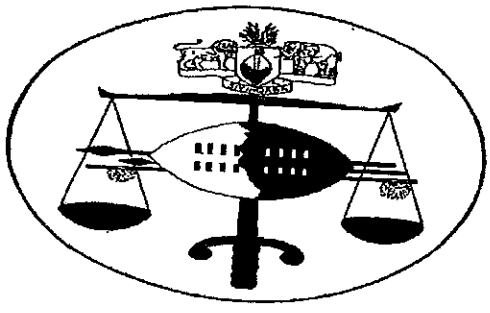


IN THE SUPREME COURT OF ESWATINI

Case No. 47/2023

In the matter between:

ALAN ALEXANDER McGREGOR	**First Appellant**
SONIA LYNDALL McGREGOR	**Second Appellant**
INEZ KATHERINE McGREGOR	**Third Appellant**
ALEXANDER LYNDALL McGREGOR	**Fourth Appellant**
ROBERT WILLIAM ASHWORTH MCGREGOR	**Fifth Appellant**
ALASDAIR ALRIC ASHWORTH McGREGOR	**Sixth Appellant**

and

ROBERT CRABTREE	**First Respondent**
KRISTOPHER ASHWORTH CRABTREE	**Second Respondent**
EMILY JANE CRABTREE	**Third Respondent**
KATIE JANE CRABTREE	**Fourth Respondent**
WALTER BENNETT	**Fifth Respondent**
ROSEMARIE KARIN McEWEN	**Sixth Respondent**
RINA DU TOIT	**Seventh Respondent**
NEDBANK SWAZILAND LIMITED	**Eighth Respondent**
THE MASTER OF THE HIGH COURT	**Ninth Respondent**
THE ATTORNEY GENERAL	**Tenth Respondent**

NEUTRAL CITATION: ***Alan Alexander McGregor and Others v Robert Crabtree and Others (47/2023) [2024] SZSC 95 (26 September 2024)***

CORAM: S.B.M. Maphalala, S.J.K Matsebula *et* J. M. van der Walt JJA

HEARD: 3 June 2024

DELIVERED: 26 September 2024

Summary

Appeal – Rules of Court – restated that Court has duty to ensure compliance with its Rules, mero motu to raise any concerns and to make appropriate orders in the event of non-compliance - litigants should not bargain on apparent non-compliance going undetected or unaddressed merely because no other party had raised it and/or had not sought an order in respect thereof - there is a limit beyond which litigants cannot escape the results of their legal representatives' lack of diligence

*Appeal - Notice of Appeal – Amendment – leave of Court required as per **Rule 12** then applicable (**current Rule 17**)*

*Appeal – Record – Requirements - **Rule 2** defines what constitutes a "record" for purposes of an appeal - implicit that an appeal record must be a proper complete and correct record subject to permissible omissions as per then **Rule 30(5)** (current **Rule 36(6)**) – incomplete record may mislead Court resulting in incorrect conclusions regarding what transpired in the Court a quo and thus resulting in serious miscarriage of justice – held that record* in casu *was incomplete in material respects and thus defective*

*Appeal – Record – Purpose of consultation under said **Rule 30(5)** - to ensure that all parties and Court satisfied that proper record has been placed before Court* – in casu *Appellants not only failed to comply with this Rule but also were resistant to the Respondents' efforts to facilitate and achieve compliance*

*Appeal – Record – Record Defective - Certification by Registrar does not cure the defects and cannot render incomplete record to be complete - unreasonable to seek to apportion blame or remissness to the Registrar, who is entitled to assume a high degree of bona fides and competence on the part of Counsel including compliance with said **Rule 30(5)** when record is submitted, more so where a voluminous record is involved*

Appeal – Record – Record defective — Respondents in casu supplementing record for sake of progress - not for a respondent to ensure that a proper and complete record is before Court -

this duty squarely rests on an appellant – Court however satisfied that record as supplemented constitutes a proper record but Court mindful that record supplemented well after expiry of period within which record was to be filed.

Appeal – appropriate order in casu *– Court reluctant to close doors to Appellants – appeal struck off with costs including costs in respect of supplementing the appeal record – ordered however that appeal may be reinstated upon good cause shown*

JUDGMENT

Cur adv Vult
(Postea: 26th September 2024)

BACKGROUND

[1] Lying at the core of this appeal is an Order by the Honourable Justice Mlangeni dated 14th June 2023 (hereinafter referred to as the "Order") in terms of which *inter alia* the First Appellant was removed as executor of the estate of the late Solveig Crabtree (hereinafter respectively referred to as the "estate" and the "deceased.") The other role players in this chequered legal saga are described in the ensuing reasons for the judgment *a quo*[1] and for current purposes, except insofar as reference may be required for purposes of context, these descriptions will not be repeated in this judgment.

