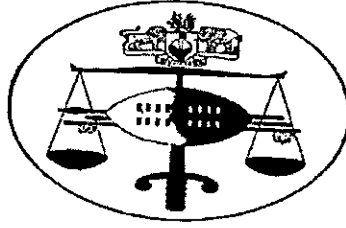


IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 07/2023

HELD AT MBABANE

In the matter between:

UNITED GENERAL INSURANCE LIMITED — **Applicant**

and

DIDAK PARMER — **Respondent**

In re:

DIDAK PARMER — **Appellant**

and

UNITED INSURANCE LIMITED — **Respondent**

Neutral Citation: *United General Insurance Limited vs Didak Parmer In re: Didak Parmer vs United Insurance Limited* (07/2023) [2023] *SZSC* 44 (19/10/2023)

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

Heard: 13 September, 2023.

Delivered: 19 October, 2023.

SUMMARY: *Civil procedure – Appeal filed out of time – No application for extension of time, nor application for condonation for non-compliance – No bundle of authorities filed by respondent – Relevant principles and Rules of Court, distinction between Rules 8(2) and 30(4) as well as prayer for further and/or alternative relief considered – Held that the appeal is not properly before this Court and therefore there is no appeal pending – Costs awarded to applicant.*

JUDGMENT

J.M. CURRIE – JA (sitting as a single judge)

INTRODUCTION

[1] This matter arises as a result of a judgment granted by the Court *a quo* on 21 December 2022 in favour of the applicant as a result of the respondent's failure to file its plea within the prescribed time period after the service of a notice of bar.

[2] The respondent was dissatisfied with the judgment and filed a notice of appeal on 27 January 2023 and a copy of the record on 7 March 2023.

[3] Falling for consideration by this Court is an application declaring the appeal abandoned in terms of **Rule 30 (4)** of the Rules of this Court. There also is a prayer for further and/or alternative relief.

[4] The central issue to be determined is whether the notice of appeal was timeously filed in terms of the rules.

ARGUMENT ON BEHALF OF THE APPLICANT

[5] The applicant contends that the notice of appeal was filed out of time and that in the circumstances leave to appeal out of time ought to have been sought in terms of **Rule 8(2)**, which the respondent failed to do. Neither did the respondent file any application for condonation for non-compliance with the rules.

[6] Furthermore, the respondent failed to file a certified copy of the record within two months of the date of filing of the notice of appeal being on or before 20 March 2023. The applicant claims that the copy of the record served on his attorneys' offices on the 21 February 2023 at 09:06 am did not reflect the Registrar's certificate. Whilst a certified copy of the record bearing the Registrar's certificate dated 7 March 2023, received by applicant's attorneys at the same time of the unsigned copy, was produced by respondent's counsel at the hearing of the matter, applicant's counsel denied receipt of same and vehemently contended that a copy of the record certified by the Registrar was never received by his offices. He had checked at the Registrar's office before launching the present application and stated that applicant would never

have contended that the record was filed out of time if same had been timeously received. He submitted that it was incongruous that both copies bore the same date and time of receipt of the record and suggested that there was *mala fides* on the part of the respondent.

[7] Whilst the respondent states in its answering affidavit to the application deeming the appeal abandoned that a certified copy of the record was timeously filed, no copy of same was annexed to the affidavit.

[8] The provisions of **Rule 30 (4)** are peremptory and the failure by the respondent to timeously file an appeal or certified copy of the record renders the appeal deemed abandoned.

[9] With regard to the issue of costs the applicant contends that the conduct of the appeal proceedings by the respondent has been cavalier and the respondent has not taken the court into its confidence by launching an application for condonation and providing full reasons for its failure to comply with the rules. It has firmly maintained its stance that the rules have been complied with. This amounts to an abuse of the court process and as such warrants an award of costs on the attorney and client scale.

ARGUMENT ON BEHALF OF THE RESPONDENT

[10] The respondent has filed brief heads of argument but no bundle of authorities has been provided to the Court, as is required.

