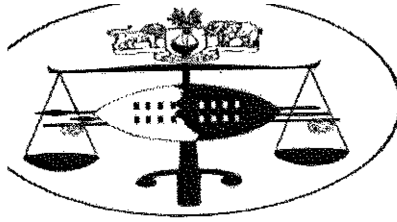

IN THE SUPREME COURT OF ESWATINI

HELD AT MBABANE

CASE N.O. 26/2020

In the matter between:

FIRST NATIONAL BANK SWAZILAND	
(PTY) LTD	Applicant
And	
HOMEBASED INVESTMENTS (PTY)	1st Respondent
LTD SILOMBO INVESTMENTS (PTY)	2nd Respondent
LTD CLINT MARK BAILEY	3"1 Respondent
MARCIA BAILEY	4th Respondent
In re;	
HOMEBASED INVESTMENTS (PTY)	pt Appellant
LTD SILOMBO INVESTMENTS (PTY)	2nd Appellant
LTD CLINT MARK BAILEY	3rd Appellant
MARCIA BAILEY	4th Appellant

And

FIRST NATIONAL BANK SWAZILAND

(PTY) LTD **Respondent**

Neutral Citation: *First National Bank of Swaziland (Pty) Ltd v Homebased Investments (Pty) Ltd and 3 others (67/2019)* [202l] SZSC 28 (29th October 2021).

Coram: **N.J. HLOPHE J.A.**

Date Heard: **17th August 2021.**

Date Handed Down: **29th October 2021.**

Summary

Application proceedings - Declaratory order that a noted appeal had been abandoned sought - Notwithstanding an appeal having been noted on the 28th October 2019, about two years earlier, no record of appeal filed despite that such should have been done within two 1nonths of the noting of the appeal - Respondents ignored a re,ninder in January 2020 by applicant calling upon the111 to pro1nptly file the said record of appeal as they were

out

of tilne - Re,ninder to the respondents' attorneys to file the required record had been 1nade in a period just slightly below one 1nonth fi'o1n the day of the lapse of the ***dies*** *for filing the record of appeal -After no record of appeal had beenfiledfor about a year after the lapse of the* ***dies*** *to file sa1ne, application to declare the appeal abandoned instituted - Despite the institution of the application concerned, neither opposing affidavit to the application nor the record of appeal was filed until the 3rd August 2021 (so1ne nine or so 1nonths from the filing of an application seeking the declaratory order referred to above) - The record of appeal and the opposing affidavit to the Applicant bank's application were filed together with the application by the four respondents seeking at least three reliefs na,nely the condonation for the late filing of the record of appeal, reinstate1nent of the abandoned appeal and the extension of ti1ne to file the record of*

appeal on or about the 3rd August 2021 , just two days before the

date set for hearing the application by the Applicant bank and the 1nain appeal - Apparent that the filing of the said processes by the Appellants were spurred by the fact that the application for a declaratory order and the appeal were 1neant to be heard on the said date the 5'11 August 2021-In line with judg1nents fro1n this jurisdiction and beyond, the necessity for filing application for abandonment in circumstances like the present co1n1nented upon.

Our law enjoins an Appellant to, upon realisation of a failure to co111ply with the provisions of the rules to i1n1nediately rectify the failure and to without delay file an application seeking condonation for the failure to comply and extension of tilne to rectify that failure - There are instances where even if the Appellant had prospects of success he would not be granted condonation or extension of tilne if the Court concludes that it would be unfair to the Respondent to overlook the extent of the

disregard of the rules exhibited by the Appellant - The approach by the Court in such ,natters is to take into account all the relevant factors before exercising its discretion whether or not to grant the indulgence sought - Whether or not a case 1nade for the reliefs sought.

JUDGMENT

HLOPHEJA

[1] The current proceedings in which I was tasked by the Chief Justice to preside over and determine as a single Justice of appeal, started off as an application by the First National Bank of Swaziland Limited (FNB) or Applicant herein and First Respondent in the main appeal, to have declared that the appeal previously noted by the four Respondents herein, who comprised two companies and two natural persons, had been abandoned following the failure by the said Respondents to file a record of appeal.

