IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE Civil Appeal Case No. 25/2021

In the matter between:

THE ESWATINI OBSERVER (PTY) LTD **Applicant**

And

SIBUSISO BARNABAS DLAMINI **Appellant**

In re:

SIBUSISO BARNABAS DLAMINI **Appellant**

And

THE ESWATINI OBSERVER (PTY) LTD **1st Respondent**

DONNY NXUMALO **2nd Respondent**

Neutral Citation: *The Eswatini Observer (Pty) Ltd vs Sibusiso Barnabas Dlamini (25/2021) [2023] SZSC 32 (15/08/2023)*

Coram: **J.P. ANNANDALE JA;**
S.J.K. MATSEBULA JA; AND
N.J. HLOPHE JA.

Date Heard: 31st May, 2023.
Date Delivered: 15th August, 2023.

SUMMARY : *Civil Procedure – Application to deem appeal abandoned in terms of Rule 30 (4) of the Rules – Notice of Appeal filed timeously with the Registrar but served on Respondent one court day late – Record of Appeal filed timeously with the Registrar but served 7 months later on the Respondent – No Application for condonation to explain late filing – Respondent adamant that Notice of Appeal and Record filed in terms of the Rules is the date to be considered by the Court, being the date the process was filed with the Registrar – Dispute whether filed Record was complete or not.*

Held: Filing documents with the Registrar is incomplete if not simultaneously served on the opposing party.

Held: Application for deeming appeal abandoned in terms of Rule 30 (4) granted with costs.

JUDGMENT

S.J.K MATSEBULA, JA:

The Parties

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

The Application

[2] This is an application in terms of Rule 30 (4) of the Court of Appeal Rules, 1971 which reads-

> *"30. (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."*

The Background

[3] The Applicant is a newspaper publisher known as the Eswatini Observer (Pty) Ltd and the Respondent is described in his particulars of claim, (as Plaintiff), as "a prominent international soccer player of repute, contracted to Mpumalanga Black Aces earning a E20, 000.00 monthly salary".

[4] The Applicant published an article in its newspaper about the Respondent which the Respondent claimed to have defamed him and therefore he sought damages. He instituted action proceedings in the High Court against the Applicant and the High Court dismissed the action or suit. The Respondent was not happy with the judgment of the Court *a quo* and consequently appealed the decision to this Court.

Applicant's Case

[5] The case of the Applicant is that this Court should officially declare that the appeal noted by the Respondent should be deemed to have been abandoned in terms of rule 30 (4) of the Court of Appeal Rules because the Respondent failed to note and serve the notice of appeal and the record on appeal timeously in terms of the Rules of this Court.

[6] The Applicant submits that the impugned judgment was delivered on the 30th April, 2021 and that the Notice of Appeal was filed with the Court on the 28th May 2021 as required by the Rules but served on 31st May 2021 on the Applicant, one court day late.

[7] The record on appeal was in terms of the Rules due to be filed within two months after delivery of judgment, that is by the 28th July 2021. It was filed in compliance with the Rules by the 23rd July 2021 but its copy was not simultaneously, as required by the Rules, served on the Applicant. The Respondent served the record on appeal on the Applicant on the 3rd February,

2022, some nine (9) months after delivery of judgment of the court *a quo*. The Applicant submits that the serving on it of the record on appeal some nine (9) months is outside the Rules and a flagrant disregard of the Rules of this Court.

[8] The Applicant further submits that the record on appeal served on it was incomplete as the impugned judgment was not included in the record on appeal. The Applicant therefore submits that an incomplete record on appeal amounts to no record at all, which means that the Respondent has failed to file and serve a record on appeal as required by the Rules. The Applicant submits that in the circumstances the Court should and ought to declare the appeal as abandoned in terms of Rule 30 (4).

The Respondent's Case

[9] The case of the Respondent is that the appeal has not been abandoned in as much as the Applicant at all material times knew that the Respondent was pursuing the appeal. The Respondent maintains that the Notice of Appeal was filed timeously with the Registrar on the 28th May, 2021, and continues to state thus–

> *"The Notice was eventually served on the 31st of May as the 29th and 30th of May fell on a weekend"* (without giving reasons why it was not served on the Applicant on the 28th May, 2021 the date on which it was filed with the Registrar).

[10] The Respondent, in respect of the record on appeal, submits that it was filed with the Registrar within the required two months and therefore it complied with the Rules. When challenged with the fact that the Applicant signed and acknowledged receipt of the record on appeal on the 3rd of February, 2022 (9 months later), the Respondent states that the Registrar's date stamp of 23rd July, 2021, the date it filed it with the Registrar, should be the date that the Court should consider.