[11] The respondent contends that there is no merit in the **Rule 30 (4)** application and the application constitutes an abuse of the court process as it is the rule itself that "*does the deeming and there is no need for the Court to be involved.*" The respondent ought to have approached the Court *a quo* for leave to execute instead of launching the application in terms of Rule 30(4).

[12] In any event the appeal was timeously noted as the judgment was delivered outside the High Court's last session. Furthermore, the fact that the Registrar accepted and filed the notice of appeal confirms that same was timeously filed.

[13] The respondent claims that the filing of the record was well within the prescribed time limits of two calendar months as per **Rule 30 (1)** and one of the copies filed in court dated 7 March 2023 does bear the Registrar's stamp, although one copy does not.

[14] The respondent denies that the record was not certified but submits that even if it was not the rules should not be applied "*as if they are the Ten Commandments.*" The respondent's counsel submitted that the Court should give consideration to the fact that all attorneys' offices are closed over the festive period and therefore it was not possible to serve court process at that time. He relied on the case of ***George Sophocleus vs Sam Sophocleous (Civil Appeal case No. 12/2002*** where the court stated:

"...***The judgment takes too rigid a view of the Rules of court because regard must always be had to all the relevant facts and circumstances of each particular case. Rules of Court, important as they are, should not be regarded as if they are the Ten Commandments. Indeed, it has been held that Rules of Court should be interpreted so as to provide for the expeditious disposition of litigation...***'.

[15] The applicant's counsel submitted that this approach had been adopted in countless prior judgments of this Court which culminated in the matter of ***Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors (4 of 2006) [2006] SZHC 78 (28 April 2006)***, without specific reference to any authorities in support thereof, which remains precedent in this jurisdiction.

Without filing any authorities on point he maintained that latter decisions of this Court adopted a rigid and inflexible approach "*devoid of any precedential force*" as they do not demonstrate that the ***Shell Oil*** case was incorrect.

[16] Both decisions referred to by counsel for the respondent were incomplete for want of full citations and no bundle of authorities was provided.

THE LAW AND FINDINGS OF THIS COURT

[17] **Rule 26** of the High Court Rules provides for *dies non* as between 16 December and 7 January in respect of delivery of a pleadings but this rule does not apply to the Supreme Court. There is nothing contained in the Supreme Court Rules which either constitutes a similar provision or which provides that **Rule 26** would find application.

[18] The time periods regarding the filing of a notice of appeal are contained in **Rule 8** of the latter Rules which provide as set out hereunder, and the construct of which was fully argued by Counsel for both parties:

"Rule 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 a written judgment such period shall run from the date of delivery of such written judgment:

....

Rule 8 (2) ***The Registrar shall not file any notice of appeal which is presented after the expiry of the period referred to in paragraph (1) unless leave to appeal out of time has previously been obtained.*** (my underlining for emphasis)

[19] **Rule 8 (1)** is thus peremptory and requires that the appeal should be filed within four weeks of the date of the written judgment and in this case the notice of appeal should therefore have been filed on or before 18 January 2023, whereas it was filed out of time on 27 January 2023.

[20] Likewise in terms of **Rule 8 (2)** the Registrar is directed, in peremptory terms, that she shall not file any notice of appeal which is presented for filing to her after the expiry of the four week period referred to in **Rule 8 (1)** without the litigant having sought leave to appeal out of time and leave having been granted by the court.

[21] If the respondent realized that he was not able to file its notice of appeal within the four week period it ought to have brought an application for an extension of time in terms of **Rule 16** setting forth good and substantial reasons why compliance was not possible. In this regard **Rule 16** provides as follows:

"Rule 16 (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 of appeal may if he thinks fit refer the Application to the Court of Appeal for decision.

Rule 16 (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."*

[22] Further, it has been held in this Court in numerous judgments, that as soon as a litigant realizes that he has not complied with the rules he should, apart from remedying his default, immediately apply for condonation without delay setting forth full reasons for the delay.

