



IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 90/2020

HELD AT MBABANE

In the matter between:

DIAMOND CONTRACTORS (Pty)Ltd

Applicant

and

TRIOMF SWAZILAND (Pty) Ltd

Respondent

In re:

TRIOMF SWAZILAND (Pty) Ltd

Appellant

and

DIAMOND CONTRACTORS (Pty) Ltd

Respondent

Neutral Citation: Diamond Contractors vs Triomf Swaziland (Pty) Ltd

Coram: (90/2020) [2021] szsc22 (29/09/2021)
S.J.K MATSEBULA JA.

Heard: 20th August, 2021.

Delivered: 29th September, 2021.

SUMMARY

- Civil procedure — Application that appeal be deemed abandoned in terms of Rule 30 (4) — Record of proceedings not filed — Heads of arguments not filed... Notice to oppose filed — From the bar Respondent tells Court he intends to challenge the validity of Rule 30 (4) — Further tells Court (single judge) is unconstitutional ...Single Judge competent to hear certain matters but not to determine cause or matter - Section 145 (2) and Section 149 of the Constitution discussed — Points of law to be raised by Notice.

Held: Appeal deemed abandoned and costs of suit awarded to Applicant.

JUDGMENT

S.J.K. MATSEBULA - JA

The Parties

[1] In the present application, the Applicant is the Respondent in the Appeal proceedings and the Respondent herein is the Appellant in the Appeal proceedings. For convenience, the parties shall be referred to as Applicant and Respondent

BACKGROUND

- [2] The Court a quo delivered its judgment against the Respondent on the 26th November, 2020 and the Respondent noted an appeal in terms of Rule 8 which provides that such an appeal should be noted within four weeks from the date of delivery of such judgement. The appeal was noted on the 4th of December, 2020. After noting the appeal, Rule 30 (1) required that the Respondent should then prepare the record on appeal in accordance with sub-rule (5) and (6) and lodge it with the Registrar of this Court within two months from the date of noting the appeal . The Respondent should have lodged the record on appeal (commonly referred to as the record of proceedings) by the 4th of February, 2021. The Respondent failed to do this and up-to this date has not done so.
- [3] On the 7th of April, 2021, the Applicant served a notice for an application, in terms of Rule 30 (4) of the Rules of this Court, to deem the Respondent's appeal abandoned.
- [4] The Registrar set the matter for hearing for the 16th August, 2021 and on this date by consent of both parties it was postponed to the 20th August, 2021. On the 20th of August, 2021, both counsel for the parties appeared before Court. The Applicant had filed its Heads of Argument as early as 28th of May 2021. The Respondent did not file anything except a notice of Intention to Defend. On this date Counsel for the Respondent, without filing any documents or notices as aforesaid, sought to raise from the bar legal issues and also stated that he was of the opinion that the Court was

only sitting for the setting of date-lines for filing or setting of dates. This is notwithstanding the fact that the notice of Application under Rule 30 (4) requests that the date of hearing be determined by the Registrar who subsequently determined that the matter should be heard on the 16th August, 2021 as per the Court Roll. I believe Counsel was in Court because of the notification as per the Court Roll.

THE PRESENT APPLICATION

[5] The Applicant in its Notice of Application in terms of Rule 30 (4) of the Court of Appeal Rules, 1971 seeks an order in the following terms:

1. "That the Appeal dated 4th December, 2020 by the Respondent be and is hereby deemed to have been abandoned in terms of Rule 30
2. Costs of Suit
3. Further and/or alternative relief,

[6] The Applicant on the same application gives Notice to the Respondent that if it intends to oppose this application it is required to:

- "(a) Notify Applicants attorneys of your intentions to oppose within seven (7) days service of the Court process.
- (b) And "i.t.h.in fourteen (14) days of giving such notice, to file your answering andavit, if any and to appoint an address at which you will accept service of process. Kindly place the matter on the Roll Accordingly.

Dated at Manzini on the 29th Day of March, 2021. " (my underlining)

[7] The Respondent complied with paragraph [6] (a) above and filed its notice of intention to oppose but did not follow it with paragraph [6] (b) as no answering affidavit was filed but sought to address the Court from the bar without notice to the Applicant.