[11] The Respondent further denies that the record on appeal was defective or incomplete. The Respondent's attorney, Mr. Sifiso Jele, authored the Respondent's Answering Affidavit and at paragraph [8] he states-

> *"I am advised and verily believe that the service of the record on the Applicant was not defective and there is no prejudice on them for such. The date stamp is the effective date of noting the appeal"*

It is not clear who advised Mr. Jele as Mr. Jele is the one who is supposed to give advice to his client. But the bottom line is that the Respondent denies that the record on appeal was defective or incomplete or that it was served outside the parameters of the Rules. Respondent urges the Court to regard the 23rd July 2021(the date of filing with the Registrar) as the date of filing and serving of the record to both the Registrar and the Applicant herein, alternately, to regard filing with the Registrar as constituting complete filing and service of the record. The Court is urged to disregard the 3rd of February, 2022 (being the date the record was served on the Applicant) as if such date is a non issue, with nothing turning on it.

[12] At paragraph [14] of its Answering Affidavit the Respondent states that-

> *"The defective record of proceedings complained of is denied. The document has been correctly filed and there is no shortage of pages thereat. The document runs up to page 57 and ends with the written judgment subject of the appeal. Had the record been defective the Applicant's attorneys would have communicated same timeously and same rectified, but clearly there is no need to rectify same as it is complete and accurate"* (Underling mine).

It would appear the Respondent is saying that since Applicant's attorneys did not inform him about the defective record, then the record must be complete and accurate. In the circumstances it is disingenuous to attempt to lay the blame on the other side when the duty is on your own shoulders to consult when compiling the record.

The Issues and Analysis

[13] Before this Court is an Application in terms of rule 30 (4) of the Rules of this Court seeking an endorsement or declaration or legally speaking, the deeming of the Appeal noted by the Respondent herein abandoned. The use of the words "declaring or endorsement" emanates from the argument by the Applicant that through the doctrine of **by operation of law**, the Appellants' appeal is to be deemed as abandoned on the date the Respondent failed to serve the Notice of Appeal and failed to serve the record on appeal, both as per the Rules and when it served a defective record on appeal.

[14] The argument that by operation of law an appeal is automatically abandoned on the date of failure to comply with the Rules without further ado had come up many times before this Court. This Court is of the view that whilst that may appear to be so, though practice and numerous judgments of this Court, the prevailing argument is that the Applicant must by way of an Application give Notice to the other party that it intends to have such abandonment endorsed by a court order. This practice provides certainty to the status of the ligation and affords the Respondent to state its side as to why the appeal should not be deemed as abandoned.

[15] The legal issue for this Court to decide is whether or not the Respondent breached or failed to comply with the applicable Rules of this Court, thus justifying the invocation of Rule 30 (4).

[16] In terms of Rule 8 of the Rules of this Court, the Respondent (as Appellant) should have filed the Notice of Appeal by the 28th May, 2021. Rule 8 (1) states that-

> *"The Notice of Appeal shall be filed within four weeks of the date of the judgment appealed against...."*

The Notice of Appeal was indeed filed with the Registrar on the 28th May 2021 but a copy thereof was only served to the Applicant on the 31st May, 2021. The Respondent has offered no explanation why it did not serve the Applicant on the 28th May, 2021 except to state that the following two days, that is the 29th and 30th, fell on a weekend. The Court expected a better

explanation for this failure to serve as the Applicant has taken issue with this failure and it becomes one of the arguments being put forward for deeming the appeal to be abandoned. The Respondent has offered no contest rebutting this submission.

[17] Again in terms of Rule 30 (1), the Respondent was bound to file the record on appeal on or before the 28th July, 2021. This was partly done or the sub-rule was partly complied with, as the record was filed with the Registrar on the 23rd July, 2021 but it was not served on the Applicant until the 3rd February 2022 (some 7 months after filing with the Registrar).

[18] Service of the record on appeal some seven (7) months after filing with the Registrar or nine (9) months after noting an appeal is contrary to the Rules, practice and spirit of the Rules yet, the Respondent does not think so. The Respondent holds that the purported late service of seven (7) months is immaterial since what is material is the filing with the Registrar, hence the Court should only consider the date stamp of the Registrar on the document. This Court considers such submission as shocking and amazing. It goes against the well-established practice of this Court and the spirit of the Rules. The practice and the spirit of the Rules is explained in the next paragraph.

[19] The second proviso to Rule 8 (1) provides the practice and spirit of the Rules in respect of filing and service, that is, filing and service should be done simultaneously or immediate thereafter. The 2nd proviso hereinunder states-

"Time for filing notice of appeal.

8. (1) The notice of appeal shall be filed within four weeks of the date of the judgment appealed against.

Provided that if there is written judgment such period shall run from the date of delivery of such written judgment.