22.1 Condonation is dealt with in **Rule 17** which provides:

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

22.2 In the matter of ***Terror Maziya v The Attorney General (66/2020) [2021] SZSC 03 (02ND June 2021)*** the Honourable Chief Justice M.C.B. Maphalala stated: ***"This Court has a discretion which it exercises judiciously to condone non-compliance with its own Rules upon 'sufficient cause' shown pursuant to an application for condonation. When the Court considers that sufficient cause exist in support of condonation, the Court may give directions in matters of practice and procedure as it considers just and expedient."***

[23] Despite the above rules and the plethora of judgments of this Court, the respondent has "*dug in its heels*" and maintained its stance that the notice of appeal was timeously filed and therefore it was not necessary to apply for leave to appeal in terms of **Rule 8(2)**, nor to file any application for an

extension of time in terms of **Rule 16,** nor apply for condonation in terms of **Rule 17,** setting out full details of the reasons for non-compliance with **Rule 8 (1).**

[24] I find the attitude of the respondent remarkable and disappointing in that litigants have been warned by this Court over the years that failure to comply with the Rules shall not be tolerated.

24.1 The Rules are intended to regulate the administration of justice and litigants are obliged to comply with same. In ***De Barry Anita Belinda vs. A.G.Thomas (Pty) Ltd (30/2015) [2016]*** **this Court** stated that:

"Despite numerous Judgments, circulars, warnings from Judges, practitioners in this Court nevertheless continue to fail to abide by the Rules of this Court with seeming impunity and we hope that this Judgment will demonstrate that this Court will no longer tolerate non-compliance of the Rules of this Court nor the flagrant abuse of such Rules. Having said that, this Court will always consider genuine, well documented Applications in terms of the Rules provided that full acceptable details are set out in Founding Affidavits, the

Court taken into the confidence of the Applicant and such Applications brought in terms of the Rules of this Court immediately upon a problem arising."

24.2 In the matter of Terror ***Maziya** (supra)* the Honourable Chief Justice M.C.B. Maphalala also quoted with approval the dicta in ***Simon Musa Matsebula v Swaziland Building Society, Civil Appeal No 11 of 1998*** wherein Steyn JA stated that:

"It is with regret that I record that practitioners in the Kingdom only too frequently fragrantly disregard the Rules. Their failure to comply with the Rules conscientiously has become almost the rule rather than the exception. They appear to fail to appreciate that the Rules have been directly formulated to facilitate the delivery of speedy and efficient justice. The disregard of the Rules of Court and a good practice have so often and so clearly been disapproved by this Court that non-compliance of a serious kind will henceforth result in appropriate cases either in the appropriate procedural orders being made such as striking matters off the roll or in appropriate orders for costs, including orders for costs de bonis propriis."

24.3 For instance, in the matter of ***Royal Eswatini Sugar Corporation Limited vs Acting Judge Misimango N.O. & 4 Others (93/2020) [2021] SZSC 27 (12/10/21)*** the Court dismissed an appeal filed out of time as a result of failure of the applicant in the application for condonation to allege reasonable and credible reasons for the delay.

[25] Despite these warnings and the numerous judgments of this Court, over many years, the respondent's Counsel persists in his attitude that the Rules are not essential and should not be regarded as "*the Ten Commandments,*" which in my view would have the effect of rendering the remedies available to a prospective appellant, having failed to timeously file the notice of appeal, to be of no more than passing academic interest.

[26] The fact that the Registrar accepted the notice of appeal, although it was filed out of time, does not exonerate the respondent from compliance with the rules. The office of the Registrar has previously been cautioned not to accept process filed out of time without an order being granted by the Court, for instance in ***Mfanukhona Maduna and Two Others and Junior Achievement Swaziland (105/2017) [2018] SZSC 31 (2018)*** where the Court had this to say:

"[21] However, it is apposite at this juncture to caution the office of the Registrar that where the Rules preclude the office from accepting processes that are out of time, that it must be done so at all times in a uniform fashion. Therefore, the phenomenon whereby filing of papers which are out of time is allowed in certain cases and rejected in others must stop forthwith."

