



IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

JUDGMENT

Civil Appeal Case No. 47/2014

In the matter between

FAKUDZE ATTORNEYS

Appellant

And

**CHAINSAW AND FORESTRY SUPPLIES
(PTY) LIMITED**

Respondent

Neutral citation: *Fakudze Attorneys v Chainsaw and Forestry Supplies (Pty) Limited (47/2014)* [2014] SZSC 75 (3 December 2014)

Coram: RAMODIBEDI CJ, MOORE JA and OTA JA

Heard: 21 NOVEMBER 2014

Delivered: 3 DECEMBER 2014

Summary:

Civil procedure – Flagrant disregard of the Rules of Court in several respects – Abuse of Court process – Appellant filing a “Notice of Abandonment of Appeal” with a tender as to costs – Appeal dismissed as being irregular – The appellant ordered to pay costs on the punitive scale as between attorney and own client – Such costs to be paid by Attorney Thabo Fakudze *de bonis propriis*.

JUDGMENT

RAMODIBEDI CJ

[1] On 30 June 2014, the plaintiff, now respondent, issued out a simple summons against the appellant, as defendant, for the following relief:-

1. *“Payment of the sum of E 40,000.00 being in respect of monies collected by the Defendant in its capacity as Legal Representative of the Plaintiff, from Afrotim Construction (Pty) Limited under case number 247/2014, which funds were collected by the Defendant but the Defendant failed to account for the said funds to the Plaintiff which amount is now due, owing and payable but despite demand therefor, the Defendant fails, neglects and/or refuses to pay to the Plaintiff;*

2. *Interest on the said sum of E 40,000.00 at the rate of 9% per annum compounded, a tempore morae to date of final payment;*
3. *Costs of the suit;*
4. *Further and/or alternative relief.”*

[2] The return of service filed of record shows that the defendant was duly served with the summons on 4 July 2014 at 12:36 hrs.

[3] In terms of Rule 19 (1) of the High court Rules, the defendant is allowed at least ten (10) days after service of summons within which to deliver a notice of intention to defend, either personally or through his/her attorney. The defendant failed to avail itself of this procedure. Accordingly, it has got only itself to blame for the outcome of this matter as proposed below.

[4] As could well be expected in the circumstances, and on 24 July 2014, the plaintiff filed a notice of application for default judgment. It did so in terms of Rule 31 (3) (a) of the High Court Rules which provides as follows:-

“Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in sub-rule (5) for default judgment and the court may, where the claim is for a debt or liquidated demand, without hearing evidence, oral or documentary, and in the case of any other claim, after hearing such evidence as the court may direct, whether oral or documentary, grant judgment against the defendant or make such order as to it seems fit.”

[5] On 25 July 2014, the High Court (Mabuza J) duly granted default judgment as prayed. This was subsequently followed by a writ of execution filed of record on 5 August 2014. It is common cause that this writ was duly served upon the defendant on 12 August 2014. The Deputy Sheriff subsequently filed a *nulla bona* return of service.

[6] Instead of applying for rescission of default judgment under Rule 31 (b) of the High Court Rules, and on 26 August 2014, the defendant filed a “Notice of Appeal” to this Court. It is a further strange feature of this case that in doing so the defendant failed to

attach any grounds of appeal at all. This, in my view, is contrary to Rule 6 (4) of the Court of Appeal Rules which provides as follows:-

“(4) The notice of appeal shall set forth concisely and under distinct heads the grounds of appeal and such grounds shall be numbered consecutively.”

[7] A proper reading of this Rule shows that it was clearly the intention of the lawgiver that grounds of appeal must be filed simultaneously with the notice of appeal itself, failing which condonation ought to be sought and obtained from this Court. It need hardly be stressed that the grounds of appeal define the issues for determination. They are part and parcel of the notice of appeal itself. Indeed, they assist the Court in determining whether an appeal is genuine or frivolous, filed simply to delay the respondent from enjoying the fruits of his/her judgment in the matter. It follows inexorably from these considerations that a notice of appeal which does not contain grounds of appeal is incompetent. See **Silence Gamedze and Others v Thabiso**

Fakudze; in re Thabiso Fakudze v Silence Gamedze, Civil Appela Case No. 14/2012 per my Sister Ota JA (Ramodibedi CJ and Dr Twum JA concurring).

[8] Faced with these difficulties, and on 12 November 2014, the defendant filed a “Notice of Abandonment of Appeal,” tendering costs on the ordinary scale as between party and party. Quite understandably in the circumstances, Mr J. Henwood for the plaintiff submitted in this Court that the defendant’s conduct warranted an award of costs on the punitive scale as between attorney and own client. He submitted that such costs should be paid by the attorney Thabo Fakudze de *bonis propriis*. For the reasons which follow shortly, I am disposed to agree. Indeed for the sake of completeness, the record will show that by letter dated 18 November 2014, the appellant was duly put on notice to show cause why a punitive costs order in this regard should not be made.

[9] It is necessary to point out that this Court has repeatedly warned against flagrant disregard of its Rules. Thus, for example, my Brother Moore JA put the point emphatically in the following apposite terms in **Sandile Hadebe v Sifiso Khumalo N.O. and Others, Civil Appeal Case No. 25/2012** at paragraphs [7] and [8]:-

“[7] This Court has repeatedly, as if reciting a litany, pointed out that non compliance with the Rules of the Supreme Court would not be countenanced except in cases where good and substantial reasons, or sufficient cause, have been shown to warrant the exercise of this Court’s indulgence.

[8] Despite these many warnings, glaring violations of the rules still continue. This case was enrolled for hearing at the May session of the Supreme Court. That roll was first published on the 22nd March 2013”.

[10] Legal practitioners have thus sufficiently been warned. Some might argue that it is difficult to take an unwilling horse to drink. But I venture to say that the courts must stand firm in enforcing

compliance with the Rules of court in the interests of justice to all. Failure to comply with the Rules would lead to chaos and anarchy. It is the fundamental function of the courts to prevent all of these unsavoury phenomena.

[11] Finally, it is a matter of grave concern to this Court to observe that it is not the first time the defendant has flagrantly flouted the rules of Court with impunity. The defendant was respondent in the case of **Silence Gamedze and Others (supra)**. On that occasion this Court awarded costs against the defendant on the scale as between attorney and client. It is evident, therefore, that the defendant is a repeat offender. Accordingly, it is this Court's hope that the punitive order set out below will finally drive the message home that the defendant cannot get away with repeated flagrant disregard of the Rules of Court, amounting, as they evidently do, to abuse of court process.

[12] Of course, I should at this stage draw attention to the fact that I duly take into account the defendant's passionate plea for mercy

made at the hearing before this Court. Mr Thabo Fakudze who appeared in person did say that the defendant will never repeat its mistakes in the future. The enormity of the defendant's folly, however, calls for censure as proposed in the order set out below.

[13] It follows from these considerations that the "appeal" is irregular and falls to be dismissed. The following order is hereby made:-

- (1) The appeal is dismissed as being irregular.
- (2) The Appellant is ordered to pay costs on the punitive scale as between attorney and own client.
- (3) Such costs shall be paid by Attorney Thabo Fakudze *de bonis propriis*.

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

S.A. MOORE
JUSTICE OF APPEAL

I agree

E.A. OTA
JUSTICE OF APPEAL

For Appellant : Mr J. Henwood

For Respondent : Mr T.E. Fakudze