And provided further that if the Appellant is in gaol, he may deliver his notice of appeal and a copy thereof within the prescribed time to the officer in charge of the gaol, who shall therefor endorse it and the copy with the date of receipt and forward them to the Registrar who shall file the original and forward the copy to the Respondent".

(My underlining is for emphasis).

The same spirit and practice is found in rule 9 (2), the proviso thereto and sub-rule (3), and it is as follows -

"9.(2) The appellant shall deliver such petition and its supporting documents to the Registrar, and serve a copy on the respondent ***forthwith.***

Provided that if the appellant is in gaol he may deliver the petition and supporting documents...to the officer in charge...who shall...forward them to the Registrar who shall file the original and forward the copy to the respondent. (My underling is for emphasis).

(3) Such motion accompanied by supporting documents shall be delivered to the Registrar and a copy thereof shall be served by the Appellant on the Respondent ***forthwith****"* (for emphasis).

Rule 31 (2) in respect of filing and serving of documents captures the spirit in this manner –

> *"(2) A copy of such heads of argument and list shall be served within the same period on the Respondent"* (for emphasis).

There is also rule 30 (8) which states-

> *"(8) Where the Registrar of the High Court has certified the record the appellant shall forthwith lodge with the Registrar five copies thereof and deliver to the Respondent or Respondents such number of copies as may reasonably be required by them..."*

[20] Our conclusion from the preceding paragraph is that as per well-established practice and spirit of the Rules the record on appeal was supposed to be served on the Applicant immediately or forthwith, not in seven months afterwards. Seven months renders failure on the Respondent to serve the record on appeal timeously on the Applicant and that is breach of the practice and spirit of the Rules. We therefore hold that such breach is material non-compliance with the Rules and supports the grant of the application for abandonment under Rule 30 (4). The word "supports" is used wisely as there is still the point of whether the record on appeal was actually filed or not and the argument being that what was filed was an incomplete record which amounts to non-service.

[21] The next legal issue this Court must decide is whether a complete record was filed or not and if it was incomplete, could it be held that there is a record before Court or not.

[22] Rule 2 defines the word "record" as meaning-

> *"The aggregate of papers relating to an appeal (including the pleadings, proceedings, evidence and judgments) proper to be laid before the Court of Appeal on the hearing of the appeal"* (for emphasis).

Our understanding of this definition is that if a record on appeal does not include the judgment appealed against, the record cannot be said to be compliant the Rule resulting in the conclusion that there is no record before Court.

[23] The record provided or placed before this Court has an index to it with 9 itemised contents, the last item being "Notice of Appeal") showing that the Record contains 40 pages. There is no item or indication that amongst the contents there is a judgment. But there is a judgment at the end in the record. Confusion starts when the Applicant files another index to the record which it says it uplifted from the Registrar's file. Its index also has 9 itemised contents. This index does not have the item "Notice of Appeal" but instead has the item "judgment" written by hand, not typed as the rest of the document and showing that it runs to page 57. Pages 38 to 40 are not catered for or not mentioned in the index at all. But the copy of the record placed before the Court has a Notice of Appeal.

[24] The Applicant alleges that its own copy of the record does not have the impugned judgment. The Applicant, under paragraph 21.1 of its application

under Rule 30 (4), promises to provide to the Court as proof the defective copy it was served with. It did not, though its provision to the Court would have had little evidential value since the judgment as a last item could easily be removed without further ado. This confusion and uncertainty could have been solved by an application for condonation by the Respondent as it is responsible for this mess.

[25] This Court asked the Respondent why it did not file a condonation application in terms of Rule 17. The Respondent, apart from persistently holding that the papers were in order, said filing a condonation application would have been an irregular step. The Court pointed out that a condonation application would have addressed the late service of the Notice of Appeal to the Applicant, the hand-written part of the index and the late service of the record on appeal. The Respondent was adamant that the filing of a condonation application would have been an irregular step. This Court disagrees with such reasoning.

[26] In **Terror Maziya v Attorney General (66 of 2020) [2021] SZSC 3 (2 June 2021)** at paragraph [17] as per M.C.B Maphalala CJ, the Court said the following-

> *"[17]...it is well-settled in this jurisdiction that an application for condonation should be made as soon as the litigant realises that the Rules of Court have not been complied with. Negligence on the part of a litigant's attorney will not exonerate the litigant. The general principle of our law regarding condonation is that whenever a prospective Appellant realizes that he has not complied with the Rules*

of Court, he should, apart from remedying his default immediately also apply for condonation without delay. Condonation is available to a litigant where the time prescribed by the Rules has elapsed".

