



IN THE SUPREME COURT OF SWAZILAND
JUDGMENT

Civil Case No: 04/2012

In the matter between:

ROOTS CIVILS (PTY) LTD

APPELLANT

v

INYATSI CONSTRUCTION LIMITED

RESPONDENT

Neutral citation: Roots Civil (Pty) Ltd. v Inyatsi Construction Limited (04/12)

[2012] SZSC 67 (30 NOVEMBER 2012)

Coram: EBRAHIM J.A., MOORE J.A., and M.C.B. MAPHALALA J.A.

Heard: 12 NOVEMBER 2012

Delivered: 30 NOVEMBER 2012

Summary: Civil Procedure – Record of Appeal filed out of time – Appeal deemed to have been abandoned under Rule 30 (4) of the Rules of the Supreme Court – Appeal dismissed – Cross appeal withdrawn – Costs of appeal and cross-appeal to the respondent.

MOORE J.A.

INTRODUCTION

- [1] This is an appeal brought by Roots Civils (Pty) Ltd, hereinafter Roots, against the judgment of Mamba J delivered on the 20th January 2012 in the High Court. In that judgment, the learned Judge ordered that Roots pay to the respondent Inyatsi Construction Limited, hereinafter Inyatsi, the sum of E450,000.00 being the balance of the purchase price of a certain grader plus interest thereon at the rate of 9% per annum *a tempore morae*. Roots was also ordered to pay the costs of the action – Civil Case No. 3358/05.
- [2] Simultaneously, the trial judge also dismissed a counter claim brought by Roots against Inyatsi with costs: and he also ordered that the costs of the action should include the costs of counsel to be duly certified in terms of the relevant Rule of court. The judge's order amounted to a defeat for Roots upon all fronts.
- [3] The reverses suffered by Roots in the High Court did not satiate its appetite for continuing litigation: so, on the 31st January 2012, it filed a notice of

appeal complaining that the honourable court a quo had erred in law as itemized below:

- i. by holding that the only issue to consider was whether payment had been made by Appellant.
- ii. and in fact by relying on the evidence of individuals who were not present when the contract was concluded.
- iii. and in fact in holding that the Respondent had proved the material terms of the oral agreement.
- iv. By not applying the best evidence rule by relying on hearsay evidence.

BACKGROUND

[4] On the 19th September 2005, Inyatsi brought a claim against Roots for payment of the sum of E537,791.66 in respect of monies due and payable for the sale/purchase of Motor Grader 140G plant sold by Inyatsi to Roots on 31st May 2005 which sum remained unpaid despite repeated demands for payment. Inyatsi also claimed interest at the rate of 2% per month *a tempore morae* to the date of payment plus costs of the suit.

ABANDONMENT OF APPEAL

[5] When the matter was heard before this Court, counsel for Inyatsi seized the initiative and raised *in limine* the question concerning the abandonment of the appeal. Her submissions on this point are clearly articulated in his heads of argument which speak for themselves as set out hereunder:

- “1. Rule 30(1) of the Rules of the above Honourable Court provides that: “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,” and
2. Rule 30(4) of the said Rules provides that: “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;” and
3. The said Rule 16(1) provides that: “**The Judge President or any judge of appeal designated by him may on application extend any time prescribed** by these rules: Provided that the Judge President or such judge of appeal may if he thinks fit refer the application to the Court of Appeal for decision” and Rule 16(2) that: “**An application for extension shall be**

supported by an affidavit setting forth good and substantial reasons for the application and where the application is for leave to appeal the affidavit shall contain grounds of appeal which prima facie show good cause for leave to be granted.”

(Own emphasis)

4. ***In casu***, the appeal was noted on the **31st January 2012** and the Appeal Record (styled “Book of Pleadings”) was lodged only on the **28th August 2012**, i.e. the Record was filed almost seven months later.
5. There is no application for an extension in terms of the said Rule 16(1).
6. The Appeal Record not having been lodged within two months as prescribed, the appeal is deemed to have been abandoned.
7. The appeal has not been revived by way of an application for an extension in terms of Rule 30(4) read with Rule 16(1). It then follows, effectively, that there is no appeal before the above Honourable Court, and that that should be the end of the matter.

[6] The matter having been irrevocably and irreversibly interred by the above submissions, the respondent nevertheless took the point that the record was

incomplete. Counsel for Roots candidly and apologetically admitted the deficiencies in the record.

- [7] In **Commissioner of Police v Vilakati** [2012] SZSC 63, this Court highlighted the processes and procedures which must be observed in the preparation and filing of appeal records if they are to satisfy the requirements of Rule 30 of the Court of Appeal Rules. The record in that case being both in complete and otherwise not in compliance with the Rules in several respects, this Court struck the appeal from the roll with costs.

CONCLUSION

- [8] In the event, the appeal must be, and is deemed to have been abandoned for the reasons set out above. The cross-appeal, which upon its face bore little prospect of success, was saved from the fate of dismissal by its withdrawal by the appellant.

ORDER

- i. The appeal is deemed to have been abandoned for non-compliance with the Rules of Court.
- ii. This Court notes that the cross-appeal has been withdrawn by the appellant.

- iii. The costs of the appeal and of the cross-appeal must go to the respondent.

S.A. MOORE
JUSTICE OF APPEAL

I agree

A.M. EBRAHIM
JUSTICE OF APPEAL

I agree

M.C.B. MAPHALALA
JUSTICE OF APPEAL

For the Appellant : Mr. S.V. Mdladla
For the Respondent : Ms. Van-der Walt