IN THE SUPREME COURT OF APPEAL OF SWAZILAND
Held at Mbabane

Civil Appeal No. 21/06

In the matter between

JOHANNES HLATSHWAYO	Appellant
And	
SWAZILAND DEVELOPMENT AND SAVINGS BANK	First Respondent
THE REGISTRAR OF DEEDS	Second Respondent
CECIL JOHN LITTLER N.O.	Third Respondent
SIFISO MAZIYA	Fourth Respondent
WILLIAM KELLY	Fifth Respondent

CORAM: **BROWDE AJP**
ZIETSMAN JA
RAMODIBEDI JA

HEARD: 2nd November 2006
DELIVERED: 16th November 2006

SUMMARY

Civil appeal - Flagrant disregard of the Court of Appeal Rules -Appellant failing to lodge a proper record - Judgment appealed against not attached to the record - Heads of argument filed late - No application for condonation - Matter deemed to have been abandoned and dismissed.

JUDGMENT

RAMODIBEDI JA

[1] A bank loan which has incredibly allegedly been left unpaid for more than twenty years to date has landed the appellant in deep trouble. On 29 May 1986, the appellant's late wife, Thandi Judith Hlatshwayo (born Nsingwane ("the deceased"), secured a loan from the first respondent in the sum of E19 404.00.

[2] On 12 November 1986, and pursuant to the loan in question, a mortgage bond was duly registered in favour of the first respondent over the deceased's property, namely, Lot No. 350 situated at Extension 3, Zakhele Township, Manzini. Regrettably, the deceased died on 9 April 1987. It is the first respondent's case that at that stage the balance on the deceased's loan account stood at E19,452.16.

[3] Upon the deceased's death, the third respondent was appointed Executor of her estate. He duly proceeded to wind up the estate and in the process he prepared a Liquidation and Distribution Account which was subsequently approved by the Master of the High Court. It is not disputed for that matter that the appellant then signed a certificate as a beneficiary to the effect that he had seen the Liquidation and Distribution Account in question. According to the third respondent's averment in paragraph 4 of his answering affidavit this took place

as long ago as February 1989.

[4] The significance of the Liquidation and Distribution Account in question is that it admittedly reflected that there were insufficient funds in the estate to pay the amount due to the first respondent.

[5] On 20 September 2002, the first respondent obtained default judgment against the third respondent in the sum of E22,696.55 being the outstanding balance on the loan account as at that stage.

[6] On 27 October 2003, after a warrant of execution of movable goods had apparently come to nought, the fifth respondent attached the immovable property referred to in paragraph [2] above ("the property"). Thereafter a notice of sale of the property was duly published on 10 December 2003.

[7] On 14 January 2004, the property was duly sold to the fourth respondent at a public auction, the appellant's belated attempts to stop the sale in question having failed.

[8] On 16 January 2004, the appellant launched an application on notice of motion in the High Court in which he sought relief, *inter alia,* rescinding the default

judgment in question and also a declaration to the effect that the notice of sale which took place on 14 January 2004 was null and void.

[9] Although the judgment of the court *a quo* has not been annexed to the record, a point to which I shall return later, the appellant's notice of appeal dated 6 April 2006 indicates that judgment was in fact delivered on 24 March 2006.

[10] Now, Rule 30(1) of the Court of Appeal Rules, 1971 provides in mandatory terms that the appellant shall prepare the record on appeal 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.

[11] Rule 30(4) in turn reads as follows:-

> "*(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.*"

[12] Rule 16(1) provides that the Judge President or any Judge of Appeal designated by him may on application extend any time prescribed by the rules.

[13] Despite the peremptory nature of the Rules referred to above, the "record" produced by the appellant contains the following major deficiencies :-

(1) As earlier stated, the judgment forming the subject matter of the appeal has not been annexed to the record. It need hardly be stressed that, by making this omission, the appellant has in effect denied this Court an opportunity to determine the correctness or otherwise of the judgment in question. Such conduct cannot be tolerated by this Court.

2)There is no replying affidavit attached to the record. Instead, the appellant's counsel made a belated attempt to hand in the affidavit comprising 18 pages during argument. This, he did without bothering to lodge it with the Registrar of the High Court for certification as correct in terms of Rule 30(1) and (2).

3)Pages 17 - 25 of the record are illegible and yet they are supposed to reflect documents which are important to the case.