[27] The Respondent has failed to avail itself the remedy provided for by rule 17. The Court is of the view that the Respondent committed several negligent acts in the prosecution of this case, namely -

(a) it served the Notice of Appeal late;

(b) it served the record on appeal on the Applicant late;

(c) it failed to explain the two disparities on the indices, why one is hand written and the other is not and differences in itemization thereon;

(d) whether or not the impugned judgment was included or attached in the typed index or not as well as in the one with a hand written index of the record;

(e) the filing notice date stamped 3rd February 2022 is purporting to be Applicants Replying Affidavit when in fact it is Appellants Brief Heads of Argument;

(f) a document styled "index to Pleading" is actually a bundle of Authorities.

(g) Admit or dispute the submission by the Applicant that the Applicant signed for the receipt of three (3) documents on the 3rd February, 2022, namely-

(i) the record on appeal;

(ii) Heads of Arguments; and

(iii) bundle of authorities.

(h) an explanation why the Respondent did not comply with rule 30 (5), which states-

> *(5) The Appellant in preparing the record shall, in consultation with the opposite party,...* (a consultation to mutually determine which documents to include or exclude from the record).

Had there been this consultation the issue of the inclusion or exclusion of the judgment in the record would not have arisen as an issue here, and if there was any blame it could have fallen on the shoulders of both parties. Whether the impugned judgment was included or not remains unknown to this Court but what is clear and known is that the record is fraught with many errors. The errors are a burden to be carried by the person responsible for compiling and filing of the record

[28] It is not the duty of this Court to make sense out of this quagmire of errors or try to put together a puzzle such as this. The Respondent could have addressed all these questions through the facility provided by rule 17 which the Respondent was adamant it would not use as it viewed such as an irregular step. This Court was as a result denied vital information or submissions that

could possibly have enabled it to do better justice and fairness to this case. In a condonation application the present Respondent would then have been expected to elaborate on the prospects of success of the appeal itself. It is this elaboration which would ultimately have meaningfully assisted the Court to be persuaded one way or another.

Conclusion

[29] The Notice of Appeal was filed in terms of the Rules but not served in terms of the Rules. Lodging a Notice of Appeal is two pronged, it involves filing with the Registrar and serving the opposite party simultaneously, both within the terms of the Rule. This principle or requirement equally applies in lodgment of the record. The record was filed within but served outside the terms of the Rules. The one day breach in respect of serving the notice of appeal could easily have been be condoned on sufficient reasons given for the non-compliance but the seven (7) months would require a stronger persuasion. The reasons and persuasion could only reach the Court through a condonation application. In the absence of such application, the application for abandonment must be granted. The Rules are a condition without which it would be chaotic to effectively litigate. A failure to materially adhere to the Rules of Court would be counterproductive to the legal system, the operation of our Courts and the administration of justice in the Kingdom.

[30] In **Nhlanhla Macingwane vs Family of God Church and 2 Others (60/2018) [2019] SZSC 56 (26/11/2019)** at paragraph [24] the Court stated-

> *"The Rules of Court are intended to introduce certainty and facilitate the speedy administration of justice. Non-compliance, therefore, will introduce uncertainty and frustrate the administration of justice. It encourages negligence amongst practitioners and, in the absence of good and sufficient reason, will not be condoned"*

In **Blumenthal and Another vs Thomson and Another 1994 (2) SA 118** at 121 the Court, notwithstanding that therein was an application for condonation, had to say the following-

> *"This Court has often said that in the cases of flagrant breaches of the Rules, especially where there is no acceptable explanation therefore, the indulgence of condonation may be refused whatever the merits of the appeal are: this applies even where the blame lies solely with the attorney"* as is the case here.

And in **Saloojee and Another NO vs Minister of Community Development 1965 (2) SA 135 (A)** at 141 C-E there is this passage which cannot be ignored by this Court-

> *"There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or inefficiency of the explanation tendered".*

This is a typical case where a litigant carries the sins of his saviour or legal representative.

[31] For completeness, there was also an application for condonation for the late filing of Heads of Argument and the Bundle of Authorities filed by the Eswatini Observer (Pty). There is no contest against it and it satisfies the requirements for condonation. It is therefore granted.

Court Order

[32] In view of the foregoing, this Court makes the following Orders-

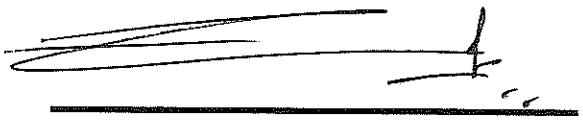
1. The Appeal is deemed to have been abandoned as provided for under Rule 30 (4) of the Rules of this Court.

2. Costs are awarded to the Applicant.

S.J.K. MATSEBULA

JUSTICE OF APPEAL

I agree



J.P ANNANDALE

JUSTICE OF APPEAL

I agree

N.J. HLOPHE

JUSTICE OF APPEAL

For the Applicant: MAGAGULA & HLOPHE ATTORNEYS

For the Respondent: S.M JELE ATTORNEYS