IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 57/2018

In the matter between:

FRANCISCA THANDEKA SHAYO **Appellant**

and

LINAH THEMBI MBHAMALI N.O. **1st Respondent**
MASTER OF THE HIGH COURT **2nd Respondent**
ATTORNEY GENERAL **3rd Respondent**

Neutral Citation: *Francisca Thandeka Shayo vs Linah Thembi Mbhamali N.O. and 2 Others* (57/2018) [2019] *SZSC 49* (14/11/2019).

Coram: **R.J. CLOETE JA, J.P. ANNANDALE JA AND M.J. MANZINI AJA.**

Heard: 5th November, 2019.

Delivered: 14th November, 2019.

SUMMARY : *Appellant found not to have been in compliance with the provisions of various Rules of this Court including Rules 7, 8, 16, 30 (1) and 30(5) – Appellant accordingly found to be in flagrant breach of Rules – Record of proceedings not properly before the Court – The provisions of Rule 30(4) discussed – Found that upon Appeal being abandoned in terms of that Rule, that it is the end of the matter and the Appeal must accordingly be formally dismissed with costs*

JUDGMENT

CLOETE – JA

BACKGROUND

[1] The Appellant filed a Notice of Appeal on the 27th July 2018. At this point it needs to be mentioned that the format of this Notice is highly unusual and that it reads like a commercial contract rather than the tried and tested format in which Notices of Appeal are filed in this jurisdiction in terms of Rule 6(4).

[2] This Notice itself was out of time according to the affidavit in support of an Application for the Condonation of the late filing of the Notice of Appeal as attested to by the Appellant in person on the 8th August 2018. As such there was clearly no compliance with the provision of Rule 8 (1) and Rule 8 (2) which provide as follows:

> **"(1) The notice of appeal shall be filed <u>within four weeks of the date of the judgment appealed against:</u>**
>
> **Provided that if there is a written judgment such period shall run from the date of delivery of such written judgment:**
>
> **(2) The Registrar shall not file any notice of appeal which is presented after the expiry of the period referred to in paragraph (1) <u>unless leave to appeal out of time has previously been obtained."</u>** (my underlining)

[3] On the 11th October 2018 the Appellant filed a document under the heading **"Amended Notice of Appeal"**. There was no compliance with the provisions of Rule 7 which provides that:

> **"7. The appellant shall not, <u>without the leave of the Court of Appeal,</u> urge or be heard in support of any ground of appeal not stated in his notice of appeal, but the Court of**

Appeal in deciding the appeal shall not be confined to the grounds so stated." (my underlining)

[4] The Appellant in its Application for Condonation of the late filing of the Notice of Appeal alleged that the Court *a quo* heard the matter on the 4th June 2018 and handed down an *ex tempore* Order on that date. I will deal with this issue below.

[5] On the 12th October 2018 the Appellant filed a document headed **"Record of Proceedings"**. The filing of this document was not preceded by any Application for an extension of time as provided for in Rule 16 which will be dealt with below.

[6] The Court requested both Counsel to address it on the provisions of Rule 30 (4) and the legal consequences of the provisions of that Rule.

SUBMISSIONS OF COUNSEL FOR THE APPELLANT

[7] Mr. Mntungwa advised the Court that he was briefed on the evening before the matter was to be heard, that he thought that he was required to argue the merits of the Appeal and that he was only made aware by Counsel for the 1st Respondent immediately before the hearing of the matter that first there

were a number of interlocutory Applications for Condonation and the like to be dealt with.

[8] After traversing the sequence of all of the documentation before us (whether properly before us or not), he reluctantly conceded that the Notice of Appeal of the 27th July 2018 was out of time, that there was no Application in terms of Rule 7 to file an amended Notice of Appeal, that the record filed on the 12th October 2018 was accordingly also out of time and that there had been no Application as is required in terms of Rule 16 for an extension of time within which to file the said Record.

[9] He requested that the Court postpone the matter to the next session so that the Appellant could get its papers in order.

SUBMISSIONS OF COUNSEL FOR THE 1ST RESPONDENT

[10] Mr. Khoza pointed out that the Appellant had not complied with Rules 7, 8, 16, 30 (1) nor Rule 30 (5) and as such that in terms of Rule 30 (4), the Appellant's Appeal is deemed to have been abandoned.

[11] He further sought an Order for costs.

FINDINGS

[12] The dates and allegations set out in the affidavit of the Appellant in support of the Condonation Application dated the 8th August 2018 do not accord with the documentation filed by her own Attorneys.

[13] She alleged that the matter was argued on the 4th June 2018 on which date the Court *a quo* handed down an *ex tempore* Order. In contrast to that the purported Record at pages 73 onwards reflect, on the written judgment of Magagula J., that the matter was in fact heard on the 18th April 2018 and that the written judgment was handed down on the 31st May 2018.

[14] In addition to that it becomes clear from the purported Book of Pleadings filed by the Appellant on the 22nd May 2019 and at pages 47 and 48 thereof that the truth of the matter is that the Appellant's Attorneys wrote to the Registrar of the High Court on the 7th August 2018 requesting a copy of the judgment of Magagula J. and that the Registrar on the 9th August 2018 furnished the said Attorneys with a copy of a judgment which was handed down on the 31st May 2018 (the reference by the Registrar to the 3rd May 2018 in the covering letter clearly is a typographical error as the judgment itself clearly provides that it was handed down on the 31st May 2018).

[15] Accordingly the Appellant's Attorneys were aware on the 9th August 2018 that there had been a written judgment handed down on the 31st May 2018. There is no evidence before us that they did anything to remedy their client's papers until the 11th October 2018 when the purported amended Notice was filed and the 12th October 2018 when the purported Record was filed. For example, they failed to bring an Application in terms of Rule 16 for an extension of time within which to file the Record bearing in mind that they were clearly aware of the written judgment since the 9th August 2018.

[16] Even on the basis of the uncontroverted facts set out in paragraph 15 above, the filing of the purported Notice of Amendment and the Record would have been out of time. That is however merely hypothetical.

[17] The fact is that there has not been a compliance with the mandatory provisions of Rule 30 (1) which reads as follows:

"30. (1) The appellant shall prepare the record on appeal in accordance with sub-rules (5) and (6) hereof and shall <u>within 2 months of the date of noting of the appeal</u> lodge a copy thereof with the Registrar of the High Court for certification as correct" (my underlining)

[18] There has also been no compliance with the provisions of Rules 7 and 8 referred to above nor has there been compliance with the provisions of Rule 16. The fact of the matter is that the only properly filed Notice of Appeal before us is the one dated the 27th July 2018. The Record should accordingly have been filed by the 26th September 2018. It was filed on the 12th October 2018. Even if it were argued that the Appellant only became aware of the written judgment on the 9th August 2018, the Record would still have been out of time.

[19] In my view the *proviso* to Rule 16(1) does not assist the Appellant in any way. Firstly the Appellant had already filed a Notice on the 27th July 2018 and as such was already party to the proceedings and consequently was required to abide by the provisions of Rule 7 if she wanted to amend the grounds of Appeal. In any event, as pointed out hypothetically above, even if she were to argue that the judgment only came to her attention on the 9th August 2018, the Record would still be out of time. In addition, the *proviso* clearly provides that the relevant date is **"the date of <u>delivery</u> of such written judgement"** which clearly is the 31st May 2018.

[20] Accordingly it is inescapable that the Appellant has been in flagrant breach of the provisions of Rules 7, 8, 16, 17, 30 (1) and apparently, insofar as it is relevant, according to Mr. Khoza, also the provisions of Rule 30 (5).

[21] Which then brings me to the provisions of Rule 30 (4):

> **"30. (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, <u>the appeal shall be deemed to have been abandoned."</u>** (my underlining)

[22] This Court has dealt with issues of this nature on numerous occasions. The question is simply whether the provisions of Rule 30 (4) are peremptory or not and as such whether non-compliance with the provisions of Rule 31(1) renders the Appeal finalised and whether that brings finality to the Appeal in that it is the end of the road and the Appeal is effectively dismissed.

[23] In the matter of **Cleopas Sipho Dlamini versus Cynthia Mpho Dlamini (65/2018) [2019] SZSC 48**, in a unanimous judgment penned by J.P. Annandale JA and agreed to by M.C.B. Maphalala CJ and J.M. Curry AJA, it was held that if an Appeal is deemed to be abandoned it has the same effect of it having been dismissed. By specific reference to the provisions of Rule 30 (4), at paragraph 26 it states as follows:

"By operation of law, Rule 30 (4) provides for such closure when an Appeal is not prosecuted in accordance with the Rules of Court."

[24] In **Thandie Motsa and 4 Others versus Richard Khanyile and Another (69/2018) [2019] SZHC 24**, in another unanimous judgment penned by S.P. Dlamini JA and agreed to by M.J. Dlamini JA and S.J.K. Matsebula AJA, it was again held that the Appeal was deemed to have been abandoned and as such dismissed.

[25] At paragraph 17 of the judgment Dlamini JA states that "**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"** and at paragraph 18 made reference to a number of these judgments including **The Pub and Grill (Pty) Limited and Another versus the Gables (Pty) Limited (102/2018 [2018] SZSC 17**.

[26] At paragraph 24, Dlamini JA refers with approval to the **Pub and Grill** matter where this Court had the following to say:

"[32] In this matter the Applicant/Appellant had disregarded its obligation to file the record, but applied to this Court to condone the late filing of its heads. <u>An Applicant cannot pick and choose</u>

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." (In that matter it was also found that the Appeal was deemed to have been abandoned and as such dismissed). (my underlining)

[27] Dlamini JA, with approval, further cited the matter of **Ronald Mosemantla Somaeb versus Standard Bank Namibia LTD Case No. SA 26/2014** as follows:

"[21] 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 (3) quoted with approval in S v Kakololo 2004 NR 7 (HC) at 10 C-E the following was set out (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, easy-going 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 underlay 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."

[28] In my view, and it is abundantly clear from all of the above, that non-compliance with Rules will generally result in adverse judgments in some form or another. In the present matter, as indicated, there has been a flagrant disregard for the Rules of this Court and therefore I have no alternative but to find that the Appeal of the Appellant has been deemed to be abandoned in terms of the mandatory provisions of Rule 30 (4). In addition I agree entirely with the sentiments expressed by this Court previously that the provisions of Rule 30(4) are peremptory and as such by operation of law the Appeal has reached the end of the road and accordingly formally results in the dismissal of the said Appeal.

[29] Ringing in one's ears is the dictum in Saloojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A) where it was held at 141 C-E that **"there is a limit beyond which a litigant cannot escape the results of his attorneys' lack of diligence or the inefficiency of the explanation tendered".**

[30] Accordingly the following Order is made:

1. The Appeal of the Appellant is deemed to have been abandoned as provided for in Rule 30 (4) and it is accordingly dismissed.

2. Costs are awarded to the Respondent on the ordinary scale.

R. J. CLOETE
JUSTICE OF APPEAL

I agree

J.P. ANNANDALE
JUSTICE OF APPEAL

I agree

M.J. MANZINI
ACTING JUSTICE OF APPEAL

For the Applicants: M. MNTUNGWA FROM ROBISON BERTRAM
For the Respondent: S. KHOZA FROM S.M. KHOZA ATTORNEYS.