

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

CASE NO. 88/2016

In the matter between

WEBSTER LUKHELE

APPLICANT

AND

KHANYISILE JUDITH DLAMINI

RESPONDENT

IN RE:

KHANYISILE JUDITH DLAMINI

APPELLANT

AND

WEBSTER LUKHELE

RESPONDENT

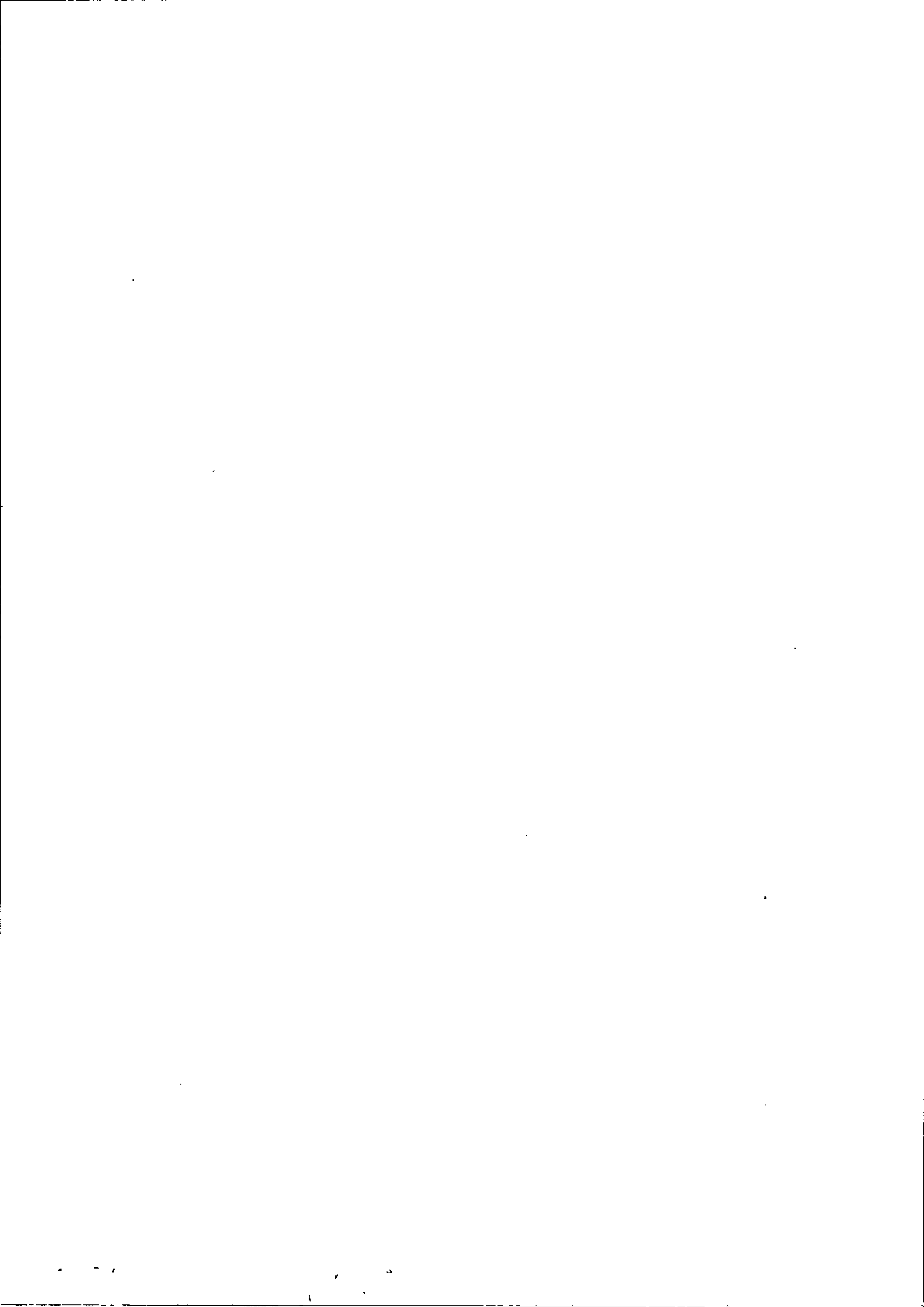
Neutral Citation:

*KHANYISILE JUDITH DLAMINI v WEBSTER LUKHELE (88/2016) [2024]
SZSC 94 (12 SEPTEMBER, 2024)*

Coram : M. D. MAMBA JA.