[27] Whilst the Court has a discretion, to be exercised judicially, to condone non-compliance with the Rules, sufficient cause ought to be shown in an application for condonation. If the Court finds that sufficient cause does exist it may grant condonation for such non-compliance.

[28] It is clear that the notice of appeal was filed after the expiry of the one month period prescribed in the rules. There was no application for leave to appeal or for an extension of time or for condonation. I find no merit in the somewhat startling argument of the respondent's Counsel that all attorney's offices are closed over the festive period and therefore that it is unnecessary to comply with the Rules of this Court during said period.

[29] Meriting further consideration *in casu*, is the nature of the relief sought to by the applicant. The main prayer pertains to **Rule 30(4)** but there is a prayer for further and/or alternative relief.

29.1 The portion of **Rule 30(4)** in dealing with a notice of appeal (*"... if an appellant fails to note an appeal... ")* in my view applies to the scenario where no notice had been filed, whereas **Rule 8(2)** is appropriate in the scenario where an appeal had been noted, albeit out of time. I am fortified in drawing this distinction by the pronouncement of this Court in the matter of ***Mfanukhona Maduna*** (*supra*) where a notice of appeal was filed out of time and where the Court as per SP Dlamini JA held:

"It follows that the matter is not properly before Court and therefore there is no appeal pending and falling for consideration by this Court........In view of the above findings of this court there are no other issues that require consideration."

29.2 As for the prayer for further and/or alternative relief, in Paragraph [11] of **Combustion Technology (Pty) Ltd v Technoburn (Pty) Ltd 2003 (1) SA 265 (C)**, cited with approval in **National Stadium South Africa**

(Pty) Ltd And Others v FirstRand Bank Ltd 2011 (2) SA 157 (SCA)

(Paragraph [45]) the following was stated:

"[11] The extent to which a plaintiff or an applicant may be granted relief in an application or action under a prayer or claim for further and/or alternative relief is not devoid of difficulty. Isaacs Beck's Theory and Principles of Pleading in Civil Actions 5th ed at 61 says that it 'cannot be precisely indicated', whilst Erasmus et al Supreme Court Practice at B1 - 130A content themselves with that it 'will not assist a plaintiff who seeks relief of quite a different nature from that asked for in the summons'. It is not possible to distill generally applicable criteria from the decided cases in which the ambit of a prayer of that nature (the so-called clausule salutare) has been considered. (See Trustees of the Orange River Land and Asbestos Co v King and Others 6 HCG 260; Colonial Treasurer v Senekal Municipality 1910 OPD 7; Queensland Insurance Co Ltd v Banque Commerciale Africaine 1946 AD 272 at 286; Rooibokoord Sitrus (Edms) Bpk v Louw's Creek Sitrus Koöperatiewe Maatskappy Bpk 1964 (3) SA 601 (T) at 608A; Luzon Investments (Pty) Ltd v Strand Municipality and Another 1990 (1) SA 215 (C) at 229G - 230B.) Berman J in Port Nolloth Municipality v Xhalisa and Others; Luwalala and Others v Port Nolloth

Municipality 1991 (3) SA 98 (C) at 112D - F provided the following, in my respectful view, instructive exposition thereof:

> *'Such a prayer can be invoked to justify or entitle a party to an order in terms other than that set out in the notice of motion (or summons or declaration) where that order is clearly indicated in the founding (and other) affidavits (or in the pleadings) and is established by satisfactory evidence on the papers (or is given), cf Trustees of the Orange River Land and Asbestos Co v King and Others 6 HCG 260 at 296 - 7. Relief under this prayer cannot be granted which is substantially different to that specifically claimed, unless the basis therefor has been fully canvassed, viz the party against whom such relief is to be granted has been fully apprised that relief in this particular form is being sought and has had the fullest opportunity of dealing with the claim for relief being pressed under the head of "further and/or alternative relief'."*

[30] The clear purpose of the applicant's application *in casu* was to obtain an order to the effect that there is no appeal pending before this Court and as aforestated, the construct of **Rule 8** was fully canvassed in argument by the parties. I therefore hold that a declaration that there is no appeal pending and

falling for consideration by this Court, based on **Rule 8**, is competent and appropriate in the circumstances of this matter.