[2] The relationship between the two natural persons and the two companies is that the said companies, the first and second Respondents herein, have the two

other respondents, the natural persons, as their Shareholders and Directors. The latter two also stood as sureties and co-principal debtors to some loans obtained by the said companies from the Applicant bank.

[3] The background as can be deciphered from the papers filed of record, is that on or around the 16th June 2017, the Court *a quo* per Maphanga J, granted the current applicant Bank Summary Judgment which comprised three claims in the overall, namely claims A, B and C. The Judgment debts from the claims eventually granted by Judge Maphanga are respectively the sums of E364, 152.93, E438, 061.81 and E2, 036,621.80. Interest was granted in each claim at prime rate (at the time said to be standing at 10.75) plus 2%, and was to be calculated from the date of issue of the summons to that of payment. Costs were for each claim granted against the Respondent and fixed at attorney and client scale. With regards claims B and C, the property of the Defendants pledged as a collateral, lot 1339, Extension 13, Madonsa Township, Manzini, Eswatini, was declared executable.

It appears that although various writs of execution and/or attachment were promptly and singularly issued in respect of each claim on or about the 20th

[4] June 2017, attempts to sell by public auction the property declared executable was meant for the 14 th September 2018 which naturally raises some questions why that had to be the case considering that that execution was after a year of the summary judgment having been granted.

[5] The four Respondents had filed an urgent application aimed at preventing and interdicting the sale in execution of the property previously attached. The Application was heard by Judge M. Dlamini on the 13th September 2018 who granted an order *inter alia* consolidating the various judgement debts. It went on to direct that the total consolidated debt was to be paid at a determined monthly instalment. The Applicant bank (FNB) was ordered to work out all the calculations and communicate the outcome from that exercise to the judgment debtors within a certain specified period. The Comi *a quo,* however did not order that the Summary Judgment was being set aside. It actually ordered that as long as the conditions it had put in place for compliance with by the four Respondents were being observed by them then the execution of the judgment was being stayed. This latter phrase suggested that the summary judgment would become executable if the Respondents failed to honour the conditions attached to their having to liquidate their indebtedness in terms of

the consolidation order.

[6] The procedure adopted by the Court *a quo* herein merits a comment. It is unclear under what rule of Court including in terms of which principle of civi1 procedure it was conducted. This is because as at the point of intervention by the Court a quo a judgement of Court was being executed in terms of the rules and principles of civil procedure which provided for no interference with the execution by payment of the judgment debt in installments short of an agreement by the parties themselves.

[7] I say this because the order annexed to the current application professing to have been issued by the Comt a quo records no agreement by the parties compromising the recovery procedure of the judgment debt or the order of Court in general. In fact, the order reads at its paragraph 1 that the cun-ent Respondents desired to have the debts in question consolidated to enable them pay a specific instalment every month. It is very doubtful if in terms of the rules of Court and the civil procedure in general, the judgment debtor at that stage had any right to be demanding to pay in instalments if he could not secure that by agreement with the judgement creditor given that a writ of execution signifying he was failing to pay the judgment debt as required had

issued. The usual and normal procedure at that stage, short of an agreement between the parties, is to execute in terms of the writ of execution.

The Court a quo recorded that FNB had refused to entertain the four Respondents, maintaining that there was no genuineness on their part (at least using words to that effect), considering that they had allegedly "sung the same song" previously without any tangible result. It was then that the Comi *a quo* took over and said the following at paragraph 2 of the Order in question, annexure **FNB2** to the current application: -

> *"2. The Court is inclined to give Applicant a chance on his undertaking but on the following conditions: -*
>
> (i) *Litigation costs.*
>
> (ii) *Costs of advertisements including sheriff's fees.*
>
> (iii) *Costs of readvertisements."*

[8] That this matter is alive today, four years after the summary judgment confirming that the judgment debtors had no defence and 3 years after the intervention by the Court a quo referred to above, is a sign that there then ensued a dispute around the meaning and effect of the order meant to give the

judgment debtors a chance which may never have arisen had the normal procedure and known practice been followed. Short of an agreement between the parties, the matter would have been dealt with in terms of the usual procedure on how executions and sales in execution are carried out.