---

[1] Reasons as per ***Robert Crabtree and Others v Alan Alexander McGregor N.O. and Others (748/2017) [2023] SZHC 179 (7 July 2023)***

[2] The ensuing chronology can be summarised as follows:

2.1 14th June 2023, i.e., the same day as the Order: The Appellants filed a Notice of Appeal under Supreme Court Case Number 47/2023 (hereinafter referred to as the "appeal") containing 19 (nineteen) grounds of appeal

2.2 4th July 2023: The Appellants filed an application in terms of **section 148(1)** of the Constitution of the Kingdom of Eswatini, 2005, under Supreme Court Case Number 52/2023 (hereinafter referred to as the "**Section 148** Application.")

2.3 7th July 2023: The Court *a quo* delivered full judgment and reasons in respect of the Order.

2.4 4th August 2023: The Appellants filed a Supplementary Notice of Appeal containing an additional 34 (thirty four) grounds of appeal.

2.5 14th August 2023: The Appellants filed a record consisting of 4 (four) volumes (hereinafter referred to as the "August Record") comprising some 966 (nine hundred and sixty six) pages;

2.6 18th December 2023: The First to Fourth Respondents filed a supplementary record consisting of a further 4 (four) volumes (hereinafter referred to as the "Supplementary Record") comprising some 1 249 (one thousand two hundred and forty nine) pages.

2.6.1 This was coupled with a 41 (forty one) page long application for condonation of late filing thereof, stated to be made *ex abudante cautela* (hereinafter referred to as the "Condonation Application") and which was predicated on a contention by the relevant Respondents that the August Record was incomplete.

2.6.2 In terms of the Notion of Motion, cost on the punitive scale was sought in the event of the application being opposed.

2.6.3 There was no response to the Condonation Application by the Appellants by way of Notice of Intention to Oppose, filing of any affidavit, or otherwise.

2.7 26th January 2024: The Court Roll for the first session of this Court was published, assigning to the **Section 148(1)** Application a hearing date of the 23rd May 2024 and to the appeal, the 3rd June 2024.

2.8 18th April 2014: The Appellants filed Heads of Argument and a Bundle of Authorities in the appeal.

2.9 2nd May 2024: The Appellants filed an Application for Stay of the Appeal pending the outcome of the **Section 148(1)** Application by the Appellants (hereinafter referred to as the "Stay Application") comprising some 101 (one hundred and one) pages.

2.10 7th May 2024: First to Fourth Respondents filed Notice of Intention to Oppose the Stay Application.

2.10 7th May 2024: Sixth Respondent filed Heads of Argument in respect of the appeal

2.11 23rd May 2024: The **Section 148(1)** Application was postponed to the next session[2] and on the same day, the First to Fourth Respondents filed Heads of Argument in respect of the appeal.

2.12 27th May 2024: Some Respondents filed answering papers in the Stay Application.

2.13 29th May 2024: Appellants filed replying papers in the Stay Application.

[3] On the 3rd June 2024 the appeal, as enrolled, was called before us, with appearances on behalf of the First to Seventh Respondents. This was 2 (two) Court days after the last papers had been filed in the Stay Application. The above convergence did not favour the Court with a reasonable opportunity properly to prepare itself, none of the parties had filed Heads of Argument thereon and it was evident that the Stay Application could not be heard.[3] That, however, was not the end of the matter.

[2] Since enrolled for hearing on the 30th October 2024
[3] In view of the ultimate Order herein, the Stay Application, for current purposes, has become academic

[4] It is important to preface what is to follow by referencing the duty of the Court to ensure compliance with its Rules, *mero motu* to raise any concerns and to make appropriate orders in the event of non-compliance.

4.1 Litigants should not bargain on apparent non-compliance going undetected or unaddressed merely because no other party had raised it and/or had not sought an order in respect thereof.

4.2 It is also trite that there is a limit beyond which litigants cannot escape the results of their legal representatives' lack of diligence. In ***Simon Musa Matsebula v Swaziland Building Society***[4], quoted in the oft cited case of ***Unitrans Swaziland Limited v Inyatsi Construction Limited,***[5] the following was stated:

> ***"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 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 Salojee vs The Minister of Community Development 1965 (2) SA 135 at***

[4] ***Civil Appeal No. 11 of 1998***

[5] ***Unitrans Swaziland Ltd Inyatsi Construction Ltd (9 of 1996) [1997] SZSC 41 (7 November 1997)*** and the plethora of cases following therefrom

141, 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."

