



**IN THE SUPREME COURT OF ESWATINI**  
**JUDGMENT**

Civil Appeal Case No. 35/2018

In the matter between:

**REAP INVESTMENTS (PTY) LTD**

Appellant

**and**

**LAKHA INVESTMENTS (PTY) LTD**

Respondent

**Neutral Citation** : *Reap Investments vs Lakha Investments (Pty) Ltd*  
(35/2018) [2018] SZSC 44 (07/11/2018)

**Coram** : **J. M. CURRIE AJA, S.J.K. MATSEBULA**  
**AND M.J. MANZINI**

**Heard** : 19 October 2018

**Delivered** : 7<sup>th</sup> November 2018

**Summary:** *Civil procedure: application that appeal deemed to have been abandoned; no record of appeal filed; no application for extension to time; appeal deemed abandoned and dismissed; costs awarded on the ordinary scale.*

## **JUDGMENT**

**CURRIE AJA**

### **BRIEF BACKGROUND FACTS AND SEQUENCE**

[1] The Respondent/Appellant had lodged an application in the Magistrate's Court for ejectment of the Applicant from House No. 12 of Lot 784 Matsapha, cancellation of the lease and payment of arrear rentals. The Applicant's goods had been attached in terms of the landlord's hypothec. The matter was argued and judgment handed down. The Applicant appealed to the High Court to have the judgment set aside. Despite having been served with an Order to appear in court the Appellant failed to appear. Justice T. Mlangeni issued an *ex tempore* order and the Appeal was granted. On the 14<sup>th</sup> June 2018 the Respondent noted an appeal. On the 20<sup>th</sup> June 2018 a written judgment was issued by the High Court. Despite the lapse of four months no record of appeal has since been filed. The Applicant has filed an application claiming:

(a) That the Notice of Appeal dated 14<sup>th</sup> June 2018 by the Respondent be and is hereby deemed to have been abandoned in terms of Rule 30 (4).

(b) Costs of suit.

(c) Such further and/or alternative relief.

[2] The Application was served on the Respondent's attorneys on the 2<sup>nd</sup> October 2018.

[3] No answering affidavit was filed before the date of hearing but at the hearing the respondent sought leave to hand up its Answering Affidavit from the bar, which it did. This should not be seen as a precedent as this Court does not accept any documents from the bar and it was only accepted so as to finalize the matter in the interests of speedy justice.

**APPLICANT'S AFFIDAVIT IN SUPPORT OF THE APPLICATION AND THE ARGUMENT BY COUNSEL FOR THE APPELLANT.**

[4] The Applicant contends that the appeal has not been pursued any further despite the lapse of some 4 (four) months. The Applicant has an order that permits the release of its goods and costs that it cannot execute without the appeal being finalized or deemed to be abandoned. Its valuable goods remain attached and same are deteriorating.

[5] In terms of Rule 8 of the Court of Appeal Rules an Appellant is required to note its Appeal within 4 (four) weeks from date of judgment.

[6] In terms of Rule 30 (1) the Appellant is required to lodge a record of proceedings with the Registrar for certification within two (2) months from

date of noting the appeal. If it does not it is entitled to utilize the mechanism of Rule 16 (1), which provides that an application may be brought for an extension of time.

[7] The Respondent was obliged to file the record of appeal by the 14<sup>th</sup> August 2018 or move an application for extension of time in terms of Rule 16 (1). It has failed to do either.

[8] As an appeal has been lodged which stays execution of a judgment of the court *a quo*, the Applicant is unable to execute its judgment. The Applicant is prejudiced by the inaction of the Respondent, as its goods remain attached, thus preventing the Applicant from continuing with its business, whilst its goods continue to deteriorate.

### **OPPOSING AFFIDAVIT AND ARGUMENT BY COUNSEL FOR THE RESPONDENT**

[9] The Respondent was served with the present Notice of Application in terms of Rule 30(4) on the 2<sup>nd</sup> October 2018 and the Respondent filed Notice of Intention to Oppose on the same day but no Answering Affidavit was filed and the Respondent sought leave to hand same from the bar which it did. (See paragraph [3] above).

[10] The Respondent contends that it is desirous of pursuing the appeal to finality and sets out various reasons why it was not aware of the judgment of the *court a quo* and the *ex tempore* order. However, no reason is given as to why the record was not filed within 2 months in terms of Rule 30 (1) although the Respondent alleges that it has good and substantial reasons for not submitting the record timeously. Most surprisingly the Respondent contends that it is entitled, in terms of Rule 16 (2) to apply for an extension of time, setting forth good and substantial reasons for the application but it

has failed to apply for such extension in terms of the said rule, nor did it apply for condonation in terms of Rule 17.

### **FINDINGS OF THIS COURT**

[11] The relevant provisions of Rule 30 of the Rules of this Court provide that:

**“30. (1) The Appellant shall prepare the Record of 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.**

**30. (4) Subject to Rule 16 (1), if an Appellant fails to note an Appeal or to submit or resubmit the Record of Certification within the time provided by this Rule, the Appeal shall be deemed to have been abandoned.**

[12] Rule 16 of the Rules of this Court provides as follows:

**“Rule 16 (1) The Judge President or any Judge of Appeal designated by him may on application extend any time prescribed by these 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.**

**Rule 16 (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.”**

[13] Rule 17 of the Rules of this Court provides as follows:

**“Rule 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.”**

[14] These Rules are clear and unambiguous and set out the obligations of a party who is obliged to submit a Record of Appeal in the fashion set out in Rule 30 and to bring Applications as set out in Rules 16 and/or 17 above.

[15] The relevant case law relating to the activities referred to above can be referred to as follows:

**In Dr. Sifiso Barrow v. Dr Priscilla Dlamini and the University of Swaziland (09/2014) [2015] SZSC09 (09/12/2015) the Court at 16 stated “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.”**

**In Unitrans Swaziland Limited v Inyatsi Construction Limited, Civil Appeal Case 9 of 1996, the Court held at paragraph 19 that:- “The Courts have often held that whenever a prospective Appellant realizes 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 same Court also referred, with approval, to Commissioner for Inland Revenue v Burger 1956 (A) in which Centlivres CJ said at 449-G that: “...whenever an Appellant realizes that he has not complied**

**with the Rule of Court he should, without delay, apply for condonation.**

[16] As was said in **Kombayi v Berkhout 1988 (1) ZLR 53 (S)** at 56 by **Korsah JA**:

**“Although this Court is reluctant to visit the errors of a legal practitioner on his client, to whom no blame attaches, so as to deprive him of a re-hearing, error on the part of a legal practitioner is not by itself a sufficient reason for condonation of a delay in all cases. (As Steyn CJ observed in *Saloojee & Anor NNO v Minister of Community Development 1952 (2) SA 135 (A)* at 141C):**

[17] In the present matter it is clear that:

- (1) The Respondent has flagrantly disregarded the rule of this Court. No Application has been brought in terms of Rule 16 to the present time, let alone without delay, despite having been served with the application for Abandonment on the 2<sup>nd</sup> October 2018. It is therefore astonishing that the Appellant recognizes in its Answering Affidavit that it is entitled in terms of Rule 16 to bring an application but fails to do so. The Appellant knew that it was out of time but simply disregarded the provisions of the Rules.
- (2) No full, detailed and accurate account of causes of delay and effect thereof have been put before the Court.
- (3) The Appellant through its Counsel conceded that the Appellant knew that it was out of time and not in compliance with the provisions of

Rules 30 and 31 and despite that, no application to this Court was brought in terms of Rule 16.

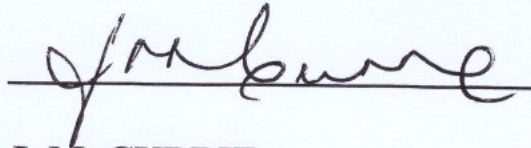
- (4) Accordingly the Appellant must dismally fail the test relating to the giving of detailed and acceptable reasons for delay and non-compliance with the Rules.
- (5) Save for stating that four months has not elapsed since the Respondent noted its Appeal all the Respondent states is that in terms of Rule 16 (1) an application for extension of time may be made and that Rule 16 (2) provides that same shall be supported by an affidavit setting forth good and substantial grounds for the application. Having said that it fails to bring such an application before or at the hearing for the abandonment of the appeal.

[18] Under those circumstances this Court has not been persuaded that the Appeal is not deemed to have been abandoned in terms of Rule 30 (4).

### **JUDGMENT**

1. The Appeal is deemed to have been abandoned in terms of Rule 30 (4) and the Judgment of the *court a quo* is confirmed.
2. Costs on the party and party scale are awarded to the Appellant.

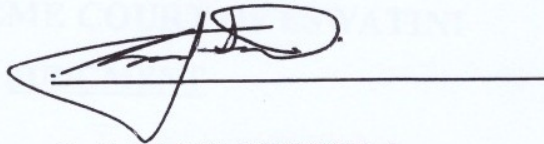




**J. M. CURRIE**

**ACTING JUSTICE OF APPEAL**

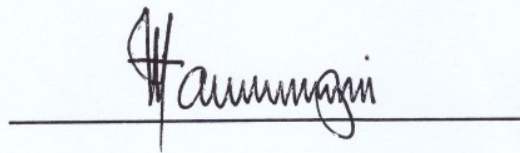
**I agree**



**S. J. K. MATSEBULA**

**ACTING JUSTICE OF APPEAL**

**I agree**



**J. M. MANZINI**

**ACTING JUSTICE OF APPEAL**

**For the Appellant : W. Maseko**

**For the Respondent : L. Magongo**