

IN THE SUPREME COURT OF ESWATINI

HELD AT MBABANE

Appeal Case No. 40/2021

In the matter between

Inyatsi Construction Limited

Appellant

And

Sunla Investments (Pty) Limited

Respondent

Neutral Citation : *Inyatsi Construction Limited v Sunla Investments (Pty) Limited* (40/2021) [2022] SZSC 02 (23 March 2022)

Coram : Mamba, Masuku and Vilakati AJJA

Heard : 17 March 2022

Delivered : 23 March 2022

Summary: Civil Appeal-defects in record of proceedings in High Court-of such a nature as to prevent proper consideration of the appeal-Appropriate order to be made

Judgment

VILAKATI AJA

1. At the hearing of this matter on 17 March 2022, and after hearing the parties, the Court made the following orders:
 - (i) The appeal is postponed *sine die*.
 - (ii) The appellant is ordered to submit part of the record which is missing by not later than 24 March 2022.
 - (iii) Each party to pay its own costs.

2. The reasons for the order are set out below.

3. This is an appeal against an order of the High Court. The high court granted an order in favour of the Respondent for the payment of damages for loss of profit in the amount of E 4 646 517.00 (Four Million Six Hundred and Forty Six Thousand Five Hundred and Seventeen Emalangeni), interest on this amount and costs of suit. The court also ordered certain deductions from the judgment debt.
4. The appellant is Inyatsi Construction Limited. The respondent is Sunla Investments (Pty) Limited. In this judgment I refer to the appellant and the respondent as "Inyatsi" and "Sunla" respectively. Both Inyatsi and Sunla are companies incorporated in terms of the company laws of Eswatini.
5. This appeal was set down for hearing on 17 March 2022. At the commencement of the hearing, Mr Nkomondze for Sunla pointed out shortcomings in the record on appeal. He informed the court that the record was missing the cross-examination of Sunla's sole witness at the trial as well as the whole of the evidence of one of Inyatsi's witnesses.
6. The shortcomings identified by Mr Nkomondze were not the only deficiencies in the record. Other flaws found by the court included:
 - 6.1 the examination in chief of Sunla's witness was incomplete; and
 - 6.2 the documentary evidence adduced at the trial was entirely missing.

7. Mr Nkomondze and Mr Shongwe for Inyatsi were in agreement that that the record was defective in material respects and that this court could not properly consider the appeal with the record in its current state. Furthermore, the parties submitted that the appropriate order for the court to make in the circumstances was a postponement of the matter.
8. The consent of the parties does not prevent this court from deciding whether the inadequacies of the record are of such a nature as to prevent the consideration of the appeal; and if so; the appropriate order for the court to make.

The Applicable Law

9. Rule 2 of the rules of this court defines the record as "the aggregate of papers relating to an appeal (including the pleadings, proceedings, evidence and judgments) proper to be laid before the [Supreme] Court ... on the hearing of the appeal."
10. In civil appeals rule 30(5) requires an appellant, in consultation with the respondent, to include in the record only those documents which are material to the subject matter of the appeal. This provision is meant to ensure that all parties to the appeal are satisfied that the proper record has been placed before this court.

11. Furthermore, the sub rule prohibits the inclusion of purely formal documents and the duplication of documents. This is intended to ensure that the record is not burdened by documents which do not contribute one way or the other to the determination of the appeal. Last but not least the sub rule allows a respondent to object to the inclusion of a document in the record and for the objection to be noted in the index if the appellant includes the document despite the objection.

12. The condition of the record on appeal received judicial consideration in *S v Chabedi* 2005 (1) SACR 415 (SCA); [2005] ZASCA 5. This was an appeal against conviction and sentence. The appeal was directed at the state of the record of proceedings of the trial court. Brand JA said the following about the record on appeal:

"[5] On appeal the record of proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the court of appeal. If the record is inadequate for a proper consideration of the appeal, it will as a rule, lead to the conviction and sentence being set aside. *However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial.* (Emphasis added)

[6] The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, *inter alia*, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal."

13. In *Myeza v R* [2016] SZSC 77 this court cited *Chabedi* with approval. Consequently, the reasoning in *Chabedi* is part of our law.

