IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No. 34/2013

In the matter between

TASTY TREATS (PTY) LTD T/A TT TRUSSCON — **APPELLANT**

And

K S DISTRIBUTORS (PTY) LTD T/A BUILD PLUS HARDWARE — **RESPONDENT**

Neutral citation:	***Tasty Treats (Pty) Ltd t/a TT Trusscon v KS Distributors (Pty) Ltd t/a Build Plus Hardware (34/2013)*** **[2013] SZSC 69 (29 November 2013)**
Coram:	**RAMODIBEDI CJ, MOORE JA and OTA JA**
Heard	**19 NOVEMBER 2013**
Delivered:	**29 NOVEMBER 2013**
Summary:	**Civil procedure: appeal against an interlocutory decision; no leave sought to appeal in terms of the rules; extension of time and condonation of late filing of the record of appeal; no record of appeal is filed simultaneously with application; application is a blatant affront to the rules of this Court; application dismissed; appeal deemed**

abandoned and dismissed; costs awarded on an ordinary scale in appreciation of the reasonable and gallant conduct of appellant's counsel in conceding the several breaches of the rules.

JUDGMENT

OTA. JA

[1] As we stand on the threshold of yet another legal year, the machinery of justice continues to be dogged by old constraints and challenges to which solutions have yet to be found and implemented. New constraints and challenges have surfaced of recent. All of these combine to pose serious obstacles to the accomplishment of our mission statement to ensure a proper administration of justice.

[2] The challenges and constraints are many and varied, however, it is no hyperbole to say that the progressive decline in professional ethics by some members of the legal profession, which is evinced by the persistent and unprecedented lackadaisical attitude towards compliance with the Rules of this Court, is a delimiting factor. A real threat to the realization of an efficient, effective and expeditious justice delivery. This is one of the factors which have conspired to hamper aggrieved persons in the pursuit of their causes.

[3] The machinery of justice is at the heart of every system of government. A democratic government based on respect for justice and fundamental rights and freedoms cannot thrive in the absence of an efficient, effective, independent and impartial justice system. If the machinery of justice cannot function

effectively, the rule of law which is so central to democracy, cannot be sustained.

[4] Law cannot administer or enforce itself. It has to be enforced by institutions and persons constituting these institutions to be able to realize its functions and perform the role of developing our society. The legal profession consisting of Lawyers and Judges, is one of the institutions of administration of law. Whether or not the purpose of law is realized depends on how members of the legal profession discharge this responsibility. For the law and the institutions of its administration to be in the service of the society not only requires an appreciation by the legal profession of its duty to the society, but it must be responsive and sensitive and not indifferent to the needs, hopes and expectations of the community at large.

[5] In this state of affairs, the society is looking up to the legal profession for salvation. We must answer to this clarion call. This is because the law and the institutions which administer it remain instruments of justice and peace only in so far as the public reposes confidence in them.

[6] It is thus of paramountcy, that the Supreme Court, the highest Court in the land, regulates its proceedings to ensure a proper administration of justice. This, it can realize by insistence on strict compliance with its Rules which are a handmaid to the effective, efficient, inexpensive and expeditious dispensation of justice.

[7] This Court has in the not too distant past reiterated that its Rules have been designed to ensure the smooth, orderly and most importantly, the timely and

expeditious conduct of litigation. The timelines set down in the rules represent realistic periods within which a given step in litigation must be taken. These periods of time were not plucked out of the air. They were based upon years of experience of what can in all probability be achieved with diligence and dispatch in the absence of unforeseen eventuality. Per dictum of **Moore JA** in **Bani Ernest Masuku v Maqbul & Brothers Investments (Pty) Ltd and Others Civil Appeal No. 25/2011 para [8].**

[8] It follows from the above, that though the Rules of this Court are not sacrosanct, they are, however, meant to be obeyed. The Court thus has a duty to enforce strict compliance with its Rules. A stopgap measure with its concomitant instability and lack of continuity, will not suffice. It is only the outright denounciation of any non-compliance or disregard of the Rules that will annihilate this problem. This has been the posture of this Court over the years.