(4) The appellant's heads of argument were filed on 25 October 2006 which was a period of only 6 days before the hearing of the matter. This was in flagrant disregard of Rule 31(1) of the Court of Appeal Rules

which provides as follows :-

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

(5) To crown it all, there is absolutely no application for condonation of any of the breaches of the Rules as set out above. In this regard, it will be noted that Rule 17 of the Court of Appeal Rules provides for condonation in the following terms:-

> "*17. The Court of Appeal may on application and for sufficient cause shown, excuse any party from compliance with any of these rules and may give such directions in matters of practice and procedure as it considers just and expedient.*"

[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 orders 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 VS THE MINISTER OF CUMMUNITY 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.*"

[15] Once again, in NHLAVANA MASEKO AND OTHERS v GEORGE MBATHA AND ANOTHER. Civil Appeal No. 7 of 2005 this Court said the following, per Zietsman JA:-

> "*The matter was in fact heard on 16 June 2005. The appellants' heads of argument, which should have been filed 28 days before the hearing of the matter, are dated 8 June 2005. The respondents' heads of argument are dated 13 June 2005. There was no application by either counsel for condonation of the late filing of the heads of argument, and no written reason given for this failure to comply with the rules of this Court. This disregard for the rules is becoming prevalent. In a circular dated 21 April 2005 practitioners were again warned that failure to comply with the rules in respect of the filing of heads of argument would be regarded with extreme disapproval by this Court and might be met with an order that the appeals be struck off the roll or with a punitive cost order. TTiis warning is hereby repeated.*"

[16] Similarly, it is evident in my view that the attitude evinced by the appellant in the instant case is that the

Rules of this Court are unimportant and fall to be disregarded with impunity. It is thus necessary to disabuse litigants of such attitude lest the justice^ system in this jurisdiction falls into disrepute. To make matters worse, the appellant has not even bothered to make an application for Condonation of all of the breaches of the Rules asi fully set out above. He has thus treated the Court in a cavalier manner.

[17] It requires to be stressed that the whole purpose behind Rule ǁ7 of the Rules of this Court on condonation is to enable the Court to gauge such factors as (1) the degree of delay involved in the matter, (2) the adequacy of the reasons given for the delay, (3) the prospects of success on appeal and (4) the respondent's interest in the finality of the matter.

[18] In a substantially similar matter in KENNETH NGCAMPHALALA V STEPHEN HOUGH AND ANOTHER, Civil Appeal No. 37 of 2001. this Court stated the following, per Tebbutt JA:-

> "*These factors* (i.e. failure to lodge the record and heads of argument timeously) *coupled with an absence of any application for condonation warrants this Court upholding the respondents' contention that the appeal has been deemed to be abandoned and acceding to the request that the appeal be struck from the roll With*

costs. It is accordingly ordered."

[19] In my view, the peculiar circumstances of the instant case as fully outlined above cry out for finality of litigajtion in the interest of justice. I discern the need to put an end to the whole saga. In this connection, it is as well to observe that the debt owing to the first respondent was never seriously contested in the first place, in my view. In this regard the appellant said the following in paragraph 7 of his founding affidavit:-

"7.

At the conclusion of the loan agreement between my late wife and the first respondent it was explained to us that the main purpose of the mortgage protection policy was to ensure that in the event my wife dies (sic) before setting (sic) the loan in full, the insurers would pay balance that would be outstanding at that

time. In sho^rt, the insurer was and is still liable to pay whatever balance is outstanding but not the estate of my late wife."

It turned out, however, that the insurance company concerned repudiated the appellant's claim on the ground that the deceased was not covered under **j** the

mortgage protection plan in question because at the time of her proposal she was pregnant. She had to wait for the delivery of the baby and thereafter go for tests before she could be protected. It is the first respondent's case that she djjed before she could do so.

[20] Furthermore, in paragraph 17 of his answering affidavit, the third respondent who, as will be recalled, was Ithe executor of the deceased's estate, makes the following significant averments:-

> "*In fact on the 24^ January 2001 applicant advised the deponent* (i.e. the ¡ Executor) *that he had approached the Swaziland Building Society from whom he had applied for a loan with which* to *pay the debt due to Swazi Bank. At that time applicant made it clear that he had no defence to the claim.*"

[21] It follows from the aforegoing considerations that the following order is justified in the circumstances:

The appeal is deemed to have been abandoned and is hereby dismissed with costs.

M.M. RAMODIBEDI

JUDGE OF APPEAL

I agree

J. BROWDE

ACTING JUDGE PRESIDENT

I agree

N.W. ZIETSMAN

JUDGE OF APPEAL

Delivered at Mbabane this 16th day of November 2006

For Appellant:	Mr. S. Magongo
For 1st, 4th and 5th Respondent:	Mr. T. Mlangeni
For 2nd Respondent:	No appearance
For 3rd Respondent:	Ms X. Hlatshwayo