



**IN THE SUPREME COURT OF ESWATINI**  
**JUDGMENT**

**Case No. 45/2020**

**HELD AT MBABANE**

In the matter between:

**XI PANDA FOODS (PTY) LTD**

**Applicant**

And

**SAMKETI DLAMINI**

**Respondent**

In re:

**SAMKETI DLAMINI**

**Appellant**

And

**XI PANDA FOODS (PTY) LTD**

**Respondent**

**Neutral Citation:**        *Samketi Dlamini vs XI Panda Foods (Pty) Ltd (45/2020)*  
[2021] SZSC 25 (21/09/2021)

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

**Heard:**                    17<sup>th</sup> August, 2021.

**Delivered:**              21<sup>st</sup> September, 2021.

**SUMMARY** : *Civil Appeal – Record not filed – No application for extension in terms of Rule 16 (1) – No application in terms of Rule 17 – No appearance by appellant at hearing – Appeal deemed abandoned – Costs awarded to Respondent.*

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**JUDGMENT**

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**CURRIE – AJA**

[1] This is an application by the Applicant/Respondent seeking a declaration that an appeal filed on the 9<sup>th</sup> July 2020 be deemed abandoned in terms of Rule 30 (4) of the Rules of this Court and dismissed for failure to file the record timeously and seeking costs of the application. An *ex tempore* order was issued after the hearing of the matter on the 31<sup>st</sup> August 2021 and the written reasons for such order are set out herein.

[2] Pursuant to filing the Notice of Appeal the Respondent failed to file the Record within two months of the date of noting of the appeal in accordance with Rule 30 of the Rules of this Court. Furthermore, the Respondent failed

to apply for an extension of time within which to file the Record. Rule 34 (4) provides:

***“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.”***

Rule 16 (1) therefore allows for a possible extension of time on application by an appellant who has not complied with, *inter alia*, Rule 30.

[3] On the 2<sup>nd</sup> December 2020 the Applicant/Respondent filed the present application. No opposing affidavit was filed in response to the application.

[4] On the 14<sup>th</sup> October 2020 the Appellant’s/Respondent’s attorneys had filed a Notice of Withdrawal of Attorneys of record in this court but failed to serve the said notice on the Appellant by way of registered post, nor was it served on him in person as required by the rules. The matter then came before this court on the 17<sup>th</sup> August 2021 and it was pointed out to the Applicant’s

counsel that the Notice of Withdrawal had not been served on the Appellant as required by the rules. The matter was then postponed for two weeks to allow for service upon the Appellant.

- [5] A service was effected by the Deputy Sheriff on the Appellant/Respondent on the 26<sup>th</sup> August 2021. Despite this service on the Respondent there was no appearance by the Respondent on the date of hearing and the Applicant's counsel contended that it was entitled to the orders sought in the application.

The question then arises as to whether the appeal is to be abandoned and dismissed and there are many conflicting judgments of this Court in this regard.

- [6] The Applicant has relied on the case of **THANDI MKHATSHWA v NOMSA STEWART & 4 OTHERS (3/2016) [2017] SZSC 07 (21<sup>ST</sup> APRIL, 2017)** which provides:

*“If the appellant has failed to comply with the rules such as by not filing the record as required by Rule 30, and has not indicated desire to invoke rule 16 (1) read with rule 17, and he has been served with the application for dismissal nor made appearance at the hearing – if only to say that he does not oppose the application – the Court*

*ought to seriously consider granting the applicant his prayers by dismissing the appeal and closing the door for possible reinstatement.”*

[7] In my view the Applicant is entitled to finality of this litigation. The Appellant has shown no intention of pursuing the appeal and it appears that he only noted an appeal to frustrate the judgment creditor by delaying execution. The Record was not lodged within two months of noting the appeal as prescribed by the rules and no application for an extension of time was brought in terms of Rule 16 (1) and the Appeal is therefore deemed abandoned and absent an application for condonation, on good cause shown, cannot be revived. Rule 30 (4) is peremptory and no amount of discretion appears except with regard to Rule 16 (1) read with rule 17. It is not necessary to dismiss the appeal as it is deemed abandoned and is not before this Court unless revived as aforesaid.

### **COSTS**

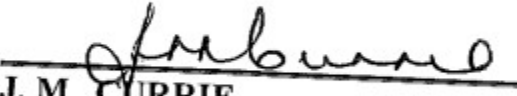
[8] The Applicant has applied for the costs of this application and in my view the Applicant is entitled to same. The Respondent has flagrantly disregarded the Rules of this Court and noted an Appeal merely to delay execution. The Applicant has had to appear in this Court on two occasions in order to obtain

this Judgment and has also incurred extra costs in serving the Notice of Set Down on the Respondent at Nkhanini-Nhlangano.

**ORDER**

[9] In view of the foregoing, 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.

  
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J. M. CURRIE  
ACTING JUSTICE OF APPEAL

**For the Appellant:** S.V. MDLADLA & ASSOCIATES

**For the Respondent:** NO APPEARANCE