IN THE SUPREME COURT OF SWAZILAND

Held at Mbabane Civil Appeal Case No. 51/2015

In the matter between:

TIMOTHY KHOZA **Appellant**

AND

PIGG'S PEAK TOWN COUNCIL **1st Respondent**

IAN VAN ZUYDAM **2nd Respondent**

Neutral citation: *Timothy Khoza vs Pigg's Peak Town Council and Another (51/2015) [2016] SZSC 24 (30 June 2016)*

Coram: **CLOETE AJA, MAPHANGA AJA AND MANZINI AJA**

Heard: 12 May 2016

Delivered: 30 June 2016

Summary: *Civil procedure – appeal – incomplete record – no written judgment – application for postponement – opposition – counter application to deem appeal abandoned in terms of Rule 30 (4) – postponement refused – appeal deemed to have been abandoned.*

JUDGMENT

MANZINI AJA

[1] On the 28th September, 2015 the Appellant filed a Notice of Appeal against the *ex tempore* judgment of Mdladla AJ (as he then was). The grounds of appeal are as follows:

1.

The court *a quo* erred in law and in fact in upholding the point of law raised by the First Respondent i.e that the Appellant had not complied with the provisions of Section 116 of the Urban Government Act of 1969, in as much as the said Section is unconstitutional and thus invalid in that it conflicts with Section 20 of the Constitution of Swaziland since it promotes and encourages inequality before the law.

2.

The Learned judge *a quo* erred in law and in fact in not holding that any rate the said Section was not shown to apply even in instances where the applicant is seeking interim relief on urgent basis.

The Learned judge *a quo* erred in law and in fact in failing to distinguish between cases where the substantive relief is sought against the town council and where those relief is sought against a third party seeding to derive a benefit from conduct of the council.

[2] The Record of Appeal, minus the written judgment assailed by the Appellant, was certified as a true record of the proceedings in the court *a quo*, and filed on the 27th November, 2015. Clearly, the Record of Appeal was incomplete at the time of certification and filing.

[3] That the Record of Appeal was incomplete, absent the written judgment of the court *a quo*, is a fact which, no doubt, was operating in the mind(s) of the Appellant's attorney as, on the 17th November, 2015, he addressed a letter to the Registrar of the High Court in the following terms:

"OUR REF: TLD/tpm/K003/09 ***YOUR REF:***

DATE: 17th November, 2015

The Registrar
High Court of Swaziland
P. O. Box 19
Mbabane
H100

Dear Sir/Madam

RE: ***TIMOTHY KHOZA/PIGG'S PEAK TOWN COUNCIL/***

IVAN VAN ZUYDAM – CASE NO. 1302/15

We refer to the above matter.

In this matter we noted an appeal on behalf of our client, Timothy Khoza on the 28th September, 2015, against the ex tempore Judgment of his lordship, Justice Mdladla AJ.

We inquire as to when the written judgment will be available to enable us to prepare the Record of proceedings for filing in the Supreme Court.

Our concern herein stems from the fact that the dies for filing the Record with the Supreme Court will expire on the 27th instant.

Kindly assist in the above regard and avail to us the said written Judgment.

Your assistance in the above regard would and is always appreciated.

Yours faithfully

T.L. DLAMINI & ASSOCIATES"

[4] When the matter was called for hearing, Counsel for the Appellant (Advocate L. Maziya) applied for a postponement to a later date within this session of the Supreme Court to enable his instructing attorneys to pursue the matter of the written judgment, as by then it had still not been obtained. The application for postponement was launched from the Bar, despite the unequivocal directive that no postponements will be entertained by this Court "except for good cause shown on written application and properly motivated in Court". This directive was

again articulated during the roll call at the commencement of this session of appeals.

[5] Nevertheless, the Court invited Mr. Maziya to argue why an application for an extension of time in terms of Rule 16(1) was not launched upon realising that the written judgment had still not been obtained when the time for filing the Record of Appeal was about to expire. Further, why the appeal should not be deemed to have been abandoned and struck off the Roll.

[6] He argued that there are no specific time frames within which to bring an application for extension of time in terms of Rule 16, and that each case must be determined upon its peculiar facts. He also argued that court rules must be interpreted in the light of section 21 of The Constitution of the Kingdom of Swaziland which guarantees the Right to a fair hearing. Lastly, he argued that the blame for the absent written judgment lay not with the Appellant but with the judiciary itself.

[7] Mr. Jele, who appeared for the Respondents, in opposing the application for postponement, argued that the appeal instead should be deemed abandoned in terms of Rule 30 (4) as the Record of Appeal was incomplete. He argued that the Appellant should have made use of the

procedure set out in Rule 16 upon realization that the written judgment had still not been obtained when the time for filing the Record became due. He submitted that an application in term of Rule 16 is competent before expiration of any time period stipulated in the Rules, failing which an application for condonation for non-compliance then becomes the appropriate remedy.

[8] At the close of arguments by both Counsel the Court indicated that judgment would be reserved until the 30th June, 2016. This was a clear indication that the application for a postponement was refused. What now follows is a determination of the application to have the appeal deemed abandoned in terms of Rule 30 (4).

[9] This Court has on numerous occasions dealt with applications for condonation for late filing or non-compliance with its Rules, and the application of Rule 30(4) in particular. Attorneys, and litigants alike, have been consistently admonished and warned about failure to observe and follow the Rules of this Court. See in this respect:

(i) **Unitrans Swaziland Limited v Inyatsi Construction Limited, Civil Appeal Case 9 of 1996,** where the Court held at paragraph 19 that:-

“**The Courts have often held that whenever a prospective Appellant realises that he has not complied with a Rule of Court, he should, apart from remedying his fault, immediately, also apply for condonation without delay.”** The Court also referred, with approval, to **Commissioner of Inland Revenue v Burger 1956 (A)** in which **Centlivres CJ** said **at 449-G** that: **“… whenever as Appellant realises that he has not complied with the Rule of Court he should, without delay, apply for condonation.”**

(ii) **<u>Simon Musa Matsebula v Swaziland Building Society, Civil Appeal No. 11 of 1998</u>** in which Steyn JA stated the following: **“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 of by this Court that non-compliance of a serious kind will henceforth 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 vs The Minister of Community Development 1965 (2) SA 135 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 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 standards 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 the clients and having to disburse these themselves."

(iii) **Maria Ntombi Simelane and Nompumelelo Prudence Dlamini and Three Others in the Supreme Court Civil Appeal 42/2015,** where the Court referred to the dictum in the Supreme Court case of **Johannes Hlatshwayo vs Swaziland Development and Savings Bank Case No. 21/06 at paragraph 7** to the following:

> **"It required to be stressed that the whole purpose behind Rule 17 of the Rules of this 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."

(iv) **Dr Sifiso Barrow v Dr Priscilla Dlamini and the University of Swaziland (09/2014) [2015] SZSC 09 (09/12/2015)** where the Court, at paragraph16 stated as follows – **"It has repeatedly been held by this Court, almost *ad nauseam*, that as soon as a litigant or his Counsel becomes aware that compliance with the Rules will not be possible, it requires to be dealt with forthwith, without any delay."**

[10] There are numerous other judgments.

[11] In the context of this case I would restate the principle laid down in the **Unitrans Swaziland Limited** case (supra) in slightly different terms as follows:

"Whenever a prospective Appellant realises that he shall not be able to comply with timelines prescribed in the Rules of Court, he should without delay apply for an extension of time in terms of Rule 16 (1) and (2)."

[12] Thus, instead of being content with writing a letter to the Registrar of the High Court, the Appellants' Attorneys ought to have filed a written application for extension of time in terms of Rule 16. Although neither Appellant nor his attorneys can be faulted for the non-availability of a written judgment, as clearly by the time the matter was heard there was still no written judgment, but they should shoulder the blame for failing to proceed in terms of Rule 16. This, however, does not dispose of the matter.

[13] Having decided that the non-availability of a written judgment cannot be attributable to the Appellant, the next question is, should the appeal be deemed to have been abandoned and struck off the Roll, with costs?

[14] In my view, a case has been made which warrants this Court to "deem" that the appeal has been abandoned. First, the Appellant has failed to apply for an extension of time in terms of Rule 16. Second, there is no application for condonation for failure to submit a complete record of appeal. Counsel for Appellant was content to move an application for postponement in complete disregard of the procedural avenues available to him.

[15] Lastly, Rules of Court are in themselves designed to ensure that litigants are afforded fair trials or hearings. Thus, there is no substance in the submission that the Appellants' constitutional right to a fair hearing has been infringed.

[16] In the circumstances, the appeal is hereby deemed abandoned with costs to the Respondents.

ORDER

[17] It is the Order of this Court that:

(i) The appeal is deemed to have been abandoned and is accordingly struck off.

(ii) The Appellant is to pay the costs of both 1st and 2nd Respondents.

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M.J. MANZINI AJA

I agree.

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R. CLOETE AJA

I also agree.

C. MAPHANGA AJA

For the Appellant: Advocate L. Maziya
(Instructed by T.L. Dlamini & Associates)

For the 1st and 2nd Respondents: Mr. N.D. Jele