[5] Counsel should know the Rules and firstly, ensure that all Rules had been complied with by or on behalf of their clients and secondly, be fully prepared, when attending Court, to deal with any apparent non-compliance arising.

5.1 This would be more so the case where, as *in casu*, and some 6 (six) months prior to the scheduled hearing, respondents in express terms alleged non-compliance with the Rules as regards the appeal record, to the extent that a formal interlocutory application was filed in respect thereof. A defective record could have a significant impact on the proceedings in that, for instance, an appeal can be deemed to have been abandoned for failure to follow the procedures prescribed in the Rules.

5.2 New Rules were promulgated late in 2023, repealing the 1971 Rules and containing a transitional provision, in **Rule 61(2)** thereof, to the effect that the conduct of an appeal or review filed before the commencement of the 2023 Rules shall, as far as may be practicable, be regulated to its conclusion

by the repealed Rules. The 1971 Rules would therefore apply in this matter.[6]

5.3 Another important point to bear in mind is that a party seeking a postponement or a stay or some other form of deferment should not assume that such an indulgence is there for the taking, but should be ready to argue the material before Court.

[6] The Court Roll is congested and the Judges of this Court bear heavy workloads. We have read and considered the papers herein which include 53 (fifty three) appeal grounds and some 2 200 (two thousand two hundred) pages worth of record, inclusive of the Supplementary Record. To pass on such a case for hearing on another day will require the Judges now sitting to expend time and energy to re-peruse the voluminous papers herein or, if there is a differently constituted Court, time and energy for same to be perused and assimilated for the first time. To do this, especially where *prima facie* there is a defective record at stake, in our view is not a step to be taken lightly.

[6] The Rules referred to in this judgment read more or less the same pre and post amendment expect as regards deemed abandonment where, under 1971 **Rule 30(4)** it could be warded off had there been an application for extension and under the 2023 **Rule 36(5)**, by an application for extension or for condonatation

[7] As a consequence Counsel was called on to address two main issues that had arisen in the collective mind of the Court being firstly, that *ex facie* the court file there never was an application by the Appellants to file a supplementary Notice of Appeal and secondly, with regard to prescribed procedures to be followed, that the question arises whether there was an appeal properly before the Court. The latter question involves completeness of the August Record and compliance with **Rule 30(5)** which, in turn, formed the subject matter of the Condonation Application.

A. AMENDMENT OF NOTICE OF APPEAL

[8] Mr Joubert SC for the Appellants took instructions from his instructing attorney Mr M Magagula and informed the Court that he is advised that there is no rule requiring such an application. The Court perforce referred to **Rule 12** of the Rules of this Court then in force which requires such an application. Mr Joubert SC also told the Court that he has been under the impression that the Stay Application was to be the sole item on the agenda for the day.

8.1 **Rule 12** read:

> *"The Court of Appeal may allow an amendment of the notice of appeal and arguments, and allow parties or their counsel to appear, notwithstanding any declaration made under rule 11 upon such terms as to service of notice of such amendment, costs and otherwise as it may think fit."*[7]

8.2 Mr Bester for the First to Fourth Respondents stated that his clients would not be prejudiced in the specific circumstances since an amendment would have been precipitated by the delivery of reasons and had there been an application for condonation for failure to comply with the said rule, it would not have been opposed.

8.3 There also was no opposition by respective Counsel for the other Respondents and in the result the Court, for the sake of progress in this protracted matter, exercised its discretion in favour of the Appellants, permitted such application for amendment to be made from the Bar, and granted same.

---

[7] 2023 **Rule 17**: *"The court may, on application, allow an amendment of the notice of appeal and heads of argument filed by a party to an appeal, upon such terms as to service of notice of such amendment, tender for costs and otherwise as the court may deem fit."*

B. FIRST TO FOURTH RESPONDENTS' CONDONATION APPLICATION *re* SUPPLEMENTING THE APPEAL RECORD

[9] In terms of **Rule 2** ***"record"*** means:

> ***"... the aggregate of papers relating to an appeal (including the pleadings, proceedings, evidence and judgments) proper to be laid before the Court of Appeal on the hearing of the appeal."***[8]

[10] Whether or not the August Record was complete for purposes of the Rules is a central motif in the Condonation Application in that the delay in filing the Supplementary Record is attributed by the relevant Respondents to alleged failure on the part of the Appellants' attorneys to participate in ensuring that a proper record serves before this Court.