Unwittingly that procedure seems to have only benefited the judgment debtors who continued to enjoy the property that had been attached and was awaiting a sale in execution. It again unwittingly and gravely prejudiced the judgement creditor. I say this not to attach blame than to sound caution in cases where there may be a request to deviate from usual procedure that it is a matter for thorough consideration so as to ensure that the requested result does not end up gravelly prejudising one of the parties whilst unduly benefiting the other. I only emphasize that since the day the consolidation order was made, the Respondents do not seem to have paid anything towards liquidating the judgment debt, they acknowledged was due and owing and further that they had no defence to in 2018.

[9] As the immovable property laid under attachment was meant to be sold in execution after more than a year of squabbling over the meaning and effect of the order consolidating all the claims, with the Applicant Bank having

advertised the property for sale once again, citing the Respondents' failure to comply with the order of consolidation as granted by the comi a quo per Judge M. Dlamini, the Respondents once again launched an urgent application to among other things interdict the intended sale in execution of the property, claiming that the Plaintiff Bank had not complied with its obligations under the order for consolidation. The Application in question was dismissed by Judge Magagula, who *inter alia* made a finding that the Plaintiff had complied with all of its obligations under the said order.

[1 O] Contending among other things that the Plaintiff had not properly computed the consolidated figures and further that it had decided to unilaterally alter the interest payable from that contained in the summary judgment order, the Appellants noted an appeal to this Comi, which is the main matter under this case number. The Comi per Magagula J had issued its judgment on the 13th October 2019, whereas the Appeal against it was noted on the 28th October 2019.

[11] According to Rule 30 of the Rules of this Comi, a patiy who notes an Appeal to this Comi is required to file a record of appeal within two months of its having noted such an Appeal. It is not in dispute that the current Respondents

failed to file a record of appeal in line with the provisions of the Rules of Court. As the record should have been filed on the 28th December 2019, the Applicant Bank, acting through its attorneys, addressed a letter to the Applicants on the 9th January 2020, reminding them of their obligation to file a record of appeal and that they risked having the appeal deemed abandoned.

[12] The Appellants did not respond to the said letter. For some reason the 3rd Appellant appears to have held various meetings with the current Applicant, without any clarification on what he had obtained therefrom. From the time the Judgment of Magagula J was appealed against, the current Respondents were represented by the firm of Attorneys, Makhosi C. Vilakati and Company, who only ceased their representation of the Respondents around July 2020, when Boxshall-Smith Attorneys took over as the Respondents' legal representatives. The said attorneys did not however immediately address the issue of the non-filing of the record of Appeal by the cmTent Respondents despite that same had been outstanding for over six months as at the time of their engagement. In fact, as attorneys Boxshall-Smith were appointed in July 2020, the Applicant Bank's attorneys had as of the 4th June 2020, demanded from the said Respondents' attorneys, payment of the outstanding arrears as

reckoned from the end of February 2019, threatening to thereafter execute against the said Respondents.

[13] Attorneys BoxShall- Smith had not applied for condonation of the late filing of the record nor had they applied for an extension of time to enable them do so as at the time this application was launched by the Applicant herein claiming an order to have declared the Appeal as abandoned on the 14th of October 2020, almost a full year after it had been noted without a record being filed.

[14] Although the Respondents had promptly filed a notice of intention to oppose the application, no answering affidavit thereto was filed, until the 3rd of August 2021, after the application and or the Appeal had been allocated the 5th August 2021 as a hearing date. It is obvious that whatever explanation they can give, the Respondents herein, had adopted a lackadaisical approach towards prosecuting their appeal or even opposing the application by the current applicants. It is easy for one to conclude that the Respondents, who had then not paid anything towards the liquidation of the judgment debts against them amounting to over 3 Million Emalangeni, were served right by the prolongation of the failure to allocate the matter a date, which on its own

was caused by the fact that not all the documents were there on file if there was neither a record for the appeal nor the opposing papers to the current application which was a situation that had persisted for close to two years at the time with regards the record.