[9] This **"appeal"** has fallen into the quagmire commanding such condemnation. It is an affront to the Rules of this Court, which most certainly, cannot be condoned. It is important that I note right from the outset that when this **"appeal"** was heard, learned counsel for the **"appellant"** Mr L. Mzizi in a show of sterling professionalism and enviable advocacy, gallantly conceded the several breaches of the Rules of this Court by the **"appeal"**. He was well advised to do so. I say this for reasons I now proceed to demonstrate.

[10] <u>CHRONOLOGY</u>

The heartbeat of this case is a provisional sentence summons which the Respondent as Plaintiff sued out *a quo* against the **"appellant"** as Respondent claiming the sum of E300,000 made up of two cheques of E150,000 each. The Defendant had issued these cheques in favour of the Plaintiff. The cheques had been dishonoured by the bank together with interest and costs.

[11] Suffice it to say that the Court *a quo* per **Hlophe J,** granted provisional sentence to the Plaintiff in the following terms:-

> **" 1. The defendant be and is hereby ordered to pay to the plaintiff a total sum of E300.000-00 made of claims 1 and 2 of the provisional sentence summons.**
>
> **2. Defendant be and is hereby ordered to pay plaintiff interest on the above amount at 9% per annum calculated from the 10th July 2012.**
>
> **3. Should the defendant desire to enter the principal case, it shall follow the provisions of the Rules of this Court in that regard."**

[12] **"<u>THE APPEAL</u>"**

The Defendant obviously derived no joy from the aforegoing order. Consequently, it sought to approach this Court for redress via a notice of appeal filed on 29th of July 2012, wherein the Defendant is named as the **"appellant".** Whether the Defendant is qualified for the said appellation remains to be seen. It is sufficient for me to state at this juncture that the notice of appeal articulates the following grounds of appeal:-

> **" 1. The Court *a quo* erred in fact and in law in granting provisional sentence against the Appellant.**
>
> **2. The Court *a quo* erred in fact and in law in holding that there was nothing special that had been put forth before it to justify the deviation from the normal route through which liquid documents are enforced.**
>
> **3. The Court erred in fact and in law in holding that the first defence of the appellant is not feasible.**

4. The Court erred in fact and in law in holding that the appellant had not paid the Respondent the amount claimed in the provisional sentence summons."

[13] BREACHES COMMITTED IN **"THE APPEAL"**

A. LEAVE TO APPEAL

The judgment of the Court *a quo* which this **"appeal"** seeks to assail was purely interlocutory in nature. That is why para 3 of the order which I had hereinbefore captured in para [11] above, enjoins the Defendant if it desired to enter the principal case, to follow the provisions of the High Court Rules in that regard. It is common cause that the High Court has not yet dealt with the principal matter in terms of Rule 8 of its Rules. It is therefore indisputable that the impugned decision was purely interlocutory. An appeal can validly lie against such an interlocutory order only with the leave of this Court. This is in terms of section 14 (1) of the Court of Appeal Act 1954, which states as follows:-

" (1) An appeal shall lie to a Court of appeal -

(a) from all final judgments of the High Court; and

(b) by leave of the Court of Appeal from an interlocutory order, an order made exparte or an order as to costs only". (emphasis mine)

[14] Being an interlocutory order, leave of this Court was required in the **"appeal".** The **"appellant"** failed to seek the requisite leave notwithstanding that its non-compliance with the provisions of section 14 (1) of the Act was taken as a point *in limine,* and exhaustively canvassed in the application for stay of execution which the **"appellant"** launched before the Court *a quo* per **S.B. Maphalala PJ,** in the wake of the **"appeal".**

[15] This **"appeal"** therefore falls short of section 14 (1) of the Act for want of leave having first been sought and obtained. This state of affairs is fatal to the **"appeal".** It falls to be dismissed on this ground alone. See **Philani Clinic Services (Pty) Ltd v Swaziland Revenue Authority and Another [2012 SZSC 74, Mmeleni Investments Corporation (Pty) Ltd and Others v Standard Bank Swaziland Ltd [2009] SZSC 22, Minister of Housing and Urban Development v Sikhatsi Dlamini and Others [2008] SZSC 33.**

