IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 86/2020

HELD AT MBABANE
In the matter between:

LITTLE INTELLECTUALS DEVELOPMENT	
CENTRE (PTY) LTD	**1st Applicant**
THE NATIONAL COMMISSIONER OF POLICE	**2nd Applicant**
THE ATTORNEY GENERAL	**3rd Applicant**
and	
SIFISO RONALD MAPHALALA	**Respondent**
In re:	
SIFISO RONALD MAPHALALA	**Appellant**
and	
LITTLE INTELLECTUALS DEVELOPMENT	
CENTRE (PTY) LTD	**1st Respondent**
THE NATIONAL COMMISSIONER OF POLICE	**2nd Respondent**
THE ATTORNEY GENERAL	**3rd Respondent**

Neutral Citation: *Little Intellectuals Development Centre (Pty) Ltd and 2 Others vs Sifiso Ronald Maphalala* (86/2020) [2021] *SZSC* 19 (01/09/2021)

Coram: **J.M. CURRIE AJA.**

Heard: 19 August, 2021.

Delivered: 01 September,2021.

SUMMARY : *Civil procedure – Application that appeal be deemed abandoned in terms of Rule 30 (4), no record of appeal filed – No application for extension of time – Notice to raise Point of Law challenging validity of Rule 30 (4) after service of application that appeal be declared to be deemed abandoned – No heads of argument filed by appellant – Appeal deemed abandoned – Costs awarded on the ordinary scale.*

JUDGMENT

CURRIE – AJA

BACKGROUND AND SEQUENCE

[1] This is an application by the 1st Applicant/Respondent declaring that the appeals dated 4th and 14th December 2020 be deemed abandoned in terms of Rule 30 (4) of the rules of this Court and that the appeals be dismissed with costs.

[2] The Respondent/Appellant had noted an appeal against an interim order of the Court *a quo* issued on the 4th December 2021 and a further appeal against the final order issued by the Court *a quo* on the 14th December 2021.

[3] Despite having noted the above appeals the Respondent/Appellant failed to file the record of proceedings within two months from the date of noting the second appeal, being in contravention of the provisions of Rule 30 (1), nor did it bring an application for an extension of time to do so in terms of Rule 16 (1) or an application for condonation in terms of rule 17.

[4] The present application was served on the Respondent/Appellant's attorneys on the 9th June 2021 whereupon the Respondent/Appellant filed a Notice of Intention to Oppose on the 8th July 2021, one month after receipt of the application to declare that the appeal is deemed abandoned. No opposing

affidavit was subsequently filed but on the 13th July 2021 a Notice to raise a Point of Law was served by the Respondent/Appellant on the Applicant/Respondent's attorneys.

[5] Whilst the Applicant/Respondent has filed Heads of Argument, none have been filed by the Respondent/Appellant and no application for an extension of time nor condonation has been brought by the Respondent/Appellant.

[6] At the hearing of the matter the Respondent's Counsel requested, from the Bar, that this Court give direction as to the filing of heads with regard to the Notice to Raise a Point of Law.

RULES OF THIS COURT

[7] 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.

Rule 31 (1) of the Rules of this Court provide as follows:

"**31 (1) In every Civil Appeal and in every Criminal Appeal the Appellant shall, not later than twenty eight 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."**

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."

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 any give such directions in matters of practice and procedure as it considers just and expedient."**

[8] The above Rules are clear and unambiguous and set out the obligations of a party who notes an Appeal and is required file a record as set out in Rule 30; Heads of Argument in the fashion set out in Rule 31 and failing that, as provided for in the case law which will be referred to below, to bring Applications as set out in Rules 16 and/or 17 above.

