



IN THE SUPREME COURT OF ESWATINI

JUDGMENT

**HELD AT MBABANE
69/2018**

CIVIL CASE NO:

In the matter between:

RICHARD KHANYILE

FIRST APPLICANT

THEMBANI KHANYILE

SECOND APPLICANT

And

**THANDI MOTSA & FOUR OTHERS
RESPONDENTS**

In re:

**THANDI MOTSA & FOUR OTHERS
APPELLANTS**

And

RICHARD KHANYILE AND ANOTHER

RESPONDENTS

Neutral Citation: *Thandie Motsa & 4 Others v Richard Khanyile & Another (69/2018) [2019] SZHC 24 (17 June 2019)*

CORAM:

S.P. DLAMINI JA

M.J. DLAMINI JA

S.J.K. MATSEBULA AJA

DATE HEARD: 1, 8 April 2019

DATE DELIVERD: 17 June 2019

SUMMARY: *Civil Procedure – Application for the Appeal to be deemed abandoned due to the alleged non-compliance with the Rules of the Court – As a consequence of the alleged non-compliance with Rules, it is prayed that the Appeal be dismissed with costs including the costs of the present application – Held that there is a flagrant failure to comply with the Rules – Held that in the circumstances the Appellants cannot escape the consequences of the non-observance of the Rules – Held that the application by Applicants must succeed – Held that the Appeal is deemed abandoned and dismissed with costs.*

S.P. DLAMINI

THE PARTIES

[1] In the present application the Applicants pray to the Court for an order to deem the Appeal abandoned and failing to be dismissed in the main Appeal the Applicants are the Respondents and the Respondents are the Appellants. For convenience, the parties will be referred to as Applicants and Respondents respectively in this judgment.

BACKGROUND

[2] For the purposes of the present application it is not necessary to give a detailed account of the background giving rise to the appeal hence a brief summary will be provided below.

[3] In the Court *a quo*, the 1st Applicant instituted action proceedings against 1st, 2nd, 3rd and 4th Respondents in which he sought the transfer of certain immovable properties into their names on the basis of Deeds of Sale between the parties. The 5th Respondent did not participate in the proceedings.

[4] The Court *a quo*, after hearing the matter, rendered judgment on the 20th July 2018 per Her Ladyship M. Dlamini J.

[5] The Court *a quo* found in favour of the 1st Applicant and stated at paragraph [61] of the Judgment that:-

“[61] In the final result, I enter the following orders:

- 1. The plaintiff’s cause of action succeeds;*
- 2. Annexure “A” is hereby rectified to read as Portion 51 measuring 5 hectares (a Portion of Portion9) of Farm Droxford situate in the District of Hhohho instead of Lot 38/1007 Droxford Farm;*
- 3. The Deputy Sheriff for the District of Hhohho is authorized to sign all necessary processes including statutory instruments in order to give effect to this judgment. That is namely,*
 - (a) all applications and documents necessary for the transfer to the plaintiff of the property under order NO. 2 herein;*
 - (b) all applications and documents necessary for the subdivision of 7 hectares of the remaining Portion of Portion 9 of Farm Droxford situate in the District of Hhohho and*

its subsequent registration and transfer to the plaintiff;

4. Costs to follow the event.”

[6] The Appellants were dissatisfied with the judgment of the Court *a quo* and launched an Appeal before this Court. The Appeal has not been heard on the merits since the Respondent launched the present Application.

THE PRESENT APPLICATION

[7] The Applicants by way of Notice of Motion dated 19 November 2018 launched the present Application against the Respondents, couched in the following terms:

- “1. The appeal noted by the respondents on or about the 20th August 2018 is hereby deemed abandoned in terms of the Rule 30 (4) of the Rules of this Court:*
- 2. The respondent’s appeal is hereby dismissed with costs;*
- 3. The respondents are ordered to pay the costs of this application.*
- 4. Further and/or alternative relief.”*

[8] The 2nd Applicant deposed on the Founding Affidavit. At this stage it is apposite to point out that the 2nd Applicant was granted the rights to participate and give evidence before the Court *a quo* due to the ill-health of the 1st Applicant who is her husband.

APPLICANT'S CASE

[9] The Applicants contended that;

- 9.1 The Appeal has no prospects of success and only launched as a delaying tactic by the Respondents;
- 9.2 The Respondents have not complied with Rule 30 (1);
- 9.3 The Respondents have not applied for an extension of time as envisaged by Rule 16;
- 9.4 The Respondents are to be deemed to have abandoned the Appeal as envisaged by Rule 30 (4); and
- 9.5 The purported filing of the record was out of time and it is incomplete, in any event.

[10] The Respondents opposed the Application. The Respondents filed the Answering Affidavit and it is contended therein on behalf of the Respondents as follows:

- 10.1 The Appeal has merit and that at law the property belonging to an estate cannot be sold by any person other than by the executor acting in conjunction with the Master of the High Court;

- 10.2 It was admitted that there was no compliance with Rule 30 (1);
- 10.3 It is admitted that the record ought to have been filed on or before 20/10/18 and that was not done;
- 10.4 The Application for extension of time was filed and is pending before this Court;
- 10.5 The Appeal was not launched for delatory purposes.
- 10.6 The Rules are merely a guide and *“only a procedural hindrance but will not affect the scheduled hearing of the Appeal”*;
- 10.7 The Applicants are not entitled to the relief sought; and
- 10.8 The delay was caused by the fact that the proceedings were voluminous and were dealt with at different court rooms. The dates on the court rooms are not indicated and as a result it is very tedious for the transcribers as they required to move from one Court to the other.

THE ISSUES

[11] The issue falling for the determination before this Court are;

- 11.1 Whether the Respondents complied with the Rules of the Court of Appeal [the Rules] regarding the Record of Appeal and its filing;

11.2 That in the event the Court finds that there was no compliance with the Rules, what is the status of the Appeal;

11.3 That in the event there was non-compliance with the relevant Rules, what is the consequence of the non-compliance; and

11.4 Costs suit.

THE RULES OF COURT AND CASE-LAW IN RELATION THERETO

[12] The filing of the record in Civil Appeal is governed by Rule 30 of the Court of Appeal Rules of 1971 as amended.

[13] The relevant parts Rule 30 in so far as the present application is concerned is reproduced herein:

“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, endeavor 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.”*

[14] In addition to Rule 30, Rules 16 and 17 are also relevant and referred to in the papers before Court.

[15] Rule 16 provides that;

“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. (Amended L.N. 102/1976.)

(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.”

[16] Rule 17 provides that;

“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.”

[17] The courts have had occasion to consider and pronounce themselves on the status of the Rules and consequences of failing to comply with the Rules.

[18] In this regard, I wish to mention but a few relevant judgments within and outside our jurisdiction and other jurisdiction; **MFANUKHONA MADUNA & 2 OTHERS v JUNIOR ACHIEVEMENT SWAZILAND (105/2017) [2018] SZCS 2017; THE PUB AND GRILL (PTY) LIMITED & ANOTHER v THE GABLES (PTY) LIMITED (102/2018) [2018] SZSC 17 (20TH May 2019); SANDRA KHUMALO & 4 OTHERS v LOMDASHI LIMITED (76/2018) [2019] SZSC 7 (20/03/2019); DIRECTOR OF PUBLIC PROSECUTIONS AND MDUDUZI ELLIOT NKAMBULE (08/2016) [2017] SZSC 03 (11 May 2017); ATTORNEY GENERAL v**

**MANICA FREIGHT SERVICES (BOTSWANA) PTY LTD CIV. APP
NO. 16 OF [2002] (27 January 2005); and DE BARRY ANITA
BELINDA & A.G. THOMAS (PTY) LTD (30/2015) [2ZSC] [2017]
(31st MAY 2017).**

ANAYLSIS AND APPLICATION OF THE LAW TO THE FACTS

[19] The judgment of the Court *a quo* was delivered on 20 July 2018. The Respondents filed their Notice of Appeal against the judgment on 20 August 2018.

[20] In terms of the Rules the Respondents were bound to file the Record of Appeal on or before 20 October 2018 in terms of Rule 30 (1). This was not done and the Respondents admitted that there was no compliance with the Rule 30 (1).

[21] As envisaged in Rule 16, if the Respondents encountered problems regarding filing of the record as they allege in the papers, they ought to have made application before this Court for the extension of the filing of the record before the expiry of the *dies*. There was no such application filed before the expiry of the *dies*.

[22] In **MFANUKHONA MADUNA & TWO OTHERS v JUNIOR ACHIEVEMENT SWAZILAND** (*supra*), the Court had to decide whether there was an appeal pending before it in view of the fact that the Notice of Appeal was filed out of time contrary to Rule 8 (1). The late filing of the Notice of Appeal had not been condoned by the Court.

In a unanimous judgment, the Court came to the conclusion that;

- (a) the Registrar of the Supreme Court ought not to have accepted Notice of Appeal filed out of time in the absence of leave to do so being first granted by the Court; and
- (b) the late filing had not been condoned by the Court, the appeal was improperly before the Court and virtually non-existent.

The only difference between the **MFANUKHONA MADUNA CASE** and this matter, is that in the former the Court was dealing with the late filing of a Notice of Appeal whereas in the present matter the issue relates to the filing of the Record of Appeal. I see no reason to depart from the dictum of the **MFANUKHONA MADUNA CASE**.

[23] In **SANDRA KHUMALO & 4 OTHERS v LOMDASHI LIMITED** (*supra*), this Court in a unanimous judgment dismissed applications

for condonation for the late filing of Heads of Argument by both sides and, consequently, dismissed the appeal. In its judgment, the Court cited with approval judgments from within and outside this jurisdiction namely; **DE BARRY ANITA BELINDA v A.G. THOMAS (PTY) LIMITED** (*supra*), **MELANE v SANTAM INSURANCE CO. LTD 1962 (4) SA 531 (A) AND DARRIES v SHERIFF, MAGISTRATE'S COURT, WYNBERG, AND ANOTHER (25/96) ZASCA**).

[24] In **THE PUB AND GRILL (PTY) LIMITED & ANOTHER v THE GABLES (PTY) LIMITED** (*supra*), this Court had this to say:-

[32] In this matter the Applicant/Appellant had disregarded its obligation to file record, but applied to this Court to condone the late filing of its heads. An Applicant cannot pick and choose which of the Rules of this Court it decides to follow. Needless to state that each of the Court's Rules is important and is there for a purpose. The attitude displayed by the Applicant in the present case is that some Rules of the Court are not important and can be disregarded with impunity. This attitude is not acceptable.

*[33] In a similar matter, in the case of **MUSA MAGONGO AND SWAZILAND DEVELOPMENT AND SAVINGS BANK AND THE REGISTRAR OF DEEDS - Court of Appeal of Swaziland - Civil Court Case NO. 27/2000** Zietsman JA at page 3 had this to say:-*

"In this matter there had been a flagrant disregard of the Rule by the Appellant. The Appellant's failure to comply with the Rules was specifically brought to the attention of his Attorney by the Respondent's Attorney. The Appellant's Attorney was advised that because of the failure to comply with the Rules an application for

dismissal of the Appeal would be made. Despite the facts the Appellant sought to proceed with the appeal without making any attempt to remedy his fault, to comply with the Rules or to apply for condonation for this failure to do so.”

The Court proceeded to order that;

“(iii) Appellant’s/Applicant’s appeal is deemed to have been abandoned in terms of Rule 30 (4) of the Rules of this honourable Court and such appeal is dismissed.

(i) Appellant’s/Applicant’s application for condonation for leave for the late filing of heads of Arguments is hereby refused, with costs.

(ii) The Appellant’s application to admit certain entries made in the court file is refused.”

[25] The Appellants in the present matter are in a similar position as the Appellants in the **SANDRA KHUMALO CASE** (*supra*) as far as non-compliance with the Rules. In that case the Court, *inter alia*, ordered that the Application for Condonation by both parties and the Appeal be dismissed.

[26] The argument by Counsel for the Respondents that Rules of Court are a mere guide flies in the face of the dicta in the judgments referred to above and is accordingly rejected by this Court.

[27] On 22 November 2018, the Applicants launched this application seeking to have the Respondents' appeal deemed abandoned as envisaged by Rule 30 (4).

[28] The Respondents purported to file the Court Record on 25 February 2019. There was no condonation sought and granted by this Court for the Respondents to file the record out of time by nearly 4 months. The Respondents failed to exercise their rights as per Rule 17.

[29] Notwithstanding that the record before Court bears the Registrar's stamp, in the absence of a Court Order granting the Respondents extension of time or condoning the late filing of the Record of Appeal the office of the Registrar was not supposed to accept the Record of Appeal.

[30] Furthermore, it was argued in the Heads of Arguments of the Applicants that the record in question was incomplete. In response to this argument, Counsel for Respondents argued that the omitted documents were immaterial. However, the materiality or otherwise of items to be included in the record is matter for both sides to discuss and agree on and for such to be disclosed to the Court as per Rule 30 (5). No such discussion and agreement were made on this matter.

[31] Regarding the office of the Registrar of the Supreme Court accepting processes that are out of time in the absence of an order of the Court allowing such, this Court in the matter of **MFANUKHONA MADUNA AND 2 OTHERS v JUNIOUR ACHIEVEMENT SWAZILAND at paragraph [21]** (*supra*) had this to say:

“[21] However, it is apposite at this juncture to caution the office of the Registrar that where the Rules preclude the office from accepting processes that are out of time, that it must be done so at all times in a uniform fashion. Therefore, the phenomenon whereby filing of papers which are out of time is allowed in certain cases and rejected in others must stop forthwith”

I reiterated this caution in this matter.

[32] Accordingly, all the processes that were irregularly filed or filed out of time namely the applications for condonation and extension of time have no legal bearing whatsoever on the present application.

[33] The purported filing of the record was out of time by Appellants' own admission. Leave to file the record out of time was not sought or granted. The Respondents failed to timeously apply for the extension of time in order for their appeal not to fall foul of the Rules. The purported record was not prepared in conjunction with

the Applicants so as to exclude some of the documents deemed not necessary. To comply with all of these steps did not require much effort or posed any difficulty on the part of the Respondents. There is no reasonable explanation for the failure to comply with the Rules at all. Therefore the application by Applicants must be allowed. The appeal stands to be deemed abandoned and to be dismissed with costs.

The record of Appeal is a fundamental and central process to an appeal. Therefore, failure by a *dominis litis* to comply with the Rules appertaining the filing of the record of appeal without good cause or to take appropriate steps to remedy such a failure is inexcusable at law.

CONCLUSION

[34] In conclusion, in **RONALD MOSEMANTLA SOMAEB v STANDARD BANK NAMIBIA LTD Case NO. SA 26/2014** the Court stated that:-

[12] It is incumbent on every litigant to comply with rules of court in view of the fact that rules of court serve a specific purpose. In Molebatsi v Federated Timbers (Pty) Ltd 1996 (3) SA 92 (b) quoted with approval in S v Kakololo 2004 NR 7 (HC) at 10 C-E the following was stated. (at p 96 G-H).

“The Rules of Court contain quantities of concrete particularity. They are not of an aleatoric quality. Rules of Court must be observed to facilitate strict compliance with them to ensure the efficient

administration of justice for all concerned. Non-compliance with the said Rules would encourage casual, easygoing and slipshod practice, which would reduce the high standard of practice which the courts are entitled to in administering justice. The provisions of the Rules are specific and must be complied with; justice and the practice and administration thereof cannot be allowed to degenerate into disorder.”

[22] *Rules of court cannot be applied selectively in the sense that they are bound to be complied with only by a certain group of persons engaged in litigation in our courts.*

[23] *In Worku v Equity Aviation Services (Namibia) (Pty) Ltd (In Liquidation) & others 2014 (1) NR 234 (SC) at 240 that court stated the following at para 17:*

“It follows from what has just been said that the appellant has not complied with the rules of the court that regulate the prosecution of appeals in material respects. In reaching this conclusion, it has been borne in mind that appellant implored the court to overlook his procedural non-compliance and determine the substantive issues that he asserts underly the appeals, namely, the satisfaction of the judgments of the district labour court mentioned above. However, we cannot overlook the rules which are designed to control the procedures of the court. Although a court should be understanding of the difficulties that lay litigants experience and seek to assist them where possible, a court may not forget that court rules are adopted in order to ensure fair and expeditious resolution of disputes in the interests of all litigants and the administration of justice generally. Accordingly, a court may not condone non-compliance with the rules even by lay litigants where non-compliance with the rules would render the proceedings unfair or unduly prolonged.”

[35] In **ATTORNEY-GENERAL v MANICA FREIGHT SERVICES**

(BOTSWANA) (supra), His Lordship TEBBUTT J had this to say:-

'Mr. Chamme has submitted that it is a well-known principle that the object of courts is to decide rights of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. That submission may be correct, as far as it goes (I express no view on it), but it is the rights of both parties to which the court must look and not only one of them. As I have said, it is in essence a case of fairness to both sides and I would not be fair to the respondent were I to grant this application. For all the foregoing reasons, the application must fail. I therefore make the following order: The application for leave to appeal out of time is dismissed, with costs. Application for leave to appeal dismissed.'

As demonstrated in the above two cases from other jurisdictions, the approach of this Court when it comes to the observance of the Rules of Court is similar to what obtains in other jurisdictions. In my view the factors to be considered in such applications, as adumbrated in the above cases, support the granting of the application in this matter.

COSTS

[36] It is now trite in our law that costs follow the cause unless there are legitimate reasons to order otherwise. I have found no reasons to order that costs follow the cause in this matter. It follows that since

the Applicants are successful in their application, costs must be ordered in their favour.

ORDER

[37] In view of the foregoing, the Court makes the following order:-

1. That the Record of Appeal was filed erroneously and contrary to the Rules.
2. That the appeal is deemed to be abandoned in terms of Rule 30 (4) and such appeal dismissed.
3. That costs are awarded in favour of the Applicants at ordinary scale.



S.P. DLAMINI JA

I agree



M.J. DLAMINI JA

I also agree



S.J.K. MATSEBULA AJA

FOR THE APPELLANTS: N.D. JELE

FOR RESPONDENTS: O. NZIMA