



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

**Case No. 69/2021**

**HELD AT MBABANE**

In the matter between:

**METROPOLITAN EVANGELICAL**

**CHURCH INTERNATIONAL**

**BEN TSABEDZE N.O.**

**SIMON MSHAYISA N.O.**

**SITHEMBISO NXUMALO N.O.**

**THEMBA NGCAMPHALALA N.O.**

and

**SOLOMON N. NHLENGETFWA**

**MHLONIPHENI J. KHUMALO**

**DUMISANI KUNENE**

**BHEKISISA N. DLAMINI**

**THE REGISTRAR OF COMPANIES**

**THE ATTORNEY GENERAL**

**1<sup>st</sup> Appellant**

**2<sup>nd</sup> Appellant**

**3<sup>rd</sup> Appellant**

**4<sup>th</sup> Appellant**

**5<sup>th</sup> Appellant**

**1<sup>st</sup> Respondent**

**2<sup>nd</sup> Respondent**

**3<sup>rd</sup> Respondent**

**4<sup>th</sup> Respondent**

**5<sup>th</sup> Respondent**

**6<sup>th</sup> Respondent**

**Neutral Citation:** *Metropolitan Evangelical Church International and 4 Others vs Solomon N. Nhlengetfwa and 5 Others* (69/2021) [2022] SZSC 06 (21/04/2022)

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

**Heard:** 05<sup>th</sup> April, 2022.

**Delivered:** 21<sup>st</sup> April, 2022.

**SUMMARY:** *Civil Procedure – Appellants purport to withdraw Notice of Appeal utilising Rule 13 (1) then filed a further Notice of Appeal under different case number – Respondents allege appeal should be deemed abandoned and dismissed – Appellant ought to have used Rule 12 – However, Court does not exist for the Rules but the Rules for the Court – Appellants entitled to fair hearing – Negligence of attorney should not be attributed to Appellants – Respondents’ application to declare appeal abandoned and/or dismissed, not succeeding.*

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**JUDGMENT**

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**J.M. CURRIE – AJA**

## **INTRODUCTION**

- [1] In the present application the 1<sup>st</sup> to 4<sup>th</sup> Respondents, who were the Applicants in the Court *a quo*, have set the matter down for an order dismissing the Appellants' Appeal filed on 10 November 2021, with costs.
- [2] The 1<sup>st</sup> Appellant is the Metropolitan Evangelical Church International (“the Church”) based in Mbabane and is registered in terms of Section 17 of the Companies Act of the Kingdom of Eswatini. The registration of the 1<sup>st</sup> Appellant as a Section 17 company had the effect of converting the then church into a company registered in terms of the Company laws of Eswatini.
- [3] The 2<sup>nd</sup> to 4<sup>th</sup> Appellants, being the Respondents in the Court *a quo*, are Pastors of the Church. It transpires that these Appellants have not recognized the Company as superseding the Church.
- [4] The 2<sup>nd</sup> to 5<sup>th</sup> Respondents are purported Directors of the Church. The two central issues for the Court *a quo* to determine were (a) to declare the correct status of the Church and (b) to determine whether the appointment of the 2<sup>nd</sup> to 5<sup>th</sup> Respondents was lawful and consistent with the Company's Memorandum and Articles of Association.

[5] The Court *a quo* granted the following orders in terms of the Notice of Motion filed in the Court *a quo*:

- “1. Declaring the Appointment of the 2<sup>nd</sup> to 5<sup>th</sup> Respondents as Directors in the Board of Directors of 1<sup>st</sup> Respondent inconsistent with its Memorandum and Articles of Association and therefore unlawful;***
- 2. That the names of the 2<sup>nd</sup> to 5<sup>th</sup> Respondents be thereby removed as Directors of the 1<sup>st</sup> Respondent from its Form J and other ancillary documentation;***
- 3. That the 6<sup>th</sup> Respondent be thereby Ordered to expunge and remove from it’s Register the Registration of the 2<sup>nd</sup> to 5<sup>th</sup> Respondents as Directors of 1<sup>st</sup> Respondent and to thereafter immediately reinstate the Applicants as the lawful Directors of the 1<sup>st</sup> Respondent”***

[6] The Appellants, being dissatisfied with the judgment of the Court *a quo* filed a Notice of Appeal on the 1<sup>st</sup> November 2021 and served same on the Respondent's attorneys on the same date. The contents of the Notice of Appeal are not relevant to these proceedings.