[9] The relevant case law relating to the activities referred to in 7 above can be referred to as follows:

9.1 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."**

9.2 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 realises 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 realises that he has not complied with the Rule of Court he should, without delay, apply for condonation."**

9.3 In **Maria Ntombi Simelane and Nompumelelo Prudence Dlamini and Three Others in the Supreme Court Civil Appeal 42/2015**, the Court referred to the dictum in the Supreme Court case of **Johannes Hlatshwayo vs Swaziland Development and Savings Bank Case No. 21/06 at paragraph 7** to the following: **"It required to be stressed that**

the whole purpose behind Rule 17 of the Rules of this Court on condonation is to enable the Court to gauge such factors as (1) the degree of delay involved in the matter, (2) the adequacy of the reasons given for the delay, (3) the prospects of success on Appeal and (4) the Respondent's interest in the finality of the matter."

9.4 In the said matter of **Hlatshwayo** referred to above, the Court at 4 stated as follows: **"The Appellant's Heads of Argument were filed on 25 October 2006 which was a period of only six days before the hearing of the matter. This was a flagrant disregard of Rule 31 (1) of the Court of Appeal Rules which provides as follows…**(the wording of the Rule followed)".

9.5 In the same matter, the Court referred to **Simon Musa Matsebula v Swaziland Building Society, Civil Appeal No. 11 of 1998** in which Steyn JA stated the following: **"It is with**

regret that I record that practitioners in the Kingdom only too frequently flagrantly disregard the Rules. Their failure to comply with the Rules conscientiously has become almost the Rule rather than the exception. They appear to fail to appreciate that the Rules have been deliberately formulated to facilitate the delivery of speedy and efficient justice. The disregard of the Rules of Court and of good practice have so often and so clearly been disapproved of by this Court that non-compliance of a serious kind will henceforth procedural orders being made – such as striking matters off the roll – or in appropriate orders for costs, including orders for costs de bonis propriis. As was pointed out in Salojee vs The Minister of Community Development 1965 92) SA 135 at 141, *"there is a limit beyond which a litigant cannot escape the results of his Attorney's lack of diligence"*. Accordingly matters may well be struck from the roll where there is a flagrant disregard of the Rules even though this may be due exclusively to the negligence of the legal practitioner concerned. It follows therefore that if clients engage the services of practitioners who fail to observe the required

standards associated with the sound practice of the law, they may find themselves non-suited. At the same time the practitioners concerned may be subjected to orders prohibiting them from recovering costs from the clients and having to disburse these themselves."

9.6 In **Nhlavana Maseko and Others v George Mbatha and Another, Civil Appeal No. 7/2005**, the Court stated at 15 **"In a circular dated 21 April 2005 practitioners were again warned that failure to comply with the Rules in respect of the filing of Heads of Argument would be regarded with extreme disapproval by this Court and might be met with an order that the appeals be struck off the roll or with a punitive cost order. This warning is hereby repeated."**

9.7 In the matter of **Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA),** the summary of the matter is as follows: **"Appeal – Prosecution of**

– Proper prosecution of – Failure to comply with Rules of Supreme Court of Appeal – Condonation Applications – Condonation not to be had merely for the asking – Full, detailed and accurate account of causes of delay and effect thereof to be furnished so as to enable Court to understand clearly reasons and to assess responsibility – To be obvious that if non-compliance is time-related, then date, duration and extent of any obstacle on which reliance placed to be spelled out."

9.8 **Herbstein** and **van Winsen, The Fifth Edition** at page 723, is instructive on when a Court may grant condonation on good cause shown. It is stated therein:

> **"Condonation**
>
> **The Court may on good cause shown condone any non-compliance with the Rules. The circumstances or 'cause' must be such that a valid and justifiable**

reason exists why compliance did not occur and why non-compliance can be condoned."

[10] In **Standard General Insurance Co Ltd v Eversafe (Pty) Ltd** it was stated that:

> **"It is well-established that an Application for any relief in terms of Rule 27 has the burden of actually proving, as opposed to merely alleging, the good cause that is stated in Rule 27 (1) as a jurisdictional prerequisite to the exercise of the Court's discretion. Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 325G. The Applicant for any such relief must, at least, furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about and to assess his conduct and motives (Silber v Ozen Wholesalers (supra at 353A)).**

[11] In the **Unitrans** matter referred to *supra*, the following observation is also made:

"In considering whether to grant condonation the Court, in the exercise of its discretion must of course, have regard to all the facts. Amongst those facts are the extent of the non-compliance, the explanation therefor and the Respondent's interest in finality."

FINDINGS OF THE COURT

[12] In the present matter it is clear that the Respondent/Appellant has flagrantly disregarded the rules of this Court and in my view that the Respondent noted an appeal merely to frustrate the execution of the orders obtained by the Applicant in the Court *a quo* in order to remain on the premises in respect of which the Court *a quo* had ordered the eviction of the Respondent/Appellant. There is no explanation whatsoever before this Court as to why the Appellant has failed to prosecute the appeal and the conduct of the Respondent is an abuse of the Court process.

[13] Furthermore, the conduct of the Respondent/Appellant has been extremely prejudicial to the Applicant/Respondent in that it has been unable to execute

the court orders obtained in the Court *a quo.* The Applicant/Respondent is paying a mortgage bond of E 28 000 on the property where intended to set up a pre-school which would have been open by January 2021.

[14] The Respondent/Appellant has no right to appear in Court on the day the matter is set down for argument on the application to declare the appeal deemed abandoned, to at that stage request that this Court give direction as to the filing of affidavits and heads of argument in response to the Notice to Raise a Point of Law. This conduct of the Respondent/Appellant once again illustrates the cavalier manner in which the Respondent/Appellant has conducted the appeal proceedings.

WRONG PROCEDURE?

[15] In my view the Respondent/Appellant has not followed the correct procedure. In the matter of **Abel Mphie Sibandze** and **Magagula Hlophe Attorneys Civil Case No. 86/2019** the Court states:

> **"Where an Appeal is deemed abandoned because the *dies* have run out, a party requiring to be heard must at least simultaneously with any other necessary process seek a**

reinstatement of the Appeal. In instances where Section 30 (4) has come into operation, as is the case in the present matter, the Court has to be persuaded to suspend or reverse the operation of Section 30 (4) on good cause shown."

[16] The South African Court of Appeal in **Court v Standard Bank of SA Ltd; Court v Bester NO And Others 1995 (3) SA 123 (A)** at 139G/H held that an application for condonation is required to revive a lapsed appeal.

[17] In a recent judgment of the Industrial Court of Appeal in the matter of **Eswatini National Trust Commission** and **Swaziland National Trust Commission Staff Association & Another, Case No. (12/2020) [2021] SZIC 03** the Court stated:

"**In view of all the aforegoing, this Court holds that an appellant may apply to this Court for condonation for late filing of the record in order to revive an appeal that is deemed to have been abandoned but, in addition to the ordinary requirements, the Appellant must demonstrate as a point of departure, why an**

application for extension in terms of Rule 16, reasonably, could not have been made." (my underlining)

[18] In my view this is the practical mechanism for reviving an appeal that is deemed abandoned.

[19] The actions of the Respondent/Appellant's attorneys clearly demonstrate that the Respondent/Appellant has conducted the prosecution of the appeal in a flagrant manner with total disregard of the Rules of this court, to the detriment of their client.

[20] 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:**

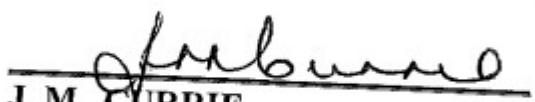
A duty is cast upon a legal practitioner, who is instructed to prosecute an Appeal, to acquaint himself with the procedure prescribed by the Rules of the Court to which a matter is being taken on Appeal."

ORDER

[21] In view of the aforegoing, this Court makes the following order:

1. The Appeal is deemed to be abandoned in terms of Rule 30 (4).

2. Costs are awarded to the Applicant.



J. M. CURRIE
ACTING JUSTICE OF APPEAL

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For the Appellant: S.S.T. MATSEBULA FROM WARING ATTORNEYS

For the Respondent: L. MAZIYA FROM NZIMA ATTORNEYS