Heard : 16 SEPTEMBER, 2024

Delivered : 18 SEPTEMBER, 2024



- [1] *Civil Law and Procedure – Noting of Appeal. Appellant enjoined to prepare and submit Court Record for certification by Registrar of the High Court within 2 months of Noting Appeal - Rule 30 (1) of 1971 Appeal Court Rules.*
- [2] *Civil Law and Procedure – Noting of Appeal – Failure by Appellant to submit or file record on appeal within 2 months of Noting Appeal – Appeal to be deemed to have been abandoned – Rule 30 (4) of Rules of Court.*
- [3] *Civil Law and Procedure – Noting of Appeal – Appeal Noted in terms of repealed Rules of Court – Application to declare appeal deemed abandoned noted after coming into force of new Rules – Application incidental to yet integral part of conduct, prosecution or non-prosecution of appeal – governed by repealed Rules – Rule 61 (2) of New Rules.*

MAMBA JA.

- [1] This is an application filed by the Applicant in terms of Rule 30 (4) of the 1971 Rules of this Court. The Applicant seeks, an order declaring that the appeal that was noted by the Respondent on 04 November, 2016 be declared to be deemed to have been abandoned. The Applicant also prays for an order for the costs of the application.
- [2] The application was filed with the Registrar of this Court on 10 July, 2017 and was served on the Respondent's attorneys on 12 July, 2017. Thereafter, the Applicant's attorneys filed a Notice of Set-down of the application, to an unspecified date during the second session of this Court in 2018. This Notice of Set-down was filed with the Registrar on 08 February, 2018; and had already been served on the Respondent's attorneys the previous day. There is, however, no indication on the papers herein whether the matter was ever

enrolled for hearing after this date and what order, if any, was made by this Court. I make these observations because this application appears to me to have been filed a long time ago but with no apparent process towards its conclusion or finalisation.

[3] The application is premised or founded on the ground that since the filing of the Notice of Appeal, the Respondent has failed to lodge or submit a certified copy of the record for purposes of the appeal.

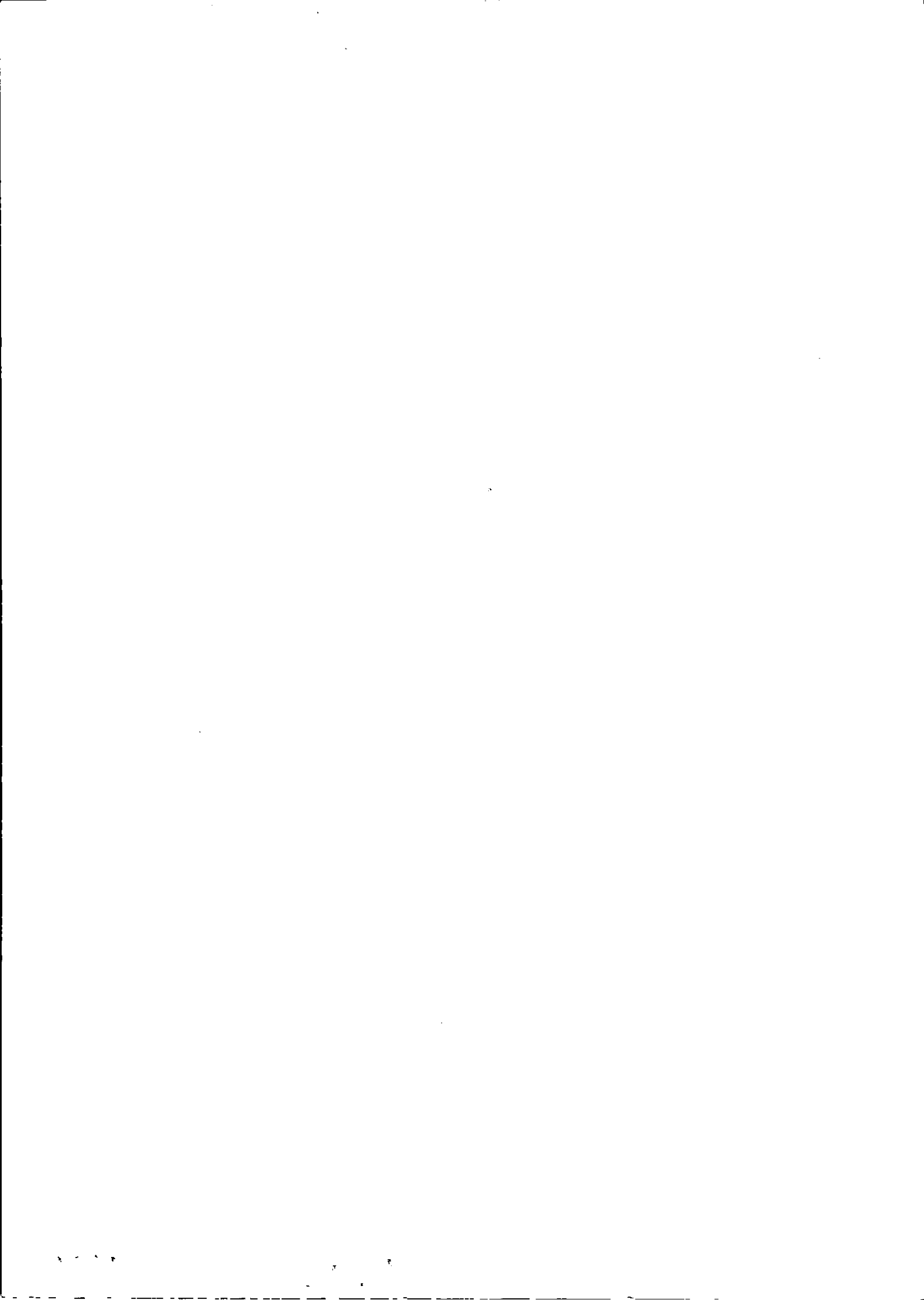
[4] In view of the fact that the appeal was noted in terms of the repealed Rules of this Court, the said appeal is, in terms of Rule 61 (2) of the 2023 Rules, governed or regulated in terms of the old Rules. Rule 61 (2) is in the following terms:

‘61 (2) Notwithstanding sub-rule (1), the conduct of any appeal or review filed before the commencement of these Rules shall, as far as may be practicable, be regulated to its conclusion by the repealed Rules.’

The lodging or submitting of the record for the appeal, is an integral part or process of the appeal or the prosecution thereof. It therefore forms part of the “conduct” or conducting of the appeal referred to in the said sub-rule.




- [5] In terms of Rule 30 (1) of the repealed Rules, an Appellant is required or enjoined to prepare the record on appeal and submit same to the Registrar of the High Court for certification, within 2 months of the date of the noting of the appeal. In the instant case, this should have been done around 6 January, 2017. The Respondent failed to do so and has offered no explanation for such failure. Additionally, the Respondent has not filed and served any papers in response to this application.
- [6] In terms of Rule 30 (4), where an Appellant fails to submit the record for certification within the stipulated period, as is the case herein, ‘the appeal shall be deemed to have been abandoned’. This Rule has been the subject or topic for discussion before this Court on countless occasions and the applicable principles are now well known in this jurisdiction. (*Vide Anita De Barry v A.G. Thomas (Pty) Ltd (30/2015) [2016] SZSC 07 (30 June, 2016)* and *Shongwe Jessie v Shongwe Samuel 1987 – 1995 (4) SLR 220*).
- [7] As already stated above, the Respondent has not responded to this application. This silence by the Respondent is palpable and tends to lend credence to the submission by the Applicant that the noting of the appeal was nothing but a stratagem to delay the execution of the judgment of the Court *a quo*.



[8] From the brief facts and legal principles stated above, I am of the considered view that there is merit in the Applicant's assertion that the appeal herein must be declared to be deemed to have been abandoned. Logically, this finding means that this Court has not dealt with the merits of the appeal. In the result, I think that the appropriate order is to have the matter struck off the roll rather than to dismiss it. (See *Shongwe (supra) and Nhlavana Maseko & Others v George Mbatha & Another 2000-2005 (1) SLR 371 at 377i*).

[9] For the foregoing reasons, I grant the following Order:

- (a) The appeal noted by the Respondent on 04 November, 2016 is hereby deemed to have been abandoned and is hereby struck off the roll.
- (b) The Respondent is ordered to pay the costs of this application.



M. D. MAMBA
JUSTICE OF APPEAL

FOR THE APPLICANT: MR. M. MAGAGULA

FOR THE RESPONDENT: (NO APPEARANCE).