[7] On the 10<sup>th</sup> November 2021 the Appellants filed a purported Notice of Withdrawal of the Appeal, reading as follows:

“

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***NOTICE OF WITHDRAWAL OF APPEAL***

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***BE PEASED TO TAKE NOTICE that the Appellants hereby withdraw the Notice of Appeal under Case No. 69/2021 and tender costs.***”

[8] The Appellants thereafter and apparently thereafter filed a second Notice of Appeal, which was allocated a different Case No. 76/2021. This second Notice of Appeal is not before this Court.

[9] On 15 November 2021 the 1<sup>st</sup> to 4<sup>th</sup> Respondents set down the matter for an order dismissing the Appellants' Appeal with costs in terms of Rule 13 (1).

[10] Rule 13 (1) of this Court provides as follows:

***“13. (1) An appellant may at any time abandon his appeal by giving notice of abandonment thereof to the Registrar and upon such notice being given the appeal shall be deemed to have been dismissed by the Court of Appeal.***

***(2) In a civil appeal the respondent shall be entitled to costs up to the date on which he receives notice of such abandonment.***

***(3) The Registrar shall forthwith give notice of such dismissal to the respondent and the Registrar of the High Court.***

***(4) A respondent who has given notice under rule 35 shall be entitled to proceed with his application under such rule notwithstanding the abandonment of the appeal by the appellant.”***

[11] Despite the wording of Rule 13 (3) it has become practice in this jurisdiction for the matter to be set down before Court to be

such withdrawn/ abandoned/and or dismissed and not for notice of dismissal being given to the Registrar.

[12] Rule 13 is to be read with Civil Form 9 which provides as follows:

**“CIVIL FORM NO.9  
THE SWAZILAND COURT OF APPEAL RULES  
(RULE 13)  
NOTICE ABANDONMENT OF APPEAL**

**Between.....Appellant**

**And**

.....Respondent

**TAKE NOTICE THAT the appellant doth hereby wholly withdraw his appeal against the respondent.**

**(Signed).....  
Appellant**

**Before me the  
Registrar of the Court of Appeal  
.....  
To the Registrar of the Court of Appeal**

\_\_\_\_\_”

[13] It is evident from the above form that the Appellants’ Notice of Withdrawal of the Notice of Appeal does not comply with this form and does not contain

the words “*Notice of Abandonment of Appeal.*” Moreover, it specifically states “*that the Appellants hereby withdraw the Notice of Appeal .....*”(my underlining) and not the appeal itself.

[14] The Rules of this Court do not provide for the withdrawal of a notice of appeal without intending the abandonment of an appeal in terms of Rule 13. Rule 13 specifically provides for a situation where a litigant intends to abandon an appeal.

[15] The Appellants, if they wished to amend their Notice of Appeal should have utilised Rule 12 which provides as follows:

***“12. The Court of Appeal may allow an amendment of the notice of appeal and arguments, and allow parties or their counsel to appear, notwithstanding any declaration made under rule 11 upon such terms as to service of notice of such amendment, costs and otherwise as it may think fit”***



## **ARGUMENT ON BEHALF OF APPELLANTS**

[16] The Appellants' counsel contends that the reason the Notice of Appeal was withdrawn was that the Notice contained a number of grammatical/and or spelling errors and that the Notice had been sent out by a member of Appellants' legal representatives' staff without final approval. The fact that the internet had at that time been shut down by a directive of the Regulator contributed to the oversight in dispatching the Notice of Appeal which had not been finalised.

[17] The error in the Notice of Appeal which was not yet finalised was explained to the Respondents' legal representatives, and legal costs were tendered by the Appellants' legal representatives, as contained in the purported Notice of Withdrawal. There was no action taken by the Appellants that indicated that they wished to be bound by the Judgment of the Court *a quo* and their conduct made it clear that they intended to appeal the said Judgment.

[18] The Respondents' legal representatives did not accept the explanation and insisted that the Appeal be declared deemed abandoned and dismissed and that there be compliance with the judgment of the Court *a quo*.

## **ARGUMENT ON BEHALF OF RESPONDENTS**

[19] The Respondents contend that the Appellants have preempted their right to challenge the orders granted by the Court *a quo* in that they acquiesced in the judgment of the court *a quo*, which is borne out by the fact that a letter was written on 28<sup>th</sup> October 2021 to the Respondents purportedly by the Appellants calling upon them to comply with the judgement of the Court *a quo*.

[20] The Appellants have refuted this allegation stating that the said letter was not written by the Appellants but by others members of the Church and reaffirmed that Appellants always intended to appeal the judgment of the Court *a quo*.

[21] The Respondent's Counsel referred to the English dictionary and argued that the word "Withdrawal" has the same meaning as "*take out or away*" and that clearly the appellants intended to abandon the Appeal by filing the Notice of Withdrawal. Further that if, the Notice of Appeal contained errors, Appellants' legal representatives were required to file a Notice of Amendment and file any amended Appeal under the same case number but, instead, a new Appeal was filed under a different case number.

**LAW RELATING TO DOCTRINE OF ACQUIESCENCE AND PEREMPTION.**

[22] Herbstein and Van Winsen – the Practice of the Superior Courts of South Africa at 637 states that:

*“Under the Common law a person who has acquiesced in a judgment cannot appeal against it. Acquiescence can be inferred from any unequivocal act inconsistent with the intention to appeal. It is not necessary to show an agreement not to appeal or conduct which would estop the Appellant from denying acquiescence, or an abandonment of the appeal, but there must be conduct leading to a clear conclusion of intention not to assail the judgment. The onus of proof of course, rests on the person alleging acquiescence and in doubtful cases it must be held not proven. Dabner v. S.A.R. 1920 AD 583 @ 894 – A voluntary unconditional payment or acceptance of payment under a judgment therefore perempts the right of appeal at common law – Hlatshwayo vs Mare & Deas 1912 AD @ 232”.*

[23] *In casu*, it is clear that the Appellants never acquiesced in the Judgment and same as borne out by Appellants conduct in filing a Notice of Appeal,

withdrawing same, albeit by adopting the wrong procedure and immediately filing a second Notice of Appeal. The legal position is that in doubtful cases acquiescence must be held not proven. Acquiescence can be inferred from any unequivocal act inconsistent with the intention to appeal and it has to be held that the speedy filing of a new notice to substitute a defective notice, is consistent with the intent to prosecute the appeal. In addition thereto, an abandonment of an appeal and as such an abandonment of a right to challenge the pronouncement of a court, is a significant and weighty step, not to be taken or imputed lightly.

**IS THE APPEAL DEEMED ABANDONED AND DISMISSED?**

[24] In my view Rule 13 has a different application to Rule 30 (4) which provides .....***“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.”***

[25] This Rule therefore applies when, due to the negligence, fault or omission of an appellant, there is no compliance with this rule and therefore the appeal is deemed to have been abandoned.

[26] This Rule is distinguishable from, and, in my view, has different consequences from Rule 13 which provides for when an appellant wishes to voluntarily withdraw a notice of appeal with no fault nor non-compliance on its part.

[27] There are a number of judgments of this court where the Court has held an appeal to be deemed abandoned and dismissed without hearing the merits. Recently this Court has held that Rule 30 (4) is peremptory and that where an appeal is deemed to be abandoned it has the same effect as it having been dismissed. Refer, for instance, **Swaziland Tobacco Co-operative Company Limited v Bertram Henwood and Others (60/2013) [2014]SZSC 29 (30 May 2014)** where this Court dismissed an appeal for failure to comply with Rule 30 (1), as the Appellant had filed the Record out of time. In **The Pub and Grill (Pty) Ltd and Another v The Gables (Pty) Ltd (102/2018) [2019] SZSC 17 (20<sup>th</sup> May 2019)** this Court issued an order in terms of which an appeal was deemed to have been abandoned and dismissed. In **Thandie Motsa and 4 Others v Richard Khanyile & Another (69/2018) [2029] SZSC 24 (17 June 2019)** this court similarly issued an order that an appeal was deemed to be abandoned and dismissed.

## **CONCLUSION**

[28] I have been unable to find any authorities of this Court dealing with the withdrawal of an appeal in terms of Rule 13 and subsequent abandonment.

[29] This matter has a long and troubled history and finality in the litigation must be reached. Furthermore, a litigant is entitled to a fair hearing as enshrined in Section 21 of the Constitution and in my view to dismiss the Appeal without hearing the merits could be construed as a violation of this right. However, I must point out that Court Rules are an integral part of a right to a fair hearing – Refer **Giddey NO v JC Barnard and Partners 2007 (5) SA 525 (CC) at 532** where O’Regan said:

*“[16] But for Courts to function fairly, they must have rules that regulate their proceedings. These rules will often require parties to take certain steps on pain of being prevented from proceeding with a claim or defence”.*

[30] The Respondents’ counsel did not request that costs be awarded to the Respondents on a punitive basis and had he done so this Court would have be

compelled to consider same in view of the flagrant disregard to the Rules of this Court which should not be condoned without sanction; the Appellants should have applied for amendment of the Notice of Appeal and cannot merely circumvent the Rules.

[31] It has been stated consistently that the Court does not exist for the Rules, for instance as follows in **Ncoweni v Bezuidenhout 1927 CPD 130**:

*“The rules of procedure of this Court are devised for the purpose of administering justice and not of hampering it, and where the Rules are deficient I shall go as far as I can in granting orders which would help to further the administration of justice. Of course if one is absolutely prohibited by the Rule one is bound to follow this Rule, but if there is a construction which can assist the administration of justice I shall be disposed to adopt that construction”*

and in **Brown Bros. Ltd. v Doise 1955 (1) SA 75 (W)** at 77:

*“ In my view this is a case where the Rules of Court as framed do not provide for one particular set of circumstances which can arise, and I think*

*that the Court has inherent power to read the Rules applicable to the procedure of the Court in a manner which would enable practical justice to be administered and a matter to be handled along practical lines."*

[32] More recently, and with reference also to modern constitutional principles, it was expounded as follows in **Motlounge and Another V Sheriff, Pretoria East And Others 2020 (5) SA 123 (SCA):**

*"[27] This approach is buttressed by the principle, articulated almost a century ago, that:*

*'The rules of procedure of this Court are devised for the purpose of administering justice and not of hampering it, and where the rules are deficient I shall go as far as I can in granting orders which would help to further the administration of justice.'* [Ncoweni v Bezuidenhout 1927 CPD 130 at 130.]

*In his judgment, sometime after the dictum under discussion, Rumpff JA cited the above authority and went on to say:*

*'(I)t is desirable to repeat what is of general application, namely, that the Court does not exist for the Rules but the Rules for the Court.'*

*And, in Trans-African Insurance Co Ltd v Maluleka [1956 (2) SA 273 (A)] Schreiner JA, in upholding the dismissal of an application to cancel an admittedly defective summons, said:*



*'But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.'* [At 278F – H]

*[28] All of these dicta emerged from general principles of our common law applied prior to the coming into effect of the Constitution. [Constitution of the Republic of South Africa, 1996] But it accords with the principles of the Constitution and thus complies with the approach to interpretation referred to in Cool Ideas. [Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC) (2014 (8) BCLR 869; [2014] ZACC 16) para 28.] It supports the constitutional right to have disputes adjudicated in a fair public hearing. [Section 34 of the Constitution.] Overly technical approaches to hinder the courts deciding of genuine disputes between parties are to be strongly discouraged. The need for condonation to show good cause allows for a consideration of prejudice. If courts are to err at all they should do so in finding that irregularities are susceptible of condonation rather than being necessarily visited with nullity.”*

[33] Despite the conduct of the Appellants’ legal representatives it appears to me that it would be unfair to attribute the negligence of and/or misguided

procedure adopted by the Appellants' legal representatives, to the Appellants and to deny them a fair hearing. In the circumstances of this matter, I am of the view that there is no compelling basis for dismissing the appeal and not hearing the merits of the matter.

[34] The above however should not be construed as free licence to disregard the Rules and legal practitioners are cautioned that a recurrence of the scenario *in casu*, will be treated with far more severity in future.

[35] Accordingly the following Order is made:

1. The application to declare the appeal to be deemed abandoned and/or dismissed and/or otherwise precluded from being heard in accordance with the second notice of appeal, is dismissed and the appeal must run the ordinary course.
2. Costs are awarded to the Respondent.

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**J. M. CURRIE**  
**ACTING JUSTICE OF APPEAL**

**For the Appellants:** MR. N.D. JELE OF ROBINSON BERTRAMS  
ATTORNEYS.

**For the Respondents:** MR. M. NDLOVU OF MTM NDLOVU ATTORNEYS.