

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Held at Mbabane

Case No. 16/2023

In the matter between:

MUZI SIMELANE

APPLICANT

AND

NTOKOZO TSELA

RESPONDENT

In re:-

NTOKOZO TSELA

APPELLANT

AND

MUZI SIMELANE

FIRST RESPONDENT

THE HONOURABLE MAGISTRATE

SECOND

RESPONDENT

I. MOTSA N.O.

THE CLERK OF COURT – MBABANE

MAGISTRATE’S COURT

THIRD

RESPONDENT

THE ATTORNEY GENERAL N.O

**FOURTH
RESPONDENT**

Neutral citation: *Muzi Simelane vs Ntokozo Tsela & Others [16/2023] [2023]*
SZSC 45 (13 November 2023)

Coram: FAKUDZE AJA

Heard: 10th August, 2023

Delivered: 13th November, 2023

JUDGMENT

FAKUDZE A.J.A

Background

- [1] This is an Application moved in terms of Rule 30 (4) of the Rules of the Supreme Court. The Applicant is seeking a declaratory Order that the Appellant has abandoned the Appeal lodged on the 29th March, 2023 or that same be deemed to have been abandoned. The appeal should therefore be dismissed and the execution of the Order of the court *a quo* should follow harmoniously.
- [2] It is common practice in this jurisdiction that where an Appellant who has filed an appeal, then fails to file the Record of Appeal within the time prescribed and further fails to file an application for an extension of time as prescribed in the Rules of Court, then the other party has a remedy which is to seek a declaratory Order that the appeal is deemed to have been abandoned and accordingly dismissed.

- [3] The Application for abandonment is not opposed by the Respondent who is the Appellant in the main.

History of the matter

- [4] On or about the 19th August, 2022, the Applicant was served with an Interim Order which apparently culminated from peace binding proceedings. The Interim Order had a return date which was set for the 31st August, 2022. A copy of the Interim Order is attached to this Application and marked as Annexure “MS 1.” The Applicant proceeded to the Mbabane Magistrate’s Court and he enquired about the process and was informed to wait until his name was called. He waited in court for his name to be called up until the end of the roll. The court adjourned for the day. He then saw a certain police officer that he knew and requested to hitch a lift from the police officers and went back to work.
- [5] On the following day, 1st September, 2022, the Applicant went back to the Mbabane Magistrate’s Court hoping to solicit audience with the Magistrate who was seized with the Applicant’s matter. The Magistrate granted the Applicant audience and informed him that his matter was handled in the Magistrate’s chambers and the Interim Order was confirmed and made final.
- [6] Given that the Applicant was not satisfied with the manner in which the matter was handled, an application for review at the High Court was moved by the Applicant. It was aimed at challenging the Magistrate’s action. Same was opposed by the Respondent. The matter was set for argument on the 3rd March, 2023 wherein the decision of the Magistrate was set aside. The High Court further ordered that the Applicant and the Respondent must keep and bind peace. The Respondent was ordered to pay

the costs for the review. A Bill of costs was prepared on the 30th March, 2023. When same was to be taxed, the Applicant's attorney was told by the court officials that the Respondent had filed an Appeal.

The Appeal

[7] Following the decision of the High Court, the Respondent filed an Appeal on the following grounds:

- (1) *The Learned Judge erred in law in finding that the decision of the 2nd Respondent ought to be reviewed and set aside in totality and ordering that the Appellant and First Respondent bind and keep peace;*
- (2) *The Learned Judge erred in law in reviewing and setting aside the decision of the 2nd Respondent in totality without admitting Appellant's Heads of Argument handed in from the Bar;*
- (3) *The above Honourable Court is kindly notified that these grounds of Appeal are provisional and the Appellant will exercise its right in terms of the Rules and amend the grounds of Appeal as soon as it is in possession of the copy of the judgment. The Judgment of the High Court was delivered on the 3rd March, 2023 and served upon the Appellant on the 14th March, 2023 and having written to the Registrar of the High Court on the 29th March, 2023; the Appellant has not yet been furnished with a copy of the judgment. A copy of the letter is herein and marked "NT 1."*

[8] The Applicant filed a Notice of Intention to Oppose the Appeal. What followed is that the execution of the judgment of the High Court was

automatically stayed pending the decision of the Appeal Court. The Record of Proceedings of the High Court was not filed.

