of the noting of the appeal as enjoined to do so by Rule 30 (1) of the Supreme Court Rules. No acceptable explanation was tendered for this breach of the Rules.”

Rule 30 (1) of the Supreme Court Rules is on par with Rule 21 (4) of the Rules of this court.

[66] In Ginindza (*supra*) the full court went on to say, in paragraph 20, with reference to Johannes Hlatshwayo v Swaziland Development and Savings Bank and others, Civil Appeal No. 2/2010 at para. 14, per Ramodibedi JA as he then was (with Browde AJP and Zietsman JA concurring):

“[14] This Court has on diverse occasions warned that flagrant disregard of the Rules will not be tolerated. Thus, for example, in Simon Musa Matsebula v Swaziland Building Society, Civil Appeal No. 11 of 1998 the Court expressed itself, per Steyn JA, in the following terms:

“It is with regret that I record that practitioners in the Kingdom only too frequently flagrantly disregard the Rules. Their failure to comply with the Rules conscientiously has become almost the rule rather than the exception. They appear to fail to appreciate that the

Rules have been deliberately formulated to facilitate the delivery of speedy and efficient justice.

The disregard of the rules of Court and of good practice have so often and so clearly been disapproved of by this Court that non-compliance of a serious kind will henceforth result in appropriate cases either in the appropriate procedural order being made – such as striking matters off the roll – or in appropriate orders for costs, including orders for costs de bonis propriis. As was pointed out in Salojee v the Minister of Community Development 1965 (2) SA 135 at 141, ‘there is a limit beyond which a litigant cannot escape the results of his attorney’s lack of diligence.’ Accordingly matters may well be struck from the roll where there is a flagrant disregard of the Rules even though this may be due exclusively to the negligence of the legal practitioner concerned. It follows therefore that if clients engage the services of practitioners who fail to observe the required standards associated with the sound practice of the law,

they may find themselves non-suited. At the same time the practitioners concerned may be subjected to orders prohibiting them from recovering costs from their clients and having to disburse these themselves’.”

[67] The disdainful attitude of the appellant with regard to the timeous filing of the complete record, coupled with his failure to even attempt applying for condonation of the late filing of the corrected record, and exacerbated by the unmeritorious grounds of appeal, cannot merely be overlooked. Especially with regard to the *dicta* above, it must result in costs of the appeal being awarded to the respondent.

[68] In the result, the unanimous order of this court is that the appeal is ordered to be dismissed in its entirety, with costs.

M.M. RAMODIBEDI
JUDGE PRESIDENT

J.P. ANNANDALE
ACTING JUSTICE OF APPEAL

Q.M. MABUZA
ACTING JUSTICE OF APPEAL

For Appellant : Mr. B.S. Dlamini

For Respondent : Mr. M.M. Sibandze