(15) When they eventually filed the answermg affidavit and other supporting papers in opposition to the Application to declare their Appeal abandoned, the Respondents also filed an application where they sought condonation for the late filing of the record together with an extension of time to be allowed to file same. There can be no doubt that it would have only been upon the Respondents or their counsel, recognizing the position of the law in this jurisdiction, that the Respondents fmther sought to amend their papers by adding a further prayer to the Notice of motion for the reinstatement of the Appeal. This latter decision was apparently taken upon them realizing that in this jurisdiction, the failure to file a record within the prescribed two months leads to an automatic abandonment of the Appeal so much so that if a party wants to pursue same even after such an occurrence, he then needs to seek a reinstatement of the said Appeal. See in this regard **Abel Mphile Sibandze vs Magagula and Hlophe Attorneys (86/2019) [2020] SZSC 25 (24/08/2020).**

[16] This latter point makes me comment at this juncture about the obvious and superfluous need for the filing of the application seeking to have declared as abandoned the appeal, filed by the Applicant as the main interlocutory application on file in this matter. The comment is to say that strictly speaking there is no need to file such an application as the deeming occurs automatically upon the lapse of the given *dies (timefi"ame).* It is however not difficult to understand why such an application was necessary in the circumstances of this matter pmticularly considering the apparent difficulty there seem to have been in placing the matter on the roll for an appropriate entry on the record by the Supreme Comt which difficulty could itself be attributable to the fact that the file would have prima facie not looked like on that was ripe for hearing considering its scant contents at the time. It is for this obvious reason I would limit my comments in this regard, it being sufficient to say that as at the time the <u>dies</u> for filing the record had lapsed, then the Appeal had automatically been abandoned.

[17] As concerns the application by the Respondents the question is whether a case has been made for the reinstatement of the appeal, the condonation for the failure to file the record in time as well as for the extension of the time to file same. In their request to be granted these prayers, the Respondents (the

Appellants in the main Appeal) contend through the 3rd Respondent, who is obviously the alter ego in the First and the Second Respondents, while he is a husband to the 4th Respondent, that they had been let down by their erstwhile attorney Makhosi C. Vilakati. He allegedly never advised them nor explained the legal position to them, that since they had noted an Appeal, they then had to file a record within two months of their noting same. This they allege is due to their being lay in matters of the law. They thus contend they should be given an opportunity to pursue their Appeal which they claim is good.

[18] They claimed further that they had mistaken a different matter between the Asset leasing wing of the Applicant, WesBank, and the First Respondent herein as one of those matters to which consolidation with the other matters had been ordered by Judge M. Dlamini at their request way back in 2018.

[19] They however clarified in their papers that in that pmticular matter, the Applicant bank had been granted an order by the Magistrate Court of Mbabane, Eswatini to attach the truck forming the subject of those proceedings and place it under the possession and control of the Court Messenger, pending the finalization of the matter. They clarified further that although the order for the attachment of the said truck had been issued in

Eswatini, the truck itself was allegedly kept or withheld (under quite unclear and completely unconvincing circumstances), by a certain garage in Richards Bay, South Africa, known as Marvic Garage. They claimed to have been immensely preoccupied by the issue of that truck such that they lost count of the fact that there had to be filed among other things, a record of proceedings.

[20] There is a flaw in this explanation because not only are the two matters emanating from different courts, namely the High Court and the Magistrates' court, there is also the fact that the parties in the matters concerned are different and distinct. In their own contention, the matter of the High Court had been given to Attorney Makhosi C. Valakati's firm to prosecute on their behalf, while that of the repossession of the truck had been handed over to their South African firm of attorneys, Shepstone and Wyle to prosecute. This means that the explanation of the default they are trying to give is very weak, if it is anything to be called that. It is unreasonable in the circumstances of the matter. The said respondents do not meet the requirement of reasonableness of the explanation to be granted the reliefs sought.

[21] I can only say it remains obvious that in these circumstances there cannot be

a sound explanation why the record would not be filed for close to two years

after noting the appeal. It remains a fact that at some point a reminder was sent to the Respondents reminding them, through their attorneys, of their obligation to file the record of appeal to no avail. It is also wo1th noting that even after the Application to have the appeal declared abandoned, it still took the Respondents close to a year to file their opposing papers, which they eventually filed together with their application seeking condonation for their failure to comply with the provision of the rules, reinstatement of the Appeal and extension of time to file record. There can be no reasonable explanation on the part of the Respondents in these circumstances.

(22] Although not a point debated deeply during the hearing of the matter and although it is a matter of law, there is a problem with regards the question of the existence or otherwise of prospects of success in the Appeal so as to enable the cou1t allow the reinstatement of the appeal, the condonation of the late filing of the record and lastly the extension of time to be allowed to file the said record. The legal question in this regard is simply whether the judgment or order of Magagula J, is appealable as of right given that the Respondent purported to appeal it without first seeking and being granted leave to do so by the Supreme Comt on account of the judgment amounting to an interlocutory judgment or order which in practice requires leave of the

Supreme Court to appeal. Section 14 (1) (b) of the Court of Appeal Act is instructive in this regard.

[23] I am of the view that in so far as the Summary Judgment granted by Judge Maphanga still stands, and in so far as the substance of it was never challenged nor changed except for its execution, which was directed, through the consolidation judgment of Justice M. Dlarnini, to be catTied out in a certain way, was interlocut01y in nature and could not be appealed as of right without leave of Court. Otherwise the judgment sought to be appealed against had merely clarified that the applicant bank had complied with its obligations under the consolidation judgment and was therefore not final and definitive. This in my view means that there are no prospects of success in the appeal just on this point alone.

[24] There is however a more fundamental reason why the Appeal cannot be said to have prospects. The defence advanced by Mr Flynn during the hearing, which is about questioning the consolidated amount as contained in the first letter to the Respondents communicating the outcome of the consolidation exercise and the proper rate of the interest due, is not the one contained in the Answering affidavit and in the Respondent's heads of argument. In any event,

even if they were covered in there, they are merely stating what the factual position as regards the two items is and that they may not have been properly captured. It hardly means that the entire judgment or order should be set aside than that the incorrectly captured aspect of the judgment be corrected. If it means anything else it could be a suggestion that perhaps the Appellant has an arguable case, which is how far I am prepared to comment with regards the Appellant's prospects of success in the appeal.

[25] The Appellants' case is further weakened by the fact that the prejudice on the Applicant bank was substantial and not superficial. Whilst the conduct of the Appellants bought them time to remain in the contentious property without paying anything towards liquidating their acknowledged indebtedness and for a period in excess of five years today when reckoned from the date of the summary judgment, the applicant bank was being subjected to grave prejudice if not injustice.

[26] The Appellant's remissness did not end with their failure to file a record of appeal but was extended to their failing to file opposing papers to the application for an order declaring the appeal abandoned, which they had failed to do for at least some nine or so months.

[27] What should be the approach by a litigant upon realizing that there has been a failure to comply with the provisions of the rules impacting on the hearing of an Appeal was stated in **Unitrans Swaziland LTD vs Inyatsi Superfos Construction LTD,** a judgment delivered on the 7th November 1997,to be that as soon as there was realization of a failure to comply with that particular provision , then the party who failed to so comply is enjoined to, over and above remedying his shortcoming, apply for condonation of his failure to comply with the said provision and to seek an extension of time, and **l** can add in a case like the present where the appeal had already been deemed abandoned, that he would also be required to promptly apply for its reinstatement. This position was stated as follows in ***Simon Musa Matsebula vs Swaziland Building Society, Civil Appeal Case No. 11/1998:*** -

> *"In a judgment of this Court in* ***Unitrans Swaziland LTD vs Inyatsi Construction LTD*** *delivered on the?" November 1997 it was held that 'whenever a prospective Appellant realizes that he has not complied with a rule of court, he should, apartfi·om remedying his default immediately, also apply for condonation without delay'. See also the cases cited therein, i.e.* ***Moraliswani***

vs Mamili 1989 (4) SA 1 at 9 E-F, and Commissioner for Inland Revenue vs Burger 1956 (4) SA (A)"

[28] In casu, not only did the Appellants fail to immediately remedy their default by filing the record of proceedings as required of them in law, they also failed to without delay file an application and seek condonation for their default together with an extension of time for filing the outstanding process. The same should also go for the reinstatement of the appeal automatically deemed abandoned in terms of the Rules of this court. Instead, the outstanding process and the application for the reliefs set out above, all of which should have been filed immediately and without delay, were filed months if not years after the Appellants' shortcomings had been brought to their attention together with advice on how to remedy the said shortcomings.

