

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

Case No.: 20/2023

In the matter between:

MAKHOSAZANA DLAMINI

1st Applicant

ALINO KADIMA

2nd Applicant

and

CORRIDOR TRADING COMPANY (PTY) LIMITED

1st Respondent

PHINDILE MBANDZE

2nd Respondent

JESTER NKALA

3rd Respondent

In re:

CORRIDOR TRADING COMPANY (PTY) LIMITED

1st Appellant

PHINDILE MBANDZE

2nd Appellant

JESTER NKALA

3rd Appellant

and

MAKHOSAZANA DLAMINI

1st Respondent

ALINO KADIMA

2nd Respondent

Neutral Citation: *Makhosazana Dlamini and Another vs Corridor Trading Company (Pty) Limited and Others In re: Corridor Trading Company (Pty) Limited and Others vs Makhosazana Dlamini and Another (20/2023) [2023] SZSC 35 (30/08/2023)*

Coram: J.M. CURRIE JA (sitting as a single Judge)

Date Heard: 01 August, 2023.

Date Delivered: 30 August, 2023.

SUMMARY : *Civil procedure – Application that appeal deemed to have been abandoned – No record of appeal filed – Counter-application for extension of time filed after application to have appeal deemed abandoned filed together with answering affidavit opposing application – No application for condonation – No heads of argument, relevant principles and rules of court considered – Appeal deemed abandoned – Costs awarded on the ordinary scale.*

JUDGMENT

J.M. CURRIE JA:

INTRODUCTION

[1] This matter arises as a result of an order granted on 23 March 2023 in the court *a quo* in favour of the applicants against the respondents as follows:

- “1. The Defendants jointly and severally, the one paying for the others to be absolved are ordered to pay to the 2nd Plaintiff the sum of E 625 000-00 (Six Hundred and Twenty Five Thousand Emalangeni);*
- 2. Interest thereon at the rate of 9% per annum a temporae morae;*
- 3. Costs of suit; and*
- 4. The First Plaintiff is hereby absolved from Second Plaintiff's claim.”*

[2] No written judgment was handed down.

BACKGROUND

[3] The respondents being dissatisfied with the judgment, noted an appeal on 12 April 2023 despite the fact that no reasons for the judgment had been delivered, as follows:

- “1. The Court a quo erred in law and in fact in finding that there are no triable issues in the matter and granting Respondents orders in terms of their particulars of claim and/or the amounts as adjusted;*

2. *The court a quo erred in law and in fact in ignoring a number of triable issues which appears ex facie on the pleading as follows:-*

2.1 *The first and second Respondents' claim was premised on a loan agreement between the parties. The existence of the agreement is disputed by the appellants, the funder (second Respondet) is unknown to the appellants and appellants deny receiving any funds either from first or second Respondent.*

2.2 *The Respondent were to prove their case on the alleged cause of action (loan) and triable issues existed.*

2.3 *In terms of Respondents' particulars of claim the funding was sourced by A P I (PTY) LTD and in terms of annexure "B" of the Respondents' combined Summons the first appellant was liable to A P I (PTY) LTD. There is a triable issue as to how the appellants are liable to the first and second Respondents.*

3. *The Court a quo erred in law and in fact in making a conclusion that the appellants' admission of their liability in terms of an exit plan after the parties' joint venture failed extinguished all triable issues in that:-*

3.1 *The admission of liability or agreement to pay was made ex gratia and was founded on another causes of action not alleged by the Respondents in their particulars of claim.*

3.2 *The liability was subject to conditions which the first Respondent was to under go (see annexure B of plaintiff's summons).*

3.3 *The amount owed in terms of the exit plan was not due and payable at once but parties were to agree on terms of payment."*

[4] The appeal was lodged on 12 April 2023, within the time limits prescribed by the Rules in that Rule 8 provides that a notice of appeal shall be filed within four weeks of the written judgment appealed against.

[5] Thereafter, the respondents/appellants failed to lodge the record of proceedings within two months of the date of noting the appeal as required by the Rules, their reason being that no written reasons for the judgment had been provided.

[6] As a result of the failure by the respondents to file the record, the applicants, on 29 June 2023 filed an application for a declaratory order declaring the appeal to be deemed abandoned.

[7] The respondents opposed the application and filed an answering affidavit on 23 July 2023 together with a counter-application.

APPLICANT'S CASE

[8] The applicants have moved the application in terms of Rule 30 (4) and maintain that in terms of this rule the appeal has been deemed abandoned and dismissed and that, consequently, execution may take place.

[9] Applicants contend that respondents had never denied liability and had always indicated that they wished to settle amounts owing to the applicants. Before proceedings were instituted in the court *a quo* respondents had put forward various settlement proposals to the applicants whereupon they had drafted various deeds of settlement in response thereto and presented them to respondents but same were never signed by respondents. As result applicants pursued the litigation proceedings and judgment was granted in the court *a quo* on 7 March 2023.

[10] When applicants attempted to execute in terms of the judgment respondents then offered to pay the sum of E 7000 (Seven Thousand Emalangeni) and thereafter monthly instalments of E 10 000 (Ten Thousand Emalangeni) in settlement of the debt. The offer was accepted by applicants and respondents made payment of the sum of E 7 000 (seven thousand Emalangeni). However, instead of paying the first instalment of E 10 000, thereafter, the respondents lodged their appeal on 12 April 2023.

[11] The record of appeal was due by 11 June 2023 but respondents failed to file same, nor did they bring an application in terms of Rule 16 for an extension of time.

[12] Applicants submit that the appeal was filed in bad faith as the respondents had clearly admitted their liability to applicants and were actually making payments towards liquidating their indebtedness to applicants. Furthermore, in their notice of appeal applicants have attempted to introduce new evidence which was not before the court *a quo*.

[13] Applicants submit that the conduct of the respondents is nothing but a delaying tactic, is an abuse of court process, and that a punitive costs orders should be granted against them.

RESPONDENTS' CASE

[14] Respondents oppose the application for abandonment and have together with their answering affidavit filed on 17 July 2023, attached a document entitled "*counter-application*" in which they seek an extension of time within which to file the record, an order directing the court *a quo*

to issue a written judgment with reasons, and ancillary relief. No heads of argument have been filed by the respondents.

[15] Respondents state that on 7 March 2023 the matter had proceeded on the contested roll in the court *a quo*. In addressing the court, the applicants' attorney submitted that the respondents had admitted liability but had failed to pay the amount owing to the applicants.

[16] In response thereto the respondents' legal representative submitted that, his clients had acknowledged themselves to be indebted to the first plaintiff's company in terms of an exit agreement, the terms of which had not yet been finalized, and therefore the debt was not yet payable, but not in terms of a loan agreement as claimed by the applicants.

[17] Despite the argument of the respondents the court *a quo* declared that there were no triable issues and granted judgment against respondents.

[18] Respondents submit that despite the grant of judgment against them and the fact that they had lodged an appeal they continued to pay the debt in *“in terms of the exit agreement”*.

[19] Respondents submit that they have been unable to file the record as no written reasons for the judgment have been delivered despite efforts on their part to obtain same. In this regard respondents state that their attorney has been in constant consultation with the clerk of Judge M. Dlamini regarding the issue of a written judgement but to no avail. No copies of correspondence were attached to the application in support of this allegation.

APPLICABLE LAW

[20] An appeal is deemed abandoned in the following circumstances as set out in Rule 30 of the Rules of this Court:

“30. (1) The appellant shall prepare the record on appeal in accordance with sub-rules (5) and (6) hereof and shall within two months of the date of noting of the appeal lodge a

copy thereof with the Registrar of the High Court for certification as correct.

....

(4) Subject to Rule (16), 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.”

[21] It is apparent from Rule 30 that where an appellant fails to file the record timeously the appeal shall be deemed to have been abandoned. However, the appellant may invoke Rule 16 as soon as he realizes that he is not able to comply with the Rules. An application in terms of Rule 16 must be done prior to the lapse of the time limit prescribed by the Rules and not after the expiry of the prescribed time limits.

[22] Rule 16 provides the following:

“(1) The Judge President or any Judge of appeal designated by him may on application extend any time prescribed by these Rules:

Provided that the Judge President or such Judge may if he thinks fit refer the application to the Court of Appeal for decision.

- (2) *An application for extension shall be supported by an affidavit setting forth good and substantial reasons for the application and where the application is for leave to appeal the affidavit shall contain grounds of appeal which prima facie show good cause for leave to be granted.”*

[23] In addition, as soon as it litigant realizes that he is not able, for whatever reason whatsoever, to comply with the rules he should, in addition to remedying his default apply for condonation for non-compliance with the Rules. In this regard Rule 17 provides as follows:

“17. The Court of Appeal may on application and for sufficient cause shown, excuse any party from compliance with any of these Rules and may give such directions in matters of practice and procedure as it considers just and expedient.”

[24] Section 30 (4) is straight forward and is couched in peremptory terms. Therefore, an appellant who fails to submit the record within the prescribed period of 2 months in terms of rule 30 (1) is deemed to have abandoned his or her appeal unless he or she has launched an application for the extension of time as envisaged by Rule 16 (1). The said application ought to be launched within the period of two months of noting of an Appeal before the *dies* expire.

FINDINGS OF THIS COURT

[25] As no record of proceedings has been filed it is unknown what exactly transpired in the court *a quo*.

[26] Whilst I am sympathetic to the plight of the respondents, being unable to obtain a written judgment, remedies were available to them in terms of Rules 16 & 17. Furthermore, no written evidence of the efforts that were made by Respondents to obtain a written judgment were attached to the answering affidavit nor the counter-application.

[27] The counter application in terms of Rule 16 appears to be an afterthought once the applicants had filed their application to have the appeal deemed abandoned and the respondents have not filed an application for condonation.

[28] With regard to prospects of success the applicants merely state: “.....we have a good case on appeal and the applicants’ aim is to have the matter dismissed on a technical point.” Full details of the prospects of success on appeal have therefore not been alleged and the respondents have failed to demonstrate that the court *a quo* failed to exercise its discretion judiciously and that consequently this Court should interfere with its judgment and reach a different conclusion. Therefore the application does not meet the requisite requirements and stands to be dismissed.

[29] There are a plethora of judgments emanating from this court and it is well-settled in this jurisdiction that as soon as a litigant becomes aware that compliance with the Rules will not be possible, he should invoke Rule 16 without delay and lodge an application for extension of time, setting forth good and substantial reasons for the application.

[30] In **Dr. Sifiso Barrow v. Dr. Priscilla Dlamini and The University of Swaziland** (09/2014) [2015] SZSC 09 (09/12/2015) the Court stated at p. 16:

“It has repeatedly been held by this Court almost ad nauseam, that as soon as a litigant or his counsel becomes aware that compliance with the Rules will not be possible, it requires to be dealt with forthwith without delay”.

[31] As far as an application for condonation is concerned, the matter is crisply enunciated in the matter of **Terror Maziya v The Attorney General** (66 of 2020) [2021] SZSC 3 (2 June 2021) and the cases cited therein are informative in this regard. The Court stated at paragraph 14:

“It is apparent from Rule 30 that where the appellant fails to file the record timeously the appeal shall be deemed to have been abandoned. However, the appellant may invoke Rule 16 as soon as he realises that he will not comply with the Rules. Rule 16 allows the appellant to lodge an application for an extension of time prescribed by the Rules whenever he realises that he will not

comply with the Rules; this should be done prior to the lapse of the time prescribed by the Rules."

[32] In paragraph 17: "Similarly, 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 the litigant's Attorney will not exonerate the litigant. The general principle of our law regarding condonation is that whenever a prospective appellant realises 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 lapsed."

[33] In my view it was incumbent on the judge in the court *a quo* to provide written reasons for the judgment as the matter was on the contested roll and opposed by respondents. Ordinarily, litigants are entitled to reasons for a judicial decision and if the matter is taken on appeal a reasoned judgment is indispensable to the appeal process. *In casu* it is unknown on what basis the court *a quo* issued judgment in favour of the respondents.

[34] Nonetheless if a written judgment was not issued timeously and the respondents were unable to file the record, remedies were available to them in terms of Rules 16 and 17. Respondents cannot bring an applicant to court for an extension of time when applicants have already sought an order declaring the appeal deemed abandoned. Respondents have merely filed a scant counter-application together with its answering affidavit without attaching any written documentary evidence, seeking an extension of time without, without filing a separate application in terms of Rule 17 for condonation for non-compliance with the rules.

[35] Despite the numerous judgments of this Court practitioners continue to flagrantly disregard the rules of this court and abuse the court process by simply noting an appeal in order to delay execution whilst they have no intention of pursuing their appeal, nor do they have good prospects of success on appeal.

[36] Whilst the provisions of Rule 34 (4) are peremptory in that if an appellant fails to file the record within the prescribed time, the appeal is deemed abandoned this court has a discretion which it exercises judiciously to condone non-compliance with the Rules if 'sufficient

cause' is shown in terms of an application for condonation. If sufficient cause exists as contained in an application the Court may condone the non-compliance with the rules and give directions in respect of procedure and practice as it considers appropriate.

[37] In the present matter the respondents did not make use of the remedies available to them. An application for an extension of time in terms of Rule 16 was not brought within the prescribed time, and no separate application was brought in terms of Rule 17. In perpetuation of the flagrant disregard of the Rules no heads of argument were filed. In the circumstances Rule 30 (4) applies with full force and the appeal is deemed abandoned.

[38] In the recent case of **The Eswatini Observer (Pty)Ltd V Dlamini (25 of 2021) [2023] SZSC 27 (15 August 2023)** the court held: “ **The reason and persuasion would only reach our courts through a condonation application. 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 counter productive to the legal system, the operation of our Courts and the administration in our Kingdom.**”

COSTS


[39] The applicants have sought costs on a punitive basis as they state that the appeal has been lodged in bad faith as respondents have admitted their liability to the applicants and were actually making payments to the applicants towards liquidating their indebtedness. By lodging a notice of appeal the applicants have been prevented from executing whereas they could have requested an extension of time within which to make payments.

[40] In my view it is unknown to this Court what transpired in the court *a quo* and exactly why the respondents have noted an appeal. Whilst costs should follow the result in my view it is not appropriate in this case to grant costs on a punitive basis.

ORDER

[41] In view of the foregoing the following order is made:

1. The appeal is deemed to be abandoned.
2. Respondents' counter-application is dismissed.
3. Costs are awarded to the applicants.


J. M. CURRIE
JUSTICE OF APPEAL

For the Appellants: MR. M. MNTUNGWA FROM DYNASTY INC.
ATTORNEYS

For the Respondents: MR. S.B. MOTSA FROM S.B. MOTSA
ATTORNEYS