[16] B. CONDONATION

From the several papers which glut these proceedings, it appears that on the 28th of October 2013, the Respondent launched an application by way of notice of motion, wherein it sought *inter alia*, that the **"appellant's**" notice of appeal should be declared abandoned, dismissal of the said notice of appeal as well as costs on attorney and clients scale. The application was founded on the supporting affidavit of one Keith Bhutana Sigwane, described therein as the Managing Director of the Respondent. The Respondent filed heads of argument of an even date simultaneously with the aforegoing application and also filed a bundle of authorities in support of same. The gravamen of the application is the complaint that the **"appellant"** failed to file the record of appeal.

[17] It appears that the **"appellant"** filed an answering affidavit to the Respondent's application on the 30th of October 2013. Thereafter, on the 31st of October 2013, the **"appellant"** commenced an application by way of motion seeking for *inter alia*, condonation of its none filing of the record of proceedings timeously, that the Court grant's it leave to file the record of proceedings

within a reasonable time from the grant of the order of Court and that the Respondent should be ordered to pay costs of the application.

[18] It is indisputable that upon commencement of the present session of the Supreme Court on 1st November 2013, and thereafter on the 4th of November 2013, this matter served before the learned Chief Justice for enrollment. The learned Chief Justice enrolled the matter and set time limits for the filing of all relevant processes.

[19] When this matter was argued before us on the 19th of November 2013, Mr Mzizi sought extension of time and condonation of the late filing of both the record of appeal and the application for leave to appeal. Let me say it straightaway that the condonation sought is a non-starter. I say this because the notice of this **"appeal"** was filed on the 29th of July 2013 going by the Registrar's stamp affixed thereon. It is pertinent that I observe here that as at the time the Respondent filed its application for abandonment of the appeal, no record of the **"appeal"** had been filed by the **"appellant"**. It is beyond disputation that at the time the **"appellant"** filed its application for condonation on the 31st of October 2013, no record of appeal had been filed in this matter. It is also the true position of things, that as at the time the matter was enrolled by the Chief Justice on the 4th of November 2013, no record of appeal had been filed. It cannot also be gainsaid that when this matter served before Court for argument on the 19th of November 2013, the much vaunted record of appeal was still conspicuously absent.

[20] It follows from the above and as correctly contended by the Respondent, that this **"appeal"** does grave violence to the provisions of Rule 30 (1) of the Rules of this Court which postulates as follows:-

> **"The appellant shall prepare the record on appeal in accordance with sub-rules 5 and 6 thereof and shall within two months of noting the appeal lodge a copy thereof with the Registrar of the High Court for certification as correct."** (emphasis added)

[21] The *literal legis* of the legislation ante puts it beyond dispute that the **"appellant"** had a mandatory duty to lodge the record of appeal with the Registrar of the High Court, within two months from the 29th of July 2013 when the notice of appeal was filed. This means that the record ought to have been lodged on or before the 28th of September 2013. This is however not the case as I have hereinbefore aptly captured above.

[22] It is also obvious and apparent from the processes before Court, that prior to the 28th of October 2013 when the Respondent launched its application for abandonment of the **"appeal",** the **"appellant"** had neither filed the record of appeal nor sought or obtained the requisite extension of time within which to file the said record of appeal in terms of Rule 16 (1) which provides that:-

> **"The Judge President or any Judge of appeal designated by him may on application extend any time prescribed by the 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."**

[23] It is imperative that I observe here, that the **"appellant"** was also remiss in filing an application for condonation of the late filing of the record of appeal, which condonation is a discretion which the Rules accord this Court via Rule 17 thereof, in the following language:-

> **"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."**

[24] The consequences of failure to file the record of appeal in terms of Rule 30 (1) and failure to invoke Rule 16 (1) for an extension of time within which to file same, flow from the uncompromising language of Rule 30 (4) which is as follows:-

> "**Subject to rule 16 (1), if an appellant fails to note an appeal or to submit or re-submit the record for certification within the time provided by this rule, the <u>appeal shall be deemed to have been abandoned"</u>** (emphasis added)

[25] It seems to me from the aforegoing, that in the face of the obvious shortcomings of this **"appeal"** in terms of the time limits set by the Rules regarding its record, the Respondent was well within its rights to launch the application of the 28th of October 2013 for an order declaring the appeal abandoned, a dismissal of same, as well as costs.

