



IN THE SUPREME COURT OF ESWATINI
JUDGMENT

Case No. 29/2023

HELD AT MBABANE

In the matter between:

ECODYNAMICS INVESTMENTS (PTY) LTD

Applicant

and

WATERSKILLS (PTY) LTD

Respondent

Neutral Citation: *Ecodynamics Investments (Pty) Ltd vs Waterskills (Pty) Ltd (29/2023) [2024] SZSC 72 (28/03/2024)*

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

Heard: 07 March, 2024.

Delivered: 28 March, 2024.

SUMMARY: *Civil Procedure – Application to deem appeal abandoned in terms of Rule 30 (4) of the Court of Appeal Rules 1971 – Notice of appeal filed timeously with the Registrar – Record of appeal filed with the Registrar after the expiry of the two month period provided by the Rules – No application in terms of Rule 16 for extension by respondent in respect of late filing of the record – Appeal deemed abandoned in terms of Rule 30 (4).*

JUDGMENT

J.M. CURRIE – JA

INTRODUCTION

[1] This is an application for an order declaring the appeal dated 3 May 2023 to be deemed abandoned in terms of Rule 30 (4) of the rules of this Court and that the appeal be dismissed with costs.

PROCEEDINGS IN THE COURT *A QUO*

[2] The applicant/plaintiff in the court *a quo* instituted action proceedings against the respondent, seeking, *inter alia*, payment of the sum of E 5 293 984.98 and ancillary relief.

- [3] For the sake of convenience in this application the parties shall be referred to as the applicant and the respondent.
- [4] As the applicant is a South African company and a *peregrinus* of these courts and the respondent demanded security for costs to be furnished by the applicant, which amount was determined by the Registrar in the sum of E 250,000.
- [5] Before the issue of security was resolved the applicant served a notice of bar on the respondent. In response to the notice of bar, instead of filing its plea, the respondent filed a notice in terms of rule 30 alleging that the notice of bar was an irregular step.
- [6] The court *a quo* dismissed the Rule 30 application with costs and judgment by default was granted in favour of the applicant.
- [7] The respondent noted an appeal against the judgment of the court *a quo*, which was delivered on 28 April 2023.

[8] Thereafter and in terms of the Rules of this Court, the respondent was to file the record within two months of noting the appeal.

RULES OF COURT

[9] The relevant rules provide as follows:

“30. (1) The Appellant shall prepare the Record of 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.

(2)

(3)

(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.

30. (4) Subject to Rule 16 (1), if an Appellant fails to note an Appeal or to submit or resubmit the Record of Certification within the time

provided by this Rule, the Appeal shall be deemed to have been abandoned.” (my underlining)

[10] Rule 16 of the Rules of this Court 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.”

[11] The above rules are clear and unambiguous and set out the obligations of a party who has noted an appeal and who is required file the record in terms of the provisions of rule 30. Unless application for extension was made in terms of Rule 16, the consequence of late filing of the record is that the appeal is deemed abandoned.

THE APPLICANT'S CASE

[12] The applicant states that the Rule 30 application was argued in the court *a quo* on 28 April 2023 and that an *ex tempore* judgment was issued on the same day. The respondent immediately filed a notice of appeal dated 3 May 2023 and thereafter a written judgment was delivered on 15 May 2023. Upon receipt of the written judgment the respondent did not file any amendment to its notice of the appeal, in the wake of the written judgment.

[13] The respondent ought to have filed the record for certification by the Registrar on or before 3 July 2023 but same was only filed on 14 July 2023 without a prior application for extension in terms of Rule 16.

(14) The provisions of Rule 30 (4) are peremptory, as has been held by this Court in numerous judgements, and in the circumstances the appeal stands to be deemed abandoned.

THE RESPONDENT'S CASE

[15] On the day of the hearing the respondent's attorney arrived without having filed heads of argument and requested a postponement so that the matter be referred to the Registrar for the allocation of a new date.

[16] The respondent's attorney proffered some lame excuse stating that he was not aware of the matter being set down, nor having received a court roll. The court pointed out that the application to for an order to declare the appeal was served on respondent on 16 January 2024 which should have alerted him to the fact that the matter was proceeding during this session.

CONCLUSION

[17] It is abundantly clear that the respondent has flagrantly disregarded the rules of court right up to the hearing of the matter. Even upon service respondent's attorneys' offices of the applicants heads of argument no effort was made to address the relevant issues.

[18] Practitioners of been warned on umpteen occasions by this Court and in a plethora of judgments that non-compliance with the rules will not be tolerated. To name but a few - in the matter of **Francesca Thandeka Shayo vs Linah Thembi Mbhamali and 2 Others (57/2018) [2019] SZSC 49 (14/11/2019)** the learned Justice Cloete cited with approval the judgments referred to above and stated:

“In my view, and it is abundantly clear from all of the above, that non-compliance with Rules will generally result in adverse judgments in some form or another. In addition I agree entirely with the sentiments expressed by this Court previously that the provisions of Rule 30(4) are peremptory and as such by operation of law the Appeal has reached the end of the road and accordingly formally results in the dismissal of the said Appeal.”

[19] This Court has considered and pronounced on the operation and the consequences of Rule 30 (4) on a number of occasions – refer **Thandie Motsa and 4 Others versus Richard Khanyile and Another (69/2018) [2019] SZHC 24, Nhlanhla Macingwane vs Family of God Church and 2 Others (60/2018) [2019] SZSC 56 (26/11/2019); Abel Mphile Sibandze vs Magagula Hlophe Attorneys (86/2019) [2020] SZSC 25 (24/08/2020); Michael Themba Nsibande and Another vs Ida Coshiwe Nsibande (Nee Kunene) (28/2020) [2020] SZSC 34 (06 October 2021);**

[20] The provisions of Rule 30 (4) are thus peremptory and as such, by the operation of law, the appeal is deemed abandoned.

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

1. The application for a postponement is refused.
2. The appeal is deemed to have been abandoned as provided for in Rule 30 (4).
3. Costs are awarded to the applicant on the ordinary scale.



J. M. CURRIE
JUSTICE OF APPEAL

For the Applicant: MR. K. GININDZA (SIBUSISO B. SHONGWE & ASSOCIATES)

For the Respondent: MR. M. MAGAGULA (ZONKE MAGAGULA & CO.)