APPLICANT'S CASE

[8] The Applicant says it is common cause that :

- (a) the Respondent noted an appeal on the 4th December, 2021.
- (b) the Respondent failed to lodge the Record of Proceedings within the period of two (2) months from the date of noting the appeal as required by Rule 30 (1) of the Court of Appeal Rules.
- (c) the Respondent has failed to invoke the mechanism provided in terms of Rule 16 (1) of the Rules of this Court to seek for an extension of time.

RESPONDENT'S CASE

[9] The Respondent has not filed an Answering Affidavit in opposition to what the Applicant has put forward before the Court for determination but states from the bar that-

- (a) the Court is not properly constituted in terms of Section 145 (2) of the Constitution of the Kingdom of Eswatini which provides that three (3) Justices should sit instead of one (1) Justice.
- (b) that the matter should have come to Court by way of a petition instead of an application as is the case in casu.
- (c) that Rule 30 (4) is not a valid Rule, it is unconstitutional and that Counsel intends to challenge its validity or constitutionality.
- (d) that Counsel prays for postponement and setting of date lines for arguments

THE ISSUES BEFORE COURT

[10] There is before me an application in terms of Rule 30 (4) of the Court of Appeal Rules, 1971 wherein the Applicant wants this Court to "confirm" that the Appeal noted on the 4th December, 2020 is deemed abandoned and the appeal be dismissed. I use the word "confirm" advisedly because I believe that is what it is. I am required by an established practice to pronounce on same, that is, to say whether the appeal is deemed abandoned or not, which would be the judgment of the Court. There are no papers or affidavit opposing this application. There are of course some interesting issues raised from the bar, although not directly answering to the application which I need to pronounce myself on, whether the appeal is deemed abandoned or not.

That notwithstanding, the issues raised by and the conduct of Counsel for the Respondent prompts a response from the Court which will be found from paragraph [17] herein under.

[11] Rule 30 (4) of the Court of Appeal Rules, 1971 provides:

" Part iv
CIVIL APPEALS

The Record

30 (1) The Applicant shall prepare the record on Appeal in accordance with sub-rule (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).

(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 (my underlining)

[12] For purposes of this case, of legal significance is the provision requiring the Appellant to prepare the record in consultation with the opposite party and lodging same within 2 months of the date of noting the appeal.

Rule 30 (4) first subordinates itself to Rule 16 (1) and then stipulates two circumstances either one of which will render an appeal being deemed abandoned:

- (a) Failure to note an appeal within the times provided by the Rule; or
- (b) Failure to submit or resubmit the record of proceedings for certification by the Registrar of the High Court and within the times provided by the Rule;

[13] It is the finding of this Court that the Respondent has complied with the first requirement, that is noting the Appeal within the times provided but has failed to meet the second requirement, there is no record filed or certified by the Registrar of the High Court. And it seems no attempt was made to meet this requirement. All legal practitioners know and are alive to the fact that without the record the appeal cannot be proceeded with. As long as the matter is said to be "pending" before Court the other party who has a judgement in its favour (judgement creditor) cannot execute or reap the fruits of the outcome of its toil. The "pending" is prejudicial to the judgment creditor. One of the common tactics to delay execution of a judgement is to note an appeal and thereafter cause yourself to fail to lodge the record timeously or at all as required by the Rule. Sub-rule (4) of Rule 30 was precisely meant to curb this dishonesty or this bad faith dealing. This is a mala fide practice by legal practitioners who do it, and honesty dictates that as soon as a legal practitioner realizes that the noted appeal will no longer be proceeded with to withdraw it so as to release the judgment creditor to execute..

[14] During the hearing this Court asked the Applicant that since Rule 30 (4) says failure amongst other things to lodge the record, the appeal shall be

deemed to have been abandoned, why is it necessary to bring an application to the Court to declare what is already declared or decreed by operation of law to be dead or deemed abandoned. The law says it shall be deemed to have been abandoned. And that's it. This question was posed by His Lordship M.J. Dlamini JA in *Themba Mkhathshwa v Nomsa Stewart and 4 others* (3/2016 [2017] SZSC07 (21st April, 2017) in the following manner at paragraph [7] therein:

"During the hearing it was not clear why the necessity for the declaration when the law treats the appeal as abandoned for failure to comply. In other words, why bother to dismiss a "dead" appeal? Or is it that the appeal is not really "dead" notwithstanding abandonment, so that the dismissal is to ensure that it is truly dead and buried and unlikely to resurrect? Or is the dismissal intended to secure

Applicant's costs? "