[26] The application achieved one immediate reaction. It evidently woke the **"appellant"** from a deep slumber and elicited from it the application of the 31st of October 2013, wherein it sought, condonation of the late filing of the record of appeal and leave to file the said record within a reasonable time from the grant of the order of the Court.

[27] It cannot be controverted that by this move, the **"appellant"** seeks to retrace its steps and regulate this **"appeal"** in terms of Rules 16 (1) and 17 respectively. It appears to me that this move is not only a red herring, but it is

also audacious. It certainly amounts to a desperate attempt by the **"appellant"** at shutting the stable after the proverbial horse had bolted away.

[28] I say this because, firstly, the application for condonation is a clear attempt by the "**appellant"** to overreach the application for abandonment of the **"appeal"** which precedes it. Secondly, the absence of a record of appeal, concomitant to such an application, denotes that the **"appellant"** is persisting in its unsavory and flagrant disregard of the Rules of this Court and is attempting to drag the Court along with it. This shows up the application as lacking in *bona fides.* It divests the **"appellant"** of the right to any indulgence by the Court in terms of the Rules.

[29] The above exposition prefigures the illuminating rhetorical analysis advanced in paragraph [7] of the Respondent's heads of argument, as follows:-

> **"In this matter before this honourable Court, Rule 16 (1) is of no application since the Appellant has neither filed a record nor issued an application envisaged by this provision. This clearly demonstrates that the appellant was merely delaying enjoyment of the judgment handed down by his Lordship Hlophe."**

[30] I am in consonance with the aforegoing elucidation. It cannot be gainsaid nor resisted in the peculiar context of this case.

[31] In coming to the aforegoing conclusion, I am cognizant of the fact that Rules 16 (1) and 17 respectively accord this Court the discretion to grant extension and condonation for the late filing of the record of appeal, if the circumstances warrant same. This discretion is, however, not a carte blanche to an unbridled right to breach or abrogate the Rules of this Court, neither is it a *sine qua non*

to the grant of such extension or condonation. This discretion, just like any other discretion, is exercised by the Court, not upon some highfalutin principle, but judicially and judiciously predicated upon the antecedents of each case and with the view to doing substantial justice.

[32] What the law giver anticipates from an appellant who wishes to invoke the Court's discretion in terms of Rules 16 (1) and 17 respectively, is to show good cause why the Court should extend such an indulgence to him. Good cause in this sense has been judicially articulated to address factors such as: reasonable explanation for the delay; the degree of delay involved in the matter; the prospects of success of the appeal; the *bona fid*es of the application and Respondent's interest in the conclusion of the matter.

[33] Adumbrating on this selfsame *modus operandi* in the case of **Johannes Hlatshwayo v Swaziland Development and Savings Bank and Others Civil Appeal Case No. 21/2006 para [17] Ramodibedi JA** (as he then was) said the following:-

> **"[17] It requires to be stressed that the whole purpose behind Rule 17 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."**

[34] The aforegoing principles in my opinion must apply *mutatis mutandis* to any application for extension of time in terms of Rule 16 (1).

[35] *In casu*, the **"appellant**" who bears the onus to demonstrate these factors convincingly has failed dismally to attain the required standards of such an application. The reasons advanced by the **"appellan**t**"** as justification for the delay in filing the record of this **"appeal"**, are most certainly untenable. These reasons are detailed in para 15 of the **"appellant's"** founding affidavit to the condonation application as follows:-