10.1 However, it goes further than that, hence the enquiry by the Court whether there is a proper appeal before it. The Rules of this Court attach significant consequences pursuant to failure to timeously file a proper and complete record. For instance, **Rule 30(4)** then in force raised the spectre of an appeal being deemed abandoned for want of compliance with the Rules.

[8] The 2023 Rules contain a similar provision which would also cover reviews

10.1.1 Said **Sub-Rule (4)** read:

> ***"(4) Subject to rule 16(1)[9], 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."***[10]

10.1.2 It is common cause that there had not been an application by the Appellants under said **Rule 16(1)** or any other Rule.

10.2 **Rule 30(5)**, in force at the relevant time, prescribes how the record should be compiled:

> ***"(5) The appellant in preparing the record shall, in consultation with the opposite party, endeavour to exclude therefrom documents not relevant to the subject matter of the appeal and to reduce the bulk of the record so far as practicable. Documents which are purely formal shall be omitted and no document shall be set forth more than once. The record shall include a list of documents omitted. Where a document is included notwithstanding an objection to its inclusion by any party, the objection shall be noted in the index of the record."*** [11]

[11] The Rules require an appellant, and not a respondent, to file a record that is complete for purposes of appeal.

---

[9] I.e., an application for extension

[10] **2023 Rule 36 (5):** *"Subject to rule 21 or 22 (extension or condonation), if an appellant fails to submit or resubmit the record for certification within the time provided by this rule, the appeal shall be deemed to have been abandoned and struck off the roll."*

[11] **2023 Rule 36 (6):** *"The appellant shall prepare the record in consultation with the respondent, and shall endeavour to exclude from the record any document which is not relevant to the subject matter of the appeal and to reduce the bulk of the record so far as practicable."*

11.1 It is not the duty of a respondent to present a proper record, but only to co-operate in the consultation process stipulated in said **Rule 30(5).** No sound argument to the contrary was submitted before us, and we hold this to be the case.

11.2 The styling of the Condonation Application as being *ex abudante cautela,* in our view therefore would be correct.

[12] Of particular note is that the Appellants did not file a Notice of Intention to Oppose, or any Answering Affidavit or Notice to Raise Points of Law therein and for all practical purposes, the Condonation Application is unopposed and the allegations and contentions contained therein stood undisputed.

[13] The Condonation Application was supported by a detailed Founding Affidavit deposed to by attorney of record Ms M Boxshall-Smith, with a number of annexures attached.

13.1 As regards delay in filing the application, this was attributed to a non-responsive attitude on the part of the Appellants, it was averred as follows:

"12. *I submit that it was incumbent on the Appellants to prepare the Appellant's record in conjunction with the Respondents as set out in Rule 30(5) of the Rules of the Appeal Court. They did not do this and did not list the omitted documents. The Appellants did not even file a transcript of the two hearings in the High Court which are vital to the reasons set out in their own Notices of Appeal.*

13. *On the 22 August 2023 a letter was addressed by me to the offices of the Registrar of the High Court outlining our concerns regarding the composition of the record and the fact that a substantial amount of the record which supported our case was missing. A copy of this letter is dated 22 August 2023 is annexed hereto and marked "**CT1**". No response was received.*

14. *On 8 September 2023, a letter was sent to Mr Magagula regarding our concerns about the composition of the record and in terms of which a written response was requested by no later than 12 September 2023. The Registrar of the High Court was also copied in on this correspondence, a copy of which is annexed hereto marked "**CT2.**" No response was received from Mr Magagula.*

15. *On 6 October 2023, a letter was addressed to His Lordship The Chief Justice regarding our concerns pertaining to the record. The Registrar and Mr Magagula were both copied in this correspondence, a copy of which is annexed marked "**CT3.**"*

16. *On 1 November 2023, a letter was received from the Registrar of the High Court regarding the record and in terms of which she requested the attendance of the parties on 2 November 2023 at 08.30am at the High Court. A copy of the letter is annexed marked "**CT4**". All parties except for Mr Magagula attended the meeting. The parties in attendance were Registrar Mazibuko, Mr Nkosinathi Manzini from CJ Littler Attorneys, attorney of the Fifth Respondent, and by Mr Musa Dlamini from Musa Dlamini and Associates, attorney to the Sixth Respondent and me.*

