IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

JUDGMENT

Civil Appeal Case No. 45/2012

In the matter between

SANDLANE ZWANE t/a
BULLNOSE BONANZA **Appellant**

And

BUSISIWE KHANYILE (born Dlamini) **Respondent**

Neutral citation:	Sandlane Zwane t/a Bullnose Bonanza *v Busisiwe Khanyile (born Dlamini)(45/2013)* [2013] SZSC 52 (29 November 2013)
Coram:	RAMODIBEDI CJ, MOORE JA, and MCB MAPHALALA JA
Heard:	**12 NOVEMBER 2013**
Delivered:	**29 NOVEMBER 2013**

Summary: **Civil procedure – Rule 30 of the High Court Rules – Irregular step - Appeal against the order of the High Court setting aside the appellant's notice of intention to defend as an irregular step – The order not final but a simple interlocutory order and therefore not appealable without leave in terms of s 14 (1) of the Court of Appeal Act – Flagrant disregard of the Rules of Court – Appeal dismissed - Costs *de bonis propriis.***

JUDGMENT

RAMODIBEDI CJ

[1] For the sake of convenience the parties in this matter will be referred to by their nomenclatures in the court below. Accordingly, the present respondent will be referred to as plaintiff. The appellant will in turn be referred to as defendant.

[2] The facts show that on 7 March 2012, the plaintiff issued a combined summons against the defendant based on an alleged breach of an oral agreement between the parties.

[3] The plaintiff alleged in her particulars of claim that on or about 2 February 2011, and at Matsapha, she purchased from the defendant two hundred boxes of two hundred square metres of brick tiles for the sum of E 58,380.00 in terms of the oral agreement in question.

[4] The plaintiff further alleged in her particulars of claim that despite the fact that she duly paid a deposit in the sum of E52,000.00 as agreed, the defendant failed to deliver the boxes of tiles in question.

[5] In the circumstances the plaintiff prayed for judgment against the defendant in the following terms:-

(1) Cancellation of the agreement in question.

(2) Payment of the sum of E 52,000.00 (Fifty Two Thousand Emalangeni).

(3) Interest calculated at the rate of 9% per annum a tempore morae.

(4) Costs of suit.

(5) Further and/or alternative relief.

[6] It is not in dispute that on 14 March 2012, the defendant was duly served with plaintiff's combined summons.

[7] It is further common cause that on 10 April 2012, the plaintiff filed a notice of application for default judgment in terms of Rule 31 (3) (a) of the High Court Rules 1954. This was admittedly after the time for filing a notice of intention to defend had already expired. The plaintiff's notice specifically stated that the application for default judgment would be heard on 13 April 2012.

[8] On 10 April 2012, before the application for default judgment could be heard, the defendant served the plaintiff's attorneys with a notice of intention to defend.

[9] On 10 May 2012, the plaintiff filed a "Notice of irregular proceedings in Terms of Rule 30." In the main, she prayed for the following relief:-

> *"Setting aside the Defendant's Notice of Intention to Defend dated 10th April 2012 as an irregular step in that it was delivered and served beyond the time limit fixed by the summons and rule 19 (1) of the rules of the above Honourable Court after service of the summons on the Defendant and in that the Defendant failed to act in terms of Rule 27 (1) of the Rules of the above Honourable Court by securing the agreement of the Plaintiff or making an application extending or abridging any time prescribed by the Rules before delivering and serving the Notice of Intention to Defend."*

[10] On 12 June 2012, the High Court granted the plaintiff's Rule 30 application. It accordingly granted an order in the following terms:-

> *"1. That the Defendant's Notice of Intention to Defend dated 10th April, 2012 is set aside as an irregular step in that it*

was delivered and served beyond the time limit fixed by the summons and rule 19 (1) of the Rules of the above Honourable Court after service of the summons on the Defendant and in that the Defendant failed to act in terms of Rule 27 (1) of the Rules of the above Honourable Court by securing the agreement of the Plaintiff or making an application extending or abridging the time prescribed by the Rules before delivering and serving the Notice of Intention to Defend.

2. That Defendant pay costs of the application."

[11] The record of proceedings further shows that on the same day, namely, on 12 June 2012, the plaintiff filed a notice of set down for default judgment in the matter.

[12] On 20 June 2012, the defendant filed a notice of appeal leading up to the present proceedings. It raised two (2) grounds of appeal, namely:-

"1. The Honourable Court a quo erred in law and in fact

in finding that the Notice to Defend was an irregular step in the proceedings.

2. *The Honourable Court a quo erred in law and in fact in setting aside the Notice to Defend on the basis that [there] was no application for condonation for late [filing] thereof and ordering that it is an irregular step in the proceedings."*

[13] The first question which arises, therefore, is whether the court a quo's order as fully set out in paragraph [10] above is appealable without leave?

[14] The starting point in determining the question posed in the preceding paragraph is s 14 (1) of the Court of Appeal Act 1954. This section reads as follows:-

"14. (1) An appeal shall lie to the Court of Appeal –

(a) from all <u>final</u> judgments of the High Court; and

(b) by leave of the Court of Appeal from an interlocutory order, an order made ex parte or an order as to costs only." (Emphasis supplied.)

[15] The next question for determination then is whether an order granting a Rule 30 application as an irregular step is final or simply interlocutory? The test in determining the question was succinctly laid down in the South African leading cases of **Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (A)** at 870; **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A)**. These cases have in turn been consistently followed by this Court in this jurisdiction. See, for example, **Lucky Mahlalela v Gilfillan Investments (Pty) Ltd, Civil Appeal Case No. 20/2005; Jerry Nhlapo and 24 Others v Lucky Howe N.O. (in his capacity as liquidator of VIP Limited in Liquidation), Civil Appeal No. 37/07; The Minister of Housing and Urban Development v Sikhatsi Dlamini and Others, Case No. 31/2008; Temahlubi Investments (Pty) Ltd v**

Standard Bank Swaziland Limited, Civil Appeal No.35/2008; Malcos Bhekumthetho Sengwayo v Thulisile Simelane and Others, Civil Appeal No. 5/2011; Swaziland Agricultural Enterprises (Pty) Ltd v Doctor Lukhele, Case No. 7/2012.

[16] The fundamental principle laid down by these authorities, more especially in the words of **Schreiner JA** in the **Pretoria Garrison Institutes** case, is that "a preparatory or procedural order is a simple interlocutory order and therefore not appealable" unless it disposes of the issue in the main action or suit. Viewed in this way, I consider that a Rule 30 order as an irregular step is such a case. It is not final or definitive. This is so because, as the *court a* quo correctly held, in my view, the party against whom the order is granted may still apply for an extension of time and removal of bar and condonation under Rule 27 of the High Court Rules 1954.

[17] It follows from these considerations that the Rule 30 order being interlocutory in the instant matter, the defendant was obliged to

seek and obtain leave of this Court to appeal. It is common cause that it failed to do so. No acceptable explanation has been furnished.

[18] The above expose remained the position from 20 June 2012 when the defendant noted an appeal right up until the hearing of the matter on 12 November 2013. Before the hearing on the latter date, this Court put the defendant's counsel, Mr Nkomondze on notice to show cause why he should not be ordered to pay costs *de bonis propriis* for his flagrant disregard of the Rules of this Court. At the hearing before this Court, counsel could only plead for mercy, while apologising for his untoward conduct. In a classical case of blowing hot and cold at the same time he was heard to say, however, that he should not be saddled with punitive costs because he did not stand to benefit from his client. I am certainly not impressed in the circumstances of this case.

[19] Apart from improperly seeking to appeal without leave of this Court, Mr Nkomondze further breached the Rules of Court in the matter in the following respects, in chronological order:-

(1) On 20 June 2012 as pointed out above, the defendant noted an appeal through its attorney Mr Nkomondze. In terms of Rule 30 (1) of the Rules of this Court, Mr Nkomondze was obliged to file the record of proceedings within two months of the date of noting the appeal, that is to say, on or before 20 August 2012. However, he failed to file any record at all. No explanation has been tendered for this flagrant disregard of the Rules. No condonation was sought or granted for that matter.

(2) On 15 October 2013, the plaintiff served heads of argument on Mr Nkomondze's chambers. Mr Nkomondze, however, failed to file any heads of argument at all despite this clear reminder. In doing so, he flouted Rule 31 of the Rules of this Court which enjoins the appellant to file heads of

argument not later than 28 days before the hearing of the appeal. Typically, Mr Nkomondze has proferred no acceptable explanation. No condonation was sought or obtained. This, despite the fact that the November 2013 session of this Court was duly published in advance. Mr Nkomondze conceded this point.

(3) Mr Nkomondze inexplicably failed to attend the roll call on 1 November 2013 as directed by this Court. Typically, no apology was forthcoming until at the hearing of this matter.

(4) To crown it all, right at the end of his submission in this Court, Mr Nkomondze handed in a "Notice of withdrawal of Appeal," tendering costs in the process. Typically, the notice had not been filed with the Registrar. It had not been served on the plaintiff's attorneys either. The Court had to warn counsel to formalise the process.

[20] I have deliberately set out the background history of the matter at length and in some detail in order to highlight the several respects in which Mr Nkomondze flouted the Rules of this Court to the inconvenience of the Court and that of the plaintiff. What is even more worrying is his explanation for all of these lapses. He submitted that the defendant's appeal was deemed to have lapsed in terms of Rule 30 (4) of the Court of Appeal Rules simply because the defendant failed to file the record of proceedings. As I understand counsel's submission, it became unnecessary to pursue the appeal in any form. In my view, that is a startling proposition, coming as it does from a party who seeks to benefit from his own failure to observe the Rules of Court. Rule 30 (4) on which Mr Nkomondze relies provides as follows:-

> *"(4) Subject to rule 16 (1) [on extension of time], 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."*

Logic and common sense dictate that it is only the court which is seized with an appeal that has the right to make a declaratory order to the effect that the appeal is deemed to have been abandoned. That decision does not lie with the litigants themselves. Until the court has made a decision in the matter litigants are obliged to observe the Rules up to finality.

[21] The principles relating to costs *de bonis propriis* are well-known in this jurisdiction. Thus, in **Jomas Construction (Proprietary) Limited v Kukhanya (Proprietary) Limited Case No. 48/11** this Court expressed itself as follows at para [18]:-

> *"[18]So, too, an award of costs de bonis propriis (out of his/her pocket) is a matter which lies within the court's discretion. Here the punishment is directed at the representative and not the litigant. As a general rule, the court will not grant an award of costs de bonis propriis unless the representative acted maliciously, negligently or unreasonably. See, for example, in Re Estate Potgieter*

(1908 T.S. 982 at p1002). Once again, the list is not exhaustive. Thus, for example, flagrant disregard of the Rules of Court may attract costs de bonis propriis against the representative within the inherent discretion of the court. In this regard we wish merely to draw attention to the following apposite remarks of Ramodibedi CJ in <u>*The Minister of Housing and Urban Development v Sikhatsi Dlamini and 10 Others*</u>*, Case No. 31/08;* <u>*The Chairman of the Commission of Enquiry into the Operations of the Municipal Council of Mbabane and 10 Others*</u>*, Case No. 32/08;* <u>*Sikhatsi Dlamini and 10 Others v Walter Bennett and Others*</u>*, Case No. 38/08 SZSC 7) (Consolidated) (reported on line under Media Neutral Citation: [2008] at para [35], namely:-*

'[35] Before closing this judgment it is necessary to make one further comment. The tortuous manner in which the parties were allowed to conduct litigation in this matter is cause for concern. There has been a minefield of applications of all sorts as the above chronology of events

shows. This has resulted in unsatisfactory and costly piece-meal litigation. The Rules of Court were bent and sacrificed along the way. While the lawyers obviously stand to benefit financially from such a scenario, it is the poor litigants who are hit in their pockets. In the end, such a practice will obviously bring the whole justice system in this country into disrepute, something that must be avoided at all costs. It is not inappropriate in these circumstances, therefore, to sound a strong warning that in future legal practitioners who do not observe the Rules of Court might find themselves having to pay costs de bonis propriis.'

See also such cases as Siboniso Dlamini v Winnie Muir, appeal Case No. 31/06 (Supreme Court); Andile Zikalala v Teaching Service Commission, Case No. 05/09 (Industrial Court of Appeal)."

[22] As can be seen, on several occasions this Court has repeatedly warned that legal practitioners who flagrantly disregard the Rules of Court might in future find themselves having to pay costs *de bonis propriis.* This is such a case.

[23] The facts show that Mr Nkomondze acted grossly negligently or unreasonably throughout. He treated the Rules and the Court with disdain. His conduct is deplorable to say the least. Indeed, as was put to him during submissions, he displayed unbecoming arrogance deserving of censure as proposed in the order below.

[24] In all the circumstances of the case, the following order is made:-

(1) The appeal is dismissed.

(2) Mr M. Nkomondze is ordered to pay costs *de bonis propriis.*

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M.M. RAMODIBEDI

CHIEF JUSTICE

I agree

_____

S.A.MOORE

JUSTICE OF APPEAL

I agree _____

MCB MAPHALALA

JUSTICE OF APPEAL

For Appellant **:** Mr M. Nkomondze

For Respondent **:** Mr X. Mthethwa