[31] In view of the aforegoing concerning the filing of the notice of appeal, it is not necessary to consider the issue of filing of a certified copy of the record within the prescribed period which, in any event, is disputed by the parties.

[32] Finally, I find that comment on the dilatory and vexatious conduct of the respondent, if it had wished to pursue the appeal unfortunately, is called for. The respondent's failure to timeously to file its notice of appeal is perpetuated by the nonchalant prosecution of the appeal which fragrantly failed to comply with **Rule 31** in that the respondent failed to provide a list of authorities, nor did the respondent provide a bundle of authorities to the Court as is the practice in this jurisdiction. Furthermore, certain of the citations in the heads of argument are incomplete and therefore of limited assistance to the Court.

COSTS

[33] The applicant has applied for costs on a punitive basis.

[34] Whilst is unfortunate that the respondent must bear the consequences of his representatives' negligent conduct, this Court has continually decried the

flagrant disregard of the rules by practitioners which undermines the speedy administration of justice, including in ***Nokuthula Mthembu and Four others vs. Minister of Housing and Another (94/2017) [2018] SZSC 15 (30 May 2018)*** where the Court referred to the ***Simon Musa Matsebula*** case *supra* in which Steyn JA stated the following:

"It is with regret that I record that practitioners in the Kingdom only too frequently flagrantly disregard the Rules. Their failure to comply with the Rules conscientiously has become almost the Rule rather than the exception. They appear to fail to appreciate that the Rules have been deliberately formulated to facilitate the delivery of speedy and efficient justice. The disregard of the Rules of Court and of good practice have so often and so clearly been disapproved of by this Court that non-compliance of a serious kind will henceforth result in procedural orders being made – such as striking matters off the roll – or in appropriate orders for costs, including orders for costs de bonis propriis. As was pointed out in <u>Salojee vs The Minister of Community Development 1965 92) SA 135 at 141</u>, "there is a limit beyond which a litigant cannot escape the results of his Attorney's lack of diligence". Accordingly matters may well be struck from the roll where there is a flagrant disregard of the Rules even though this may be due

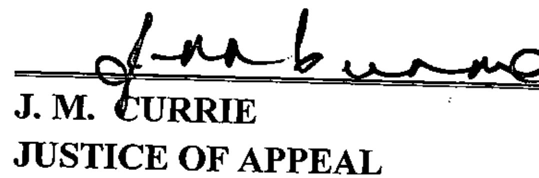
exclusively to the negligence of the legal practitioner concerned. It follows therefore that if clients engage the services of practitioners who fail to observe the required standards associated with the sound practice of the law, they may find themselves non-suited. At the same time the practitioners concerned may be subjected to orders prohibiting them from recovering costs from the clients and having to disburse these themselves."

[35] Whilst there is no doubt that the conduct herein of the respondent's legal representatives, who are senior practitioners in this jurisdiction, on the face of it could be said to has been cavalier, the Court is not persuaded that there are sufficient grounds for exercising its discretion in favour of a punitive costs order and costs therefore will be awarded on the ordinary scale, but this has to be coupled with the caution that this was a borderline case.

[36] Accordingly following order is made:

1. The notice of appeal was erroneously filed and enrolled out of time and as a result there is no appeal pending and falling for consideration by this Court.

2. Costs are awarded to the applicant.



J. M. CURRIE
JUSTICE OF APPEAL

For the Applicant: Mr. F. M. Tengbeh of SV MDLADLA & ASSOCIATES

For the Respondent: Mr. O. Maziya instructed by NZIMA & ASSOCIATES