17. *For reasons not explained fully, Mr Magagula did not attend the meeting, nor did he have the collegiality to contact the other parties to the matter that he would not be attending the meeting according to the Registrar was because he had to see a doctor in South Africa. The parties requested the Registrar to obtain a sick note as well as Mr Magagula's Passport, which have to date not been provided, but in any event, if Mr Magagula was serious about resolving the issues, one would have thought that he would have addressed correspondence to the parties in advance notifying them of this unavailability and proposing alternative dates for the meeting to take place.*

18. *On 2 November 2023, a letter was written to the Registrar of the High Court confirming what had been discussed at the meeting, a copy of which is annexed marked "**CT5**". The meeting was rescheduled for 7 November 2023 at 10:30am.*

19. *On 6 November 2023, a letter was addressed by Mr Magagula to the Registrar claiming that there was interference because of engagements with Mr Crabtree and the Chief Justice. A copy of this letter is annexed marked "**CT6**".*

20. *On the 7th November 2023 at 10:30 am, I attended the office of Registrar Mazibuko of the High Court and was accompanied by Mr Nkosinathi Manzini, Mr Musa Dlamini. Mr Magagula was notified of the meeting and again did not attend. I explained to the Registrar that parts of the record were missing. The Registrar of the High Court advised me to prepare the supplementary appeal record and application for condonation.*

21. *I commenced with preparing the 4 (volumes) for the supplementary Appeal record, but it is a considerable amount of work as eight books of each needs to be prepared, which involves indexing as well as paginating the following books 1-4 as stated hereunder in the table below which also details the documents that were omitted from the appeal record.*

BOOK	PAGES	DESCRIPTION	RELEVANCE
Book 1	*475*	**Affidavit of Rosemarie McEwen* **Supplementary affidavit of Robert Crabtree*	*The Judgement of Judge Mlangeni refers to litany of complaints. This affidavit formed part of the pleadings before court and no objection or regular proceedings were raised therefore affidavit to be part of these proceedings.*
Book 2	*511*	**Recusal application of Judge Mumcy* **Contempt of Court papers* **Deconsolidation appeal case No: 50/2018 Judgement.*	*This is relevant to paragraph 2-5 of notice of appeal of 14.06.2023 as the 2-4th Respondent's (Applicants) had been joined.* *Replying affidavits of Robert Crabtree to Allen McGregor's affidavit. The reasons for Judgement at paragraph 30.1 referred to contempt of court issue.* *The Appellant's supplementary reasons for appeal refer to the deconsolidation Judgement and paragraphs 31 & 32.*

Book 3	*223*	**Full set of Pleadings for Case No: 299/2017*	*In Paragraph 21 of the reasons for the Judgement handed down on 7 July 2023 by Judge Mlangeni and paragraph 7 of supplementary notice of appeal.*
Book 4	*187*	**Various letters between Registrar of the High Court, Magagula & Hlophe and BSA Attorneys regarding incomplete record.* **Proceedings of 20 April 2023 before Judge Mlangeni.* **Proceedings of 14 June 2023 before Judge Mlangeni.*	*Supports this affidavit regarding incomplete record.* *Transcribed record for Case No: 748/2017 subject appeal.* *Transcribed record for Case No: 748/2017 subject appeal.*

"

13.2 As regards prospects of success, the key argument regarding alleged mismanagement of the estate was that the First Appellant on behalf of the estate sold shares in property holding companies to a third party for E 28 million (twenty eight million emalangeni) only for said third party to immediately sell same to a fourth party for E 74 million (seventy four million emalangeni.)

[14] Mr Joubert SC evidently was taken by surprise when Mr Bester presented argument in respect of the Condonation Application in accordance with the

above affidavit and rose to advise the Court that he (Mr Joubert SC) had not been briefed in respect of this application.

14.1 In Court neither Mr Joubert SC nor Mr Magagula was in possession of a copy of the application, resulting in one of the members of the Bench availing them of a Court file copy.

14.2 As recorded *supra*, the Appellants did not file any document indicating opposition to the December 2023 Condonation Application, only then to take issue with it at the hearing, without any advance notice of a challenge, belated or otherwise. It could be said, in the circumstances, that the Appellants had no right to be heard on the Condonation Application.

14.3 However, because the Court *mero motu* raised the question as to completeness of the Record, which lies at the core of the Condonation Application, fairness dictated that all parties should have the opportunity to address the Court thereon. Mr Joubert SC, for lack of instructions, was not in a position to assist the Court, resulting in Mr Magagula taking the floor on behalf of the Appellants.

[15] Mr Magagula submitted to the effect that the August Record in fact was complete, that it had not been a full-blown trial but a straight forward application and that the August Record contained a full set of pleadings being the founding, answering and replying papers.

15.1 Other issues, it was submitