



IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HOLDEN AT MBABANE

Civil Appeal No.101/2017

In the matter between:

**Select Management Services
(Pty) Ltd**

Appellant

Versus

Ngabisa Precious Dlamini

Respondent

Neutral Citation: *Select Management Services (Pty) Ltd versus Ngabisa Precious Dlamini (101/2017) [2018] SZSC47 (31st October, 2018)*

Coram: **SJK MATSEBULA AJA**

Heard: 28th September 2018

Judgment: 31st October 2018

Summary

Civil matter - Application for setting aside Notice of Appeal alternatively declaration of the Notice of Appeal abandoned or lapsed – Rule 30 read together with Rule 8, meaning thereof – when computation of dies starts.

JUDGMENT

MATSEBULA AJA

- [1] The parties are Select Management Services (Pty) Ltd and Ngabisa Precious Dlamini. In the papers filed herein, the citation of the parties is jumbled up and confusing. For convenience purposes, the parties shall be referred to as they are referred in the Founding Affidavit, that is, Ngabisa Precious Dlamini as the Applicant and Select Management Services (Pty) Ltd as the Respondent.
- [2] The Applicant, through this application is challenging the Respondent under Rule 30 of the Rules of this Court for failure to prepare and lodge a record on appeal within two (2) months of noting the appeal.
- [3] The Applicants case is that she obtained a court order on or about the 10th November, 2017 in her favour rescinding an earlier judgment of the High Court in favour of the Respondent of the 10th

June, 2017. On the 30th November, 2017 the Respondent filed with Registrar of this Court a notice of appeal in the following manner -

“6.1 The Honourable court a quo erred in granting costs at attorney and client scale in a matter that was not defended.

6.2 The Honourable court a quo erred at attorney - own client scale as there was not factual or legal basis for granting such costs.

6.3 The Honourable court a quo should have held that each party pays its own costs.”

[4] The Applicant goes on to aver that she has been advised and verily believes so that the notice of appeal cannot succeed in law on the grounds upon which it is based, as it does not hold in law and in the circumstances of the case. And secondly the Applicant states that she has been advised and she verily believes even if the grounds of appeal hold, such appeal has not been prosecuted within the ambit of Rule 30 as required by this Rule of this Honourable Court.

[5] The Applicant therefore prays that, because the Respondent has not prepared and lodged the record within two months of noting the appeal, this court should –

- (a) set aside the notice of appeal dated 29th November, 2017 as nullity; alternatively
- (b) declare the notice of appeal dated 29th November, 2017 to have been abandoned/lapsed; and
- (c) costs of suit.

[6] The Respondent, as is normal, is resisting the Applicant's application on the basis that:-

- (a) rule 30 of the Rules of this court should be read together with rule 8 (1);
- (b) the dies stated in Rule 30 for the filing of a notice of appeal and a record of appeal is premised on the handing down of a written judgment by the court that made the judgment;
- (c) in the present case, no written judgment has been issued and consequently despite the lodging of the appeal, a

record cannot be put together in view of the absence of a written judgment; and

- (d) the dies as provided in rule 30 cannot be said to have run its course, when the record is incapable of being constituted without a written judgment.

[7] Rule 30 of the Court of Appeal Rules, 1971 states -

“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 for certification as correct”. **(my underlining)**

(2).....

(3).....

(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.”

[8] Rule 16 (1) states as follows –

“16. (1) The Judge President or any judge of appeal designated by him may on application extend any time prescribed by these rule: *(the proviso therein is not relevant for this application)*

[9] The contention of the Applicant is that, not only two months elapsed for the lodging of the record on appeal but almost a year has elapsed and no extension was sought and granted to the Respondent by this Court and therefore the application for appeal should be declared a nullity or be deemed to be abandoned.

[10] This proposition seems good at law but the applicant has referred this Court to rule 8 (1) which should be read together with rule 30 and it states as follows-

“8. (1) The notice of appeal shall be filed within four weeks of the date of the judgment appealed against:

Provided that if there is a written judgment such period shall run from the date of delivery of such written judgment”. **(my underlining)**

[12] There was no evidence adduced on the papers or at the hearing that a written judgment was promised or reserved by the court a *quo*.

Rule 8 (1) anticipants a situation where a judgement is pronounced after the hearing is finished and that is when an appeal notice is to

be filed within four weeks after the pronouncement by the Court of its judgment but if there is a written judgment (which I assume it means if there is going to be a written judgment) then the time of four weeks shall start from the date of delivery of the written judgment. Neither party filed the judgment order or proceedings of the court *a quo* to support the belief that there was going to be or there was a promise of a written judgment.

[13] The Respondent seems to have believed and anticipated that there was going to be a written judgment from its behaviour or conduct in that the Respondent wrote a letter dated 1st December, 2017 to the Registrar titled ***“Re: Request for written judgment: Select Management Services/Ngabisa Precious Dlamini and Another: High Court Case No. 788/22”***. The relevant part of this letter is the following –

“2. This letter serves as a formal request for written reasons for a ruling made by her Ladyship Dlamini J. on the 10th November 2017 in the above mentioned matter.

3. Our client Select Management has since lodged an appeal in the Supreme Court under case No. 101/2017. The written ruling is therefore necessary to enable the

preparation of the record to facilitate the hearing of the appeal”.

[14] There was no written follow up of this letter up to the time of hearing of this matter on the 28th September 2018. The requesting letter had been written on the 1st December, 2017. Although when the Court enquired further from Counsel for the Respondent, he said he did follow up the matter viva voce with the Registrar in a form of a reminder to the Honourable Judge, her Ladyship Dlamini J.

[15] The sequence and import of events is as follows:-

a) Applicant obtains an order in her favour on the 10th November, 2017

b) Respondent filed a notice of appeal on the 30th November, 2017 in terms of rule 8 (1), which states -

“The notice of appeal shall be filed within four weeks of the date of the judgment appealed against.”

c) This means there was a judgment or order that was pronounced in court against which the Respondent on the 30th November 2017 filed a notice of appeal.

d) There is also a proviso to rule 8 (1) which states-

“Provided that if there is a written judgment such period shall run from the date of the delivery of such written judgment.”

e) It is common knowledge that up to date there is no written judgment, notwithstanding the fact that the Respondent wrote to the Registrar requesting for a written judgement or one to be written. To-date there is still none.

g) The notice of appeal by the Respondent must have been filed under rule 8(1) standing alone without the proviso, had it been filed under the proviso it would have been filed within four weeks after delivery of the written judgment, a judgement which we all know has not as yet been delivered. Let me explain this under the next paragraph.

f) Rule 8 (1) can be broken into 2 pathways. The first pathway is contained in Rule 8(1) without the proviso. The second pathway is found in the proviso. Rule 8 (1) excluding the proviso says the notice of appeal shall be filed within four weeks of the date of the judgement appealed against. This can happen, for example, in a judgement ex tempore or a decision/order/judgement handed down straight after hearing the case or at the conclusion of hearing the case. The proviso provides another pathway and it says: if there is a written judgement such period (the four weeks) shall run from the date of delivery of such written judgement. This happens where a judge gives a judgement at the conclusion of the case but promises to give a written judgement (or reasons for the judgement) at a date in the future. The proviso caters such later situation and states that in such cases the dies starts running from the date of delivery of such written judgement. An appellant will diligently study the situation and pick the pathway that best accommodates the circumstances. Of the case.

f) Rule 30 (1) requires that the appellant (Respondent herein) to within 2 months of the date of noting of the appeal, prepare and lodge the record on appeal with the Registrar. It is common cause that this did not happen.

g) Rule 30 (4) states –

“Subject to rule 16(1), if an appellant fails to note an appeal or submit or resubmit the record for certification within the time provided by this rule, the appeal shall be deemed to have been abandoned”.

h) It is common knowledge that the Respondent failed to submit or submit the record for certification within 2 months of the date of noting the appeal.

i) Rule 16(1) states –

“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”.

It is also common cause that Appellant (Respondent herein) did not make any application under this rule.

Conclusion and judgement

[16] Rule 8 (1), states -

“The notice of appeal shall be filed within four weeks of the date of the judgment appealed against.”

The proviso to rule 8 (1) states-

“Provided that if there is a written judgement such period shall run from the date of the delivery of such written judgment.”

The proper reading of the underlined words in rule 8 (1) “filed within four weeks” should also be read into the words “such period” in the proviso. “Such period” means “within four weeks”. This would read: *Provided that if there is a written judgment the notice of appeal shall be filed within four weeks of the date of delivery of the written judgement.*


[17] In this case we have a notice of appeal filed within four weeks of the date of pronouncement of a judgement. We do not as yet have any written judgement. Therefore the notice of appeal could not have been filed under the proviso hence a record on appeal should have been filed in terms rule 30, that is, filed within 2 months of the date of noting an appeal.

[18] It is also common knowledge that the Respondent has not applied for any extension and has not filed the record on appeal within 2 months of noting the appeal. The Respondent should have applied, in terms of rule 16 (1), to extend the time prescribed

under rule 30 (1) if he wished to preserve the application of appeal or else it stood the risk of being deemed abandoned as per rule 30 (4) of the Rules of this Court.

[19] In the result –

- (a) the Notice of Appeal filed by the Appellant/Respondent on the 30th November, 2017 is declared abandoned; and
- (b) costs as prayed are awarded to the Applicant.



S.L.K. MATSEBULA
ACTING JUSTICE OF APPEAL

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