



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal No. 48/2015

In the matter between:

BOY HLOPHE N.O. AND 6 OTHERS

Appellant

VS

DUMISA NDZIMANDZE N.O AND OTHERS

Respondent

Neutral citation: *Boy Hlophe N.O. & 6 Others Vs Dumisa Ndzimandze N.O.
Others (48/2015) [2016] SZSC 9 (30 June 2016)*

Coram: **B. J. ODOKI J A, J. MAGAGULA AJA AND R .
CLOETE AJA**

For: Appellants: **M. M. Sithole**

For: Respondents: D.N. Jele

Heard: 12 May, 2016

Delivered: 30 June, 2016

Summary: *Application for dismissal of appeal on account of abandonment; appeal noted timeously but record seriously defective; record not certified by Registrar of the High Court as correct; record not indexed. Record does not contain judgment of the court a quo; heads of argument filed out of time; no application for condonation of irregularities filed.*

JUDGMENT

J. MAGAGULA AJA

[1] This matter first came before this court on the 19th November 2015. It however could not proceed because it was found to be having numerous irregularities.

- [2] Whilst the appeal had been filed timeously the record had serious and material defects. The record had not been certified as correct by the Registrar of the High Court as required by the Rules of Court. It was also not indexed and did not have a transcriber's certificate. It also did not contain the Judgement of the High Court appealed against; nor did it contain the Notice of appeal outlining the grounds of appeal.
- [3] The other serious irregularity was that the Appellants had failed to file their heads of argument within the time prescribed by Rule 31 of the Rules of this court.
- [4] Upon realizing each of these irregularities the Respondents Attorney would notify the Appellant's Attorney in writing but the latter did not do anything to rectify such. Respondent's attorney even wrote to Appellants' attorneys reminding them to file their heads of argument but Appellants' attorneys did not file them.
- [5] Notwithstanding their failure to comply with the Rules of Court, the Appellants' attorneys did not apply for extension of time in terms of Rule 16 of the Rules of Court, nor did they apply, in terms of Rule 17 of the Rules of court, for condonation of the flagrant irregularities.

[6] Having come to the conclusion that the appeal could not be heard on the merits in view of the patent irregularities and serious defects in the papers before court the court issued the following order which appears at page 15 of the judgement of **His Lordship MCB Maphalala C.J:**

“(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.”

[7] The court therefore did not dismiss the appeal but merely struck it off the roll. To make this abundantly clear the learned Chief Justice stated the following at page 15 of his judgment:

“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.”

[8] On the 11th March 2016 the Respondents filed the application now serving before court in which they seek an order as follows:

“1. The appellants appeal is deemed to be abandoned and is hereby dismissed with costs;

2. ***The Appellants are ordered to pay the costs of this application.***
3. ***Granting the respondents further and/or alternative relief.....”***

[9] The application is supported by an affidavit of Respondents’ attorney Derrick Ndo Jele who also filed his heads of argument on the 15th April 2016. The Appellants filed a Notice of Intention to oppose the application on the 11th March, 2015 but did not file any opposing affidavit. They also did not file any other form of opposing paper nor take any other step in relation to the application.

[10] When the matter was called on the 12th May 2016 there was appearance for both parties. The court asked Mr. Sithole who appeared on behalf of the Appellants if the application was opposed since there were no opposing papers filed. Mr. Sithole conceded that indeed there were no opposing papers filed and that the application therefore stood unopposed.

[11] Mr. Jele who appeared for the Respondents accordingly moved the court to grant the order as prayed in his notice of motion.

[12] Rule 30 (1) of the Rules of this court provides as follows:

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

Rule 30 (6) provides in part as follows: ***“.....The record must be properly indexed and securely bound in suitable covers. Bulky records must be divided in separate conveniently sized volumes.”***

[13] In *casu* the provisions of these sub-rules have not been complied with. The record is therefore defective in material respects. This court cannot assume that a record is correct unless it is certified as such by the Registrar of the Court in which the proceedings were initiated. An incorrect record will mislead the court and cause it to arrive at incorrect conclusions regarding what transpired in the court *a quo*. The result of such incorrect conclusions would be incorrect decisions and a serious miscarriage of justice. There is therefore no way in which this court can properly proceed to deal with an appeal where the record has not been certified as correct by the Registrar of the High Court.

I take particular note that although this matter was dealt with and struck off the roll by this court by judgment handed down on the 9th December, 2015, the record was still not certified or corrected in any other manner when the matter was called on

the 12th May 2016. In my view there can be no better manifestation of the abandonment of the appeal.

[14] Rule 31 (1) of the Rules of this court provides as follows:

“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.”

Sub-rule (2) of the same rule provides:

“A copy of such main heads of argument and list shall be served within the same period on the respondent.”

[15] The provisions of this rule have also not been complied with by the appellant. In my opinion heads of argument are essential on appeal. The notice of appeal is usually very scanty and it does not tell the court and the opposite party what the basis of complaint is. It does not state why the appellant feels the judgment of the court *a quo* is incorrect. This only appears in the heads of argument. The court and the respondents are entitled to know the appellant’s case before the matter is called in court in order to be able to prepare for it. A failure to file heads of

arguments is therefore a serious irregularity. It is only just and fair to assume that where an appellant fails to file heads of argument the appeal is abandoned.

[16] Again I notice that although the matter was struck off the roll on the 9th December, 2015, the appellants had still not filed their heads of argument when the matter was called on the 12th May 2016. This is a clear manifestation of an intention to abandon the appeal. The respondents have applied that the appeal be dismissed on account of abandonment. The abandonment of the appeal is a clear indicator that the appellants have no intention to pursue it. It is therefore only fair that it should be dismissed as such in order to bring the matter to finality once and for all.

[17] The Court accordingly grants the following order:

1. The appellants appeal is deemed to be abandoned, and is hereby dismissed.
2. The appellants are ordered to pay the costs of this application.

J.S. MAGAGULA AJA

I agree

B.J. ODOKI JA

I agree

R.J. CLOETE AJA