[15] In the present case, Counsel for the Applicant said the declaration by a Court that the appeal is abandoned is meant to convince all and sundry, including the Respondent and the "Doubting Thomas" that the appeal has been abandoned and execution may now follow. Such application seeks to give certainty and authority that the appeal is indeed deemed abandoned. There must be some form of documentary evidence in a form of a Court Order for the sheriff to waive in the face of the "Doubting Thomases". This could be one of the answers to the questions raised in *Thandi Mkhathshwa* case (*Supra*). The Court is simply confirming that the Appeal is deemed abandoned and this is just for practical purposes or reasons as stated above

for paving a smooth way to execution of the order or judgement of the Court a quo otherwise, in reality and legally, the appeal is deemed abandoned at the expiry of the two months failure to file the record as per Rule 30 (1). Yes long before the Applicant even contemplates the drafting of the application to court confirming the position or status of the deemed abandoned appeal, it is deemed abandoned by operation of law.

[16] This Court has pronounced itself on numerous cases that failure to follow the Rules or flagrant disregard of the Rules or the attitude that some Rules of the Court are not important and can be disregarded is not acceptable. Two cases will suffice: *The Pub and Grill (Pty) Ltd and Another vs The Gables (Pty) Ltd* (102/2018) [2018] SZSCv (20th May 2019) and *De Barry Anita vs Thomas (Pty) Ltd*, Appeal case number 30/2015. These two cases, amongst many, emphasize the importance of adhering to the Rules of this Court and that flagrant disregard of same will inevitably result in the appeal deemed abandoned and dismissed or struck off the Roll. The case in casu is in the same league as the foregoing cases and qualifies for the same fate, that is, deemed abandoned. The Court may, using its discretion, confirm abandonment of the appeal with dismissal or striking it off the roll depending on the nature or significance of the case, the prejudice to the judgment creditor and the overall conduct of the Respondent.

[17] As mentioned above, Counsel for the Respondent appeared before this Court empty handed, having not filed the record of proceedings, Answering Affidavit , Heads of Argument or any document to assist this Court or himself.

From the bar Counsel sought to challenge the jurisdiction of this Court in that:

- (a) the Court was not properly constituted as required in terms of Section 145 (2) of the Constitution. He submitted that a single judge has no jurisdiction to hear the matter at hand;
- (b) the matter should have come by way of a petition instead of an application; and
- (c) that Rule 30 (4) of the Rules of this Court is not valid and is unconstitutional and he intends to bring an application to challenge its validity and constitutionality.

[18] Counsel for the Respondent came to Court without having filed the documents required by the Rules but opted to raise legal issues from the bar. The Supreme Court, as an entrenched practice, does not accept submissions from the bar unless there are compelling reasons to do so. The strategy or technique of ambushing the other party as well as the Court, as it were, is not acceptable and should not in often times be tolerated. Raising a point of law from the bar when it could have been raised through notice to the other party deprives that other party an opportunity to research through case law and written materials and come up with a well digested response. In the normal run of the mill, a notice to the other party should be given in advance, so that well researched, reasoned and intelligent arguments are advanced before the Court. Frankness and honesty should be the standard in the Supreme Court. The Respondent's Counsel had ample time or more than enough time to file his papers and therein raise all or some of the legal issues but opted to come and surprise his colleague and the Court. I do not think he succeeded, though, and this Court

is not bound to follow his manner of doing things but by its Rules and established practices.

[19] Counsel for Respondent submitted that my sitting as a single judge was unconstitutional and referred the Court to Section 145 (2) of the Constitution of the Kingdom of Eswatini and it reads:

"145. (2) The Supreme Court shall be dully constituted for its Qt.dingz.y work by not less than three Justices of the Supreme Court.
" (my underlining)

[20] It must be noted that, every word in a legislative sentence or statute is not idle but intentionally there for a purpose. Sometimes it calls upon the Court to find that purpose. The word "ordinary" is significant in the sentence and its significance can only be appreciated when one reads section 149 of the Constitution, which reads:

"Powers of a single Justice of the Supreme Court

149. (1) Subject to the provision of subsection (2) and (3) a single Justice of the Supreme Court may exercise power vested in the Supreme Court not involving the determination of the cause or matter before the Supreme Court. (my underlining)

(2).....

(3) In civil matters, any order, direction or decision made by a single Justice may be varied, discharged or reversed by the Supreme Court of three Justices at the instance of either party to the matter.,»

And Section 146 (2) of the Constitution which reads:

"146. (2) without the derogating from the generality of the foregoing subsection, the Supreme Court has-

(a) such jurisdiction to hear and determine appeals from the High Court of Swaziland... .. (my underlining)

[21] "Hear and determine" appeals from the High Court is the run of the mill of the Supreme Court and that is the "ordinary work" of the Supreme Court referred to Section 145 (2). An application to deem an appeal abandoned does not determine the appeal as the Court does not go to the merits of the Appeal (... not involving the determination of the cause or matter before the Supreme Court: section 149 (1) of the Constitution, supra). It looks at the procedural aspects of the Appeal and not the appeal itself. The procedural aspects can be in most cases, be appropriately dealt with by a single Justice as provided by Section 149 of the Constitution.

[22] This position of our law has existed for a long time, way back in 2008 (three years from the promulgation of the Constitution) the Chief Justice Banda in the Supreme case of the Minister of Housing and Urban Development vs Sikhatsi Dlamini and others, Civil Appeal No. 31/2008, said the following in paragraph [1]-

"This application comes before me as a single judge of the Supreme

Court of Appeal. The Constitution and the Court of Appeal Act give powers to a single judge of this Court to deal with certain matters ' '. The Chief Justice cited Section 149 of the Constitution (Supra) and Section 3 of the Court of Appeal Act which provides:

"3. An application which may be brought before a single judge of the Court of Appeal may be dealt with by him in an open or in chambers, at his discretion ' ' .

[23] At paragraph 14 of the judgement the Learned Chief Justice had this to say:

„I am unable to accept Mr. Hlophe 's submission that the issue of an application for leave is a substantive matter which only a full Court can deal with. Mr. Hlophe was not able to cite any authority to support his proposition. In my view, if there is any one matter which can be brought before a single judge of the Court is the application for leave to appeal ' ,

In my opinion an application deeming an appeal abandoned is in the same class as an application for leave to appeal and therefore both are proper to be heard by a single judge of the Supreme Court.

[24] Counsel for the Respondent further submitted that the application before Court should have come by way of a petition. In *Minister of Housing and Urban Development vs Sikhatsi Dlamini and others* (Supra) the Learned Chief Justice addressing the same legal point stated at paragraph [13]:

"Similarly I do not see that any injustice or prejudice was occasioned to the Respondents when the applicants brought their application by notice of motion, instead of by petition. It is clear to me that the failure to observe the rules in this case

was purely procedural and I am satisfied that the Respondents did not suffer

any injustice or prejudice. It is substantial justice which must be done between the parties without undue regard for technicalities.

I am prepared to condone any such failure which I hereby do ”.

The issue of applications and petitions is an issue of form and not of substance and, by itself alone without prejudice or injustice suffered, I doubt its prospects of success.

[25] Counsel for the Respondent also said he intends to bring a suit challenging the validity of Rule 30 (4) of the Rules of this Court. Until he does so this Court may not speculate on the nature of the challenge.

[26] In cases such as the present, the case of *Abel Mphile Sibandze vs Magagula and Hlophe Attorneys (86/2019)[2020]SZSC25(24/08/2020)* is very instructive. As His Lordship SP Dlamini JA at paragraph [27] —

“... 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.”

The conclusion to be drawn herein is that once Rule 30 (4) has kicked in by the operation of the law, the Respondent if he or she wishes to be heard must first file an application for reinstatement of the abandoned appeal together with an application for condonation as it should be in the present case. .

CONCLUSION

[27](a) The Respondent has failed or flagrantly disregarded Rule 30 (l) of the Rules of this Court by failing to prepare the record on appeal in accordance with sub-rules (5) and (6) of this Rule and within 2 months of the date of noting of the appeal to lodge a copy of it with the Registrar of the High Court for certification as correct.

(b) I also find as a fact that the Respondent has not filed an application for extension of time as envisaged by Rule 16 of the Rules of this Court.

(c) Lastly I also find as a fact that the Respondent has not filed an application for condonation for late filing of the record on appeal as permitted under Rule 17 of the Rules of this Court.

COURT ORDER

[28] In view of the foregoing, this Court makes following Order:

1. That the appeal is deemed to be abandoned as provided under Rule 30 (4) of the Rules of the Court.
2. Costs awarded to the Applicant.



S.J.K. MATSEBULA

S.

J. . MATSEBULA

JUSTICE OF APPEAL

For the Applicant: Thulani Nsibandze

For the Respondent: Lucas Maziya