[29] The Appellants want to blame their failure to file the record and to seek the condonation and the related reliefs on their erstwhile attorneys. Given the flagrant nature of the disregard of the observance of the rnles, I can do no more than recite what was said in the same judgment of ***Simon Musa Matsebu/a vs Swaziland Building Society Civil Appeal Court Case***

No.11/1998 *whilst taking an excerptfi·om the* **Unitrans Swaziland Limited v Inyatsi *Construction limited Judgment*** where the position was stated as follows: -

> *"As was pointed out* ***in Saloojee vs The Minister of Community Development 1965 (2) 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 mav 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 law, they may find themselves non-suited." (Underlining has been added).*

[30] I have no doubt that even if it were to be justifiably contended that there are prospects of success in this matter which ought to weigh in the Appellants' favour, that is not how the question is necessarily decided. It was with this realization in mind that in the **Simon Musa Matsebula v Swaziland Building Society judgment** (supra), there was cited with approval what was

said again

in the ***Unitrans Swaziland Limited v Inyatsi Construction Limited*** judgment (supra), with regards the effect of prospects on the matter as a whole: -

> *"The court in the* ***UN/TRANS*** *case pointed out that it had concluded 'that it would be unfair to the Respondent in this case were we to overlook the disregard for the rules exhibited by the Appellant, irrespective of Appellant's prospects of success on the merits of the matter".*

[31] The approach by the Court in that matter was set out at page 7 of the said judgment as being that it should 'take into account all the relevant factors before exercising its discretion whether or not to grant the indulgence sought'. Later on emphasizing the said approach, the then Court of Appeal had the following to say on page 8 of the ***Simon Musa Matsebula*** judgment which I fully agree with:-

> *"This case falls within the ambit of the approach to be adopted by our Courts as outlined above when refitsing to grant a litigant an indulgence as a result of a failure to comply with the provisions of the Rules of Court. In view of the flagrant disregard of the Rules, we are of the opinion that the application for condonation should be refi1sed. We are also of the view that this should be the result*

even though Appellant may have an arguable case on appeal. I am satisfied having had regards to the merits of the matter, the disregard for the Rules, the prejudice to the Respondent of having to prepare argument with virtually no notice and the inconvenience to the Court, that the Appellant should be denied the right to pursue this appeal".

In my view these sentiments apply fully in this case.

[32] Consequently and taking into account the peculiar circumstances of the matter, paiticularly the flagrant disregard of the rules by the Appellants, I am of the view that their application for condonation of the late filing of the record of appeal coupled with their prayer for the extension of time and that for the reinstatement of the abandoned Appeal, ought not succeed. On the other hand, the application by the current applicant (the Respondent in the main appeal) seeking to declare the appeal abandoned should succeed.

[33) Accordingly I make the following order:-

33.I. The application for the order declaring the appeal abandoned, be and is hereby granted.

33.2. The application by the appellants seeking as reliefs the condonation for the late filing of the record; the extension of time for the filing of the

same record and the reinstatement of the Appeal, be and is hereby dismissed.

33.3. The applicants in the application for the reliefs set out in order 2 above (that is, the Appellants in the main appeal and the Respondents in the declaratory order application by the First National Bank), be and are hereby ordered to pay the costs of these proceedings jointly and severally, one paying the other to be absolved.

JUSTICE OF APPEAL

N.J. HLOPHE

For the Appellant	**Boxshall - Smith Associates**
For the·1'[1] Respondent	**M.J. Manzini And Associates**