> **" 15.1 That, the execution of the order rendered the Appellant indigent in the sense that it could not operate its bank accounts as they had been frozen. This meant that Appellant could not even finance any further preparation of the record.**
>
> **15.2 That the execution meant that the Appellant had to now concentrate in correcting the unlawful conduct of the Respondent. This meant that an application had to be made instead of proceeding with preparation of the Record of proceedings. This was particularly because it would have been of no use to proceed with an appeal where the very order appealed against had been executed thereby rendering the appeal academic due to it having been overtaken by events.**
>
> **15.3 Also, the application to declare the execution unlawful meant that the Court file had to be in the custody of the Judge *a quo* pending decision of the said application. Therefore, it was not possible to have the record transcribed and have the Registrar confirm the contents of the Court file."**

[36] These reasons to my mind are inconceivable as such good cause. I say this because after noting the appeal instead of timeously filing the record or seeking for an extension of time within which to file same, as well as moving the application for condonation of same, the **"appellant"** appears to have preferred to first cut a caper. In this adventure, **"appellant"** pursued an application before the High Court per **Maphalala PJ** wherein it sought to interdict the Respondent from proceeding with execution of the impugned judgment, which execution the Respondent had embarked upon in affront of the **"appeal".**

[37] The application before **Maphalala PJ** was launched on the 13th of August 2013. It is common cause that the proceedings terminated on the 4th of October 2013. Nothing prevented the **"appellant"** from complying with the set down Rules of this Court in filing a record of appeal timeously or seeking condonation for its late filing, whilst simultaneously pursuing the interdict before the High Court. The **"appellant"** however, deliberately and consciously reframed from doing so.

[38] It is also quite interesting to observe, that after the proceedings before **Maphalala PJ** terminated on the 4th of October 2013, the **"appellant"** still persisted in its nonchalant attitude towards the Rules**.** The **"appellant"** failed to file the record of appeal. It failed to seek for an extension of time within which to file same as well as condonation. The **"appellant"** only woke up and took desperate steps on the 31st of October 2013, apparently in the face of the application for abandonment of the **"appeal"** launched by the Respondent. I thus agree with the Respondent that the **"appellant"** is obviously clutching at straws in its bid to use the proceedings it commenced before the High Court to defeat its obligation to comply with the Rules of this Court.

[39] Similarly, the contention that the **"appellant"** was allegedly put out of pocket by reason of the proceedings in the High Court, which factor rendered it indigent, divesting it of the financial muscle to file the record of appeal or seek condonation of the late filing of same, is preposterous to say the least. Jurisprudence has it that lack of funds is an insufficient factor warranting condonation. It attracts no favour or grace as the requisite good cause. Commenting on this principle in the case of **Daniel Jackson Mwaisengela v**

Nedbank Swaziland Limited Civil Appeal No. 7/12, para [17], Dr Twum JA made the following apposite remarks:-

> **"[17] --------the application for postponement had tucked to it an application for condonation of various breaches of the rules governing appeals in this Court. In one moment of candour, the appellant stated in his Heads of Argument, paragraph 6.4, that the reasons for his non – preparedness for the appeal stems largely from financial difficulties. Unfortunately, lack of funds itself, is not a sufficient explanation of an appellant's unpreparedness for an appeal".**

[40] The aforegoing settles this issue. It needs no further exhortation. I have hereinbefore adequately exploded the lack of *bona fides* of this application in paras [27] to [30] above. It bears no elaborate repetition, save to reiterate that the lack of *bona fides* emasculates the condonation sought.

[41] Finally, in my considered view, the absence of a record of appeal filed simultaneously with the application for condonation, deals the final and fatal blow to this application. This is because it derogates the right of the Court to perceive any prospects of success emerging from the appeal. The question that has most agitated my mind, is, how can this Court embark on an inquiry into the prospects of success of an appeal in which there is no record? The whole inquiry as to whether there are prospects of success or not, attenuates from the record of appeal. Encapsulated therein are the relevant facts and circumstances which will aid the Court to envisage such prospects of success. The absence of a complete or proper record in terms of the rules renders this inquiry otiose.

[42] In this regard, I find my proposition in the case of **Japhet Msimuko v Sibongile Lydia Pefile NO Civil Appeal No. 14/2013, para [63] and [64]**

(Ramodibedi CJ and Ebrahim JA concurring) germaine to the circumstances of this case:-

> **" [63] This Court is a Court of record. Its business is by way of a re-hearing on the record. The record is inadequate for use by the Court in determining the appeal. The Court cannot engage in conjecture or surmise.**
>
> **[64] There is therefore no dancing around the matter to perceive any success of an appeal where there is in essence no record. No justification exists for the condonation sought. The Appellant on the whole is the architect of his own woes".**

[43] In the light of the totality of the foregoing the **"appellant"** has failed to show any scintilla of justification for the condonation sought. The application is completely devoid of merits. It fails woefully.

[44] COSTS

The Respondent seeks punitive costs on the attorney and client scale. Ordinarily the Respondent would be entitled to this scale of costs. This is because the **"appellant's"** indefensible dilatoriness in the pursuit of this appeal, coupled with its subsequent calculated and disingenuous stratagem predicated on the perfidious application for condonation, is conduct deserving of this Court's censure. What the **"appellant"** attempted to do by the frivolous application for condonation which it embarked upon, is to reap the fruits of its own dilatoriness in the very glare of the Court. This type of artifice, as disapproved by jurisprudence, ought to be eschewed by the imposition of punitive costs.

[45] This was the high water mark of the decision of the full bench of this Court in the celebrated case of **Siphamandla Ginindza v Managaliso Clinton Msibi**

and 4 Others, civil case No. 29/2013, para [22], wherein the Court made the following condign pronouncement:-

> **"It follows from the foregoing considerations that the applicant's application for review of the Supreme Court's decision in the matter is completely unmeritorious. The Court judicially exercised its discretion upon relevant considerations. It has not been shown to have committed any fault, either reviewable or at all. Accordingly, the review application falls to be dismissed with costs. We must warn, as we hereby do, that in future litigants who pursue frivolous and scandalous applications such as the present matter shows may expect to pay punitive costs. Similarly, legal practitioners involved in such cases may themselves expect to pay costs *de bonis propriis*. We point out for completeness that the applicant and his attorney escaped punitive costs in this matter primarily because they had not, in all fairness to them, been given prior warning to argue the point. Others following in their footsteps may not be so lucky"**

[46] This is however a unique case because Mr Mzizi, **"appellant's"** counsel, took unique and rare steps when he conceded all the breaches of the Rules recorded by this **"appeal".** He apologized profusely, evidently from the bottom of his heart. He did not waste the Court's time by attempting to flog a dead horse. That is commendable advocacy which accounts to his favour. There is no doubt that a lawyer owes a duty to his client but he owes a greater duty to the community and to the Courts. He must not pursue his client's interest to such an extent as to defeat law enforcement and public interest or abuse the authority and processes of Court.

[47] In the speech biography of **Viscount Buckmaster** entitled **"An orator of Justice"** we read the speech on **"The Romance of the Law"** which he delivered to the American Bar Association at Detroit in September 1925, when he said:-

> **"Our profession is the greatest to which man's energies can be called. We are servants in the administration of justice. It is therefore a profound mistake to think that a lawyer should be a man who by any device can secure victory in law Courts**

for his clients. Every lawyer down to the youngest junior ought to remember that he, in his small degree, is assisting in something more than merely settling a quarrel between two people. He is a Minister of Justice."

[48] *In casu*, Mr Mzizi's conduct shows him up as every inch a **"Minister of Justice"**. This conduct should save the **"appellant"** from the punitive costs sought. See **Jomas Construction (Pty) Ltd v Kukhanya (Pty) Ltd Civil Appeal No. 48/2011 paras [20] – [26].**

[49] CONCLUSION

In these circumstances, I order as follows:-

1. The application for condonation of Civil Appeal No. 34/2013 be and is hereby dismissed with costs.
2. Civil Appeal No. 34/2013 be and is hereby deemed abandoned and is accordingly dismissed.
3. Costs of this appeal to the Respondent on the ordinary costs scale.

_____

E.A. OTA

JUSTICE OF APPEAL

_____

I agree	**M.M. RAMODIBEDI**
	CHIEF JUSTICE
	_____
I agree	**S.A. MOORE**
	JUSTICE OF APPEAL
For the "Appellant"	**L Mzizi**
For Respondent:	**B.W. Magagula**