- [9] In terms of the Rules, an Appellant is required to file the Record within 2 months from the date of filing of the Appeal. With respect to the case at hand, the Appellant failed to do so. The appeal was noted on the 30th March, 2023, and the Record should have been filed on or before the 30th May, 2023. If the reason the Record cannot be filed within 2 months, Rule 16 anticipates those instances and allows the Appellant to file a request for an extension of time for filing. The Appellant did not file such request with the Supreme Court. The Appellant also had an opportunity to apply for condonation in terms of Rule 17. It failed to do so.

The law

- [10] Following the noting of the Appeal within the time prescribed by Rule 8, the Appellant is called upon to prepare the Record as stated in Rule 30 (1) which says:

“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 appeal, lodge a copy thereof with the Registrar of the High Court for certification as correct.”

- [11] Rule 30 (4) continues to say that:

“Subject to Rule 16(1), if an Appellant fails to note an Appeal or to submit or re-submit the record for certification within the time provided by this Rule, the appeal shall be deemed to have been abandoned.”

[12] It is clear from Rule 30 that where an Appellant fails to file the Notice of Appeal or Record timeously, the Appeal shall be deemed to have been abandoned. However, the Appellant may invoke Rule 16 as soon as it realises that it 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.

[13] Rule 16 (1) and (2) provides as follows:

“(1) The Judge President or any Judge of Appeal designated by him, may on application, extend any time prescribed by the 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 the grounds of appeal which prima facie show good cause for leave to be granted.”

[14] The litigant may, in addition, as soon as it realises that it is not able to comply with the Rules, remedy its default by applying 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.”

Findings of the court

[15] The Record of the court *a quo* shows that its Order was by consent between the parties. The Appeal should have been noted by the Appellant because it is trite that you cannot appeal a consent Order. It is also worth noting that after filing the Appeal Notice, the Appellant did not file the Record of proceedings in the court *a quo* within the two (2) months period prescribed by the Rules. Further, the Appellant did not make use of the other available avenues having failed to file the Record. It did not bother to make use of Rule 16(1) which makes room for the extension of time if a litigant did not file the Record within the two (2) months period. Rule 16 (1) provides as follows:

“16(1) The Judge President or any Judge of Appeal designated by him, may on application extend any time prescribed by the Rules... ..”

[16] In the event the Appellant fails to comply with Rule 16 (which pertains to extension of time), there is also Rule 17 which deals with condonation for non-compliance. The Rule states 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.”

[17] It seems as if the appeal was noted by the Respondent in bad faith when one considers that the High Court Order was by consent between the parties. It should not have been noted. Annexure “MS 6” shows the endorsement by the Learned Judge *a quo* when it entered the following:

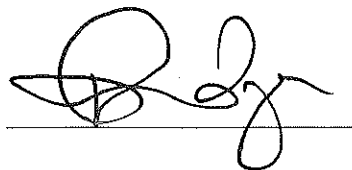
“After hearing the parties, and by consent thereof an order is made in the following terms.....”

[18] Given that the Appellant did nothing after noting the Appeal, it is therefore reasonable to conclude that it has no intention of pursuing the Appeal and therefore Rule 30 (4) should come into play. This Rule provides as follows:

“30 (4) Subject to Rule 16(1), if an Applicant fails to note an appeal or to submit or re-submit the record for certification within the time provided by this Rule, the Appeal shall be deemed to have been abandoned.”

[19] When the matter appeared before me, the Respondent’s attorney put it on record that it is not opposing the Application in terms of Rule 30 (4); therefore granting the judgment in favour of the Applicant is in order. After all there is a judgment of the court *a quo* that was pronounced in favour of the Applicant which has greatly prejudiced the Applicant as same could not be executed pending the finalisation of this appeal.

[20] Taking into account all that has been said above, the Appeal noted by the Respondent on the 30th March, 2023 is deemed to have been abandoned. Costs of these proceedings are granted in favour of the Applicant.



FAKUDZE A.J.A

Applicant: Mr. Mtungwa

Respondent: Mr. S.G. Dlamini