14. In criminal cases where the record on appeal is so deficient that an appellate court cannot properly consider the appeal, the general rule is that the conviction and sentence are set aside. In civil cases the order is usually that the appeal is struck off the roll. The cases in point include *Samba v Mabanga* [2016] SZSC 30 and *Hlophe v Ndzimandze NO* [2016] SZSC 9.
15. Striking the appeal off the roll is not the only course available to an appeal court. The authority for this proposition is *Ensign-Bickford (South Africa) (Pty) Ltd and Others v AECL Explosives and Chemicals Ltd* 1998 (2) SA 1085 (SCA). The facts of *Ensign-Bickford* were similar to the facts of the case at hand. In that case the record on appeal was deficient in that, among other things, the documentary evidence being dealt with in the evidence could not be found in the record, the trial bundles referred to in the evidence were not reproduced as such in the record and a large number of unnecessary documents were included in the record. Some of the deficiencies of the record remained even after the court had afforded the appellant an opportunity to cure them.
16. The issue before the court was whether the appeal should be struck from the roll in the light of the inadequate record and whether an appropriate order as to costs should be made.
17. The court found, among other things, that the degree of non-compliance with the rules was serious and the explanation advanced for the non-compliance was poor. Despite these findings the court did not strike the appeal off the record. The court postponed the appeal,

ordered the appellants to pay the wasted costs and directed the appellants to file a proper record within a fixed period.

18. The reason for the order was that the respondent had an interest in the finality of the appeal and the prospect of reaching finality would be achieved sooner if the appeal was postponed than would be the case if the appeal were struck off the roll.

Applying the law to the facts

19. The primary issue in the appeal in respect of which the record was filed is whether Sunla proved on a balance of probabilities that it suffered damages for loss of profit in the amount awarded by the trial court as a result of the wrongful and culpable conduct of Inyatsi. The issue turns on the oral and documentary evidence adduced by Sunla at the trial. On the record as it stands this evidence is incomplete.
20. At the hearing, Mr Shongwe for Inyatsi attempted to file the missing documentary exhibits from the bar. This is impermissible because the whole idea behind lodging a proper record on appeal ahead of the hearing is so that the judges and the other side can familiarise themselves in advance with the evidence on which the trial court made important findings. At any rate the record on appeal is still deficient because important oral evidence led at the trial is missing from it.
21. Contrary to the provisions of rule 30(5) there was no consultation between the parties when the record was prepared. If

there had been

consultation, the challenges which manifested themselves at the hearing could have been avoided. What is more documents which are purely formal, and therefore should have been excluded from the record, were included. These formal documents included filing notices, notice to defend, notice to discover and a notice requesting a trial date.

22. In the light of the deficiencies in the record I find that the defects are of such a nature that a proper consideration of the appeal is not possible.

Appropriate Order

23. The approach of the Supreme Court of Appeal in *Ensign-Bickford* commends itself to me in connection with the appropriate order for this court to make. In argument before us both parties indicated that they want this court to determine the appeal on the merits. They therefore have an interest in the finality of the matter. An order striking the appeal off the roll is unlikely to result in finality.

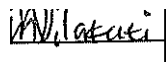

24. If the matter is struck off the roll, Inyatsi is likely to apply for a reinstatement given the relatively high amount of the quantum of damages awarded by the trial court. This will result in a further delay of the matter.

25. An order of postponement coupled with an order that the appellant cure the defects in the record within a specific period is more

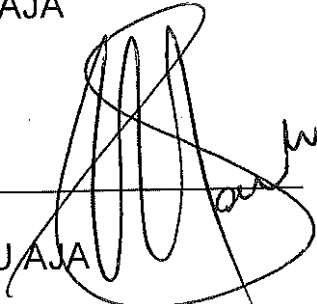
likely to result in finality of the proceedings.

26. With regard to wasted costs, the parties submitted that each party must bear its own costs. I agree with this submission because both parties bear some responsibility for the defective condition of the record. The appellant is at fault for preparing the inadequate record and the respondent for failing to object to its contents prior to the hearing.
27. These then are the court's reasons for the order which appears in paragraph 1 of this judgment.
28. Last but not least this court has over and over again in the recent past warned litigants of the results of a failure to comply with the rules. The case of *Terror Maziya v The Attorney-General* [2021] SZSC 3 and the cases cited therein are instructive in this regard. Legal practitioners who do not comply with the rules in full run the risk of being debarred from continuing with their appeals.

I concur


VILAKATI AJA

MAMBA AJA

I concur


MASUKU AJA

Appearances:

For the Appellant : Mr M P Shongwe

For the Respondent : Mr M Nkomondze