**IN THE SUPREME COURT OF SWAZILAND**

**JUDGMENT**

Civil Appeal Case No: 48/2015

In the appeal between:

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|---|---|
| **BOY HLOPHE N.O.** | **FIRST APPELLANT** |
| **NOZIPHO MDAKA N.O.** | **SECOND APPELLANT** |
| **PHINDILE MDAKA N.O.** | **THIRD APPELLANT** |
| **IPHO MAVUKELA NKENTJANE N.O.** | **FOURTH APPELLANT** |
| **EZROME MAHLALELA N.O.** | **FIFTH APPELLANT** |
| **SAMUEL MAGAGULA N.O.** | **SIXTH APPELLANT** |
| **MANGALISO NDZIMANDZE N.O.** | **SEVENTH APPELLANT** |

**VS**

**DUMISA NDZIMANDZE N.O. AND OTHERS** — **RESPONDENTS**

Neutral citation: *Boy Hlophe N.O. and Six Others vs Dumisa Ndzimandze N.O. and Others (67/2014) [2014] SZSC10 (9th December 2015)*

**CORAM:** **M.C.B. MAPHALALA, CJ**
**J.P. ANNANDALE AJA**
**M. DLAMINI, AJA**

Heard : 19th November 2015
Delivered : 9th December 2015

**Summary**

**Civil Appeal – flagrant disregard of the Rules of Court – appellants' attorneys filed a defective record of proceedings not certified by the Registrar of the High Court – no index to the Book of Pleadings - no transcriber's certificate – the Notice of Appeal excluded – the judgment of the court *a quo* excluded – heads of argument for the appellants not filed – no application for extension of time in terms of Rule 16 – no application for condonation filed for non-compliance with the Rules of Court in terms of Rule 17 – attorneys invited to address court on costs *de bonis propriis* – appeal struck of the roll with costs on a punitive scale to be borne by attorneys for the appellants *de bonis propriis*.**

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## JUDGMENT

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**M.C.B. MAPHALALA, CJ**

[1] This is an appeal against the judgment of His Lordship Justice N.J. Hlophe delivered in the court *a quo* on the 21st August 2015. His Lordship gave judgment in favour of the respondents who had instituted the legal proceedings. The order was that:

(a) The elections held by or on behalf of the Company called Takhamiti Farmers Investments (Pty) Ltd on the 28th March 2015 together with the results therefrom be and are hereby set aside.

(b)

(c) Fresh elections of the Executive Committee of Takhamiti Farmers Association (Pty) Ltd be and are to be held on a date to be determined by the person tasked with holding and/or conducting the elections which should be done within fourteen days of the order of court.

(d) Ntokozo Mkhonta, an employee of the Royal Swaziland Sugar Corporation, be and is hereby appointed and/or authorized to conduct the said elections on a date he will determine and effectively notify all members of the company.

(e) Each party shall bear its own costs of suit.

[2] The Notice of Appeal was lodged on the 2nd September 2015 by the appellants against the judgment of the court *a quo*. The Notice of Appeal was filed timeously together with the grounds of appeal within the time prescribed by Rule 8 of the Court of Appeal Rules, 1971. The rule provides that the notice of appeal shall be filed within four weeks of the date of the judgment appealed against. The rule has a proviso that if there

is a written judgment, such period shall run from the date of delivery of such judgment.

Similarly, the rule precludes the Registrar of the Court from filing any notice of appeal which is presented after the expiry of the period allowed unless leave to appeal out of time has previously been obtained.

[3] It is apparent from the record of proceedings prepared and lodged by the appellants that it is defective in material respects. The record as filed by the appellants is defective to the extent that it was not certified by the Registrar of the High Court as a true and complete record of the proceedings; hence, it did not have the Registrar's Certificate as required by the Rules of Court.

On the 19th October, 2015 the attorney for the respondents brought to the attention of the appellants' attorneys that the record was defective on the basis that it did not have the High Court Registrar's Certificate. However, a proper record was not prepared and presented to the Registrar of the High Court.

[4] Furthermore, the record does not have an Index to the Book of Pleadings; again, this anomaly was brought to the attention of the attorneys for the

appellants in the correspondence written to them dated 20th October, 2015.

Similarly, the record does not have the transcriber's certificate. This anomaly was brought to the attention of the attorneys for the appellants by the attorneys for the respondents by correspondence dated 20th October, 2015; and, to that extent the record is defective. In addition the record does not contain the judgment of the court *a quo* which is being appealed against as well as the Notice of Appeal which also outlines the grounds of appeal.

[5] Rule 30 of the Court of Appeal Rules deals with the record of proceedings and provides the following:

> **"30. (1) 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.**
>
> **(2) If the Registrar of the High Court declines so to certify the record he shall return it to the appellant for revision and amendment and the appellant shall relodge it for certification within 14 days after receipt thereof.**

**(3) Thereafter, the record may not be relodged for certification without the leave of the Chief Justice or the Judge who presided at the hearing in the court *a quo*.**

**(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.**

**(5) The appellant in preparing the record shall, in consultation with the opposite party, endeavour to exclude therefrom documents not relevant to the subject matter of the appeal and to reduce the bulk of the record so far as practicable. Documents which are purely formal shall be omitted and no document shall be set forth more than once. The record shall include a list of documents omitted. Where a document is included notwithstanding an objection to its inclusion by any party, the objection shall be noted in the index of the record.**

**(6) All copies of the record shall be clearly typed on one side of the paper only on stout foolscap paper, double-spaced, in black ink, and every tenth line of each page of the record shall be numbered, and at the top of each page there shall be typed the name of the witness whose evidence is recorded thereon. Photostats of original documents are permissible only if they be clearly legible. The pages of the record must be consecutively numbered. The record must be properly indexed and securely**

**bound in suitable covers. Bulky records must be divided into separate conveniently sized volumes.**

**(7) The Registrar of the High Court shall satisfy himself that the provisions of sub-rule (6) hereof have been complied with before furnishing the certificate required by sub-rule (1) hereof.**

**(8) When the Registrar of the High Court has certified the record the appellant shall forthwith lodge with the Registrar five copies thereof and deliver to the respondent or respondents such number of copies as may reasonably be required by them. One of the copies of the record lodged with the Registrar shall be certified as correct by the Registrar of the High Court.**

**(9) Upon receipt of the record the Registrar shall transmit one copy thereof to the Judge President who will thereupon assign a date for the hearing of the appeal not less than six weeks ahead and notify the Registrar thereof. Upon receipt of such notification the Registrar shall immediately inform the parties to the appeal of such date."**

[6] The appellants have also failed to file their heads of argument within the time prescribed by the Rules of Court. Rule 31 provides the following:

**"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.**

**(2) A copy of such main heads of argument and list shall be served within the same period on the respondent.**

**(3) The respondent shall, not later than 18 days before the hearing of the appeal similarly file with the Registrar six copies of the main heads of his argument and supporting authorities to be presented on appeal and shall serve a copy thereof upon the appellant.**

**(4) Notwithstanding anything to the contrary herein an appellant or respondent who is not to be represented by an attorney or counsel at the hearing of the appeal shall be excused from compliance with the provisions of this rule.**

**(5) The foregoing time limits may be abridged with leave of a single judge of the Court of Appeal authorised by the Judge-President."**

[7] The attorneys representing the respondents sent correspondence to the attorney representing the appellants dated 29th October 2015 and 4th November 2015 respectively reminding them to file their heads of argument. Notwithstanding the reminder they did not file their heads of argument. The attorneys for the appellants were legally enjoined to file

their heads of argument before the attorneys for the respondents could file their own heads of argument.

[8] Notwithstanding their failure to comply with the Rules of Court, the appellants' attorneys did not file an application for extension of time in terms of Rule 16 of the Court of Appeal Rules or an application for condonation in terms of section 17 of the said Rules. These rules provide as follows:

> **"16. (1) The Judge President or any judge of appeal designated by him may on application extend any time prescribed by these rules:**
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> > **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.**
> >
> > **(2) 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.**
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> **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.”**

[9] There is a proliferation of blantant and flagrant disregard of the Rules of Court by duly admitted attorneys. This Court has a Constitutional duty to uphold and enforce the Rules of Court with a view to promote and advance the administration of justice as well as to protect the rights and interests of litigants. The time has come for this Court to impose punitive costs orders including costs *de bonis propriis* with a view to uplift the standard of the legal profession and further advance the rule of law and respect for the courts. This Court has for many years given a warning to attorneys to observe and abide by the Rules of Court; however, this warning has been interpreted as a sign of weakness. Such blatant disregard of the rules should not be countenanced otherwise the administration of justice will fall into disrepute; the end result will be chaos and anarchy.

[10] Steyn CJ in the case of *Saloojee and Another v. Minister of Community Development* 1965 (2) SA 135 (A) at 141 had this to say:

**“There is a limit beyond which a litigant cannot escape the results of his attorney’s lack of diligence or the insufficiency of**

**the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney after all is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of court the litigant should be absolved from the normal consequences of such a relationship, no matter what circumstances of the failure are. . . .**

**A litigant, moreover, who knows, as the applicants did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney . . . and expect to be exonerated of all blame; and**

**if, as here the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself. That has not been done in this case. In these circumstances I would find it difficult to justify condonation unless there are strong prospects of success."**

[11] Steyn JA in the case of *Simon Musa Matsebula v. Swaziland Building Society* Civil Appeal Case No. 11/1998 had this to say:

**"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 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 v. Minister of Community Development* 1965 (2) SA 135 (A) 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 off 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 standard 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."**

[12] Her Ladyship Justice Ota JA delivered a unanimous judgment in the case of *Japhet Msimuko v. Sibongile Lydia Pefile NO* Civil Appeal Case No. 14/2013 at para 57 where she had this to say:

**"57. It remains for me to emphasise, that the legal profession is one of dignity and honour; highly revered. It is generally regarded as a formidable cult; one that is beyond reproach; supporting the weights of justice in consortium with the Courts. It thus places a duty of respect and forthrightness on its members in their dealings with the Court to facilitate the administration of justice. That is the mark of their high calling. As Moore JA observed in the case of *Malcos Sengwayo v Thulisile Simelane* (supra) para 18, with reference to the case of *Rondel v Worsley* (1966) 3 WLR 950 at 962-63 per Lord Denning MR:-**

> **"[The advocate] has a duty to the Court which is paramount. It is a mistake to suppose that he is the mouth piece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause.**
> **It is the cause of truth and justice. He must not consciously mis-state the facts. He must not knowingly conceal the truth---. He must produce all the relevant authorities even those that are against him. He must see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions of his client if they conflict with his duty to the court. The code which requires a barrister to do all this is not a code of**

> **law. If he breaks it, he is offending against the rules of the profession and is subject to its discipline".**

[13] The merits of this appeal have not been considered and determined due to the failure of the appellants' attorneys to lodge an application for condonation for their failure to comply with the Rules of Court. The conduct of the appellants' attorney should be censured as a lesson to legal practitioners to observe and abide by the Rules of Court. It is imperative that he should be ordered to pay costs *de bonis propriis*. However, it will not be in the interest of justice in the circumstances of the case to dismiss the appeal without determining the merits of the appeal.

[14] During the hearing of the appeal the appellants' attorney was called upon to show cause why he should not pay costs *de bonis propriis*. To that extent both attorneys were invited to address the Court, and, they duly made their legal submissions; hence, the principle of *audi alteram partem* in respect of costs *de bonis propriis* was observed.

[15] Accordingly, the following order is made:

(a) The appeal is struck off the roll.

(b) The appellants are ordered to pay costs on the punitive scale

as between attorney and own client.

(c) Such costs shall be paid by Attorney Machawe Sithole *de bonis propriis*.

M.C.B. MAPHALALA
CHIEF JUSTICE

I agree

J.P. ANNANDALE
ACTING JUSTICE OF APPEAL

I agree

M. DLAMINI
ACTING JUSTICE OF APPEAL

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For Appellants Attorney Machawe Sithole

For Respondents Attorney Derrick Jele

**DELIVERED IN OPEN COURT ON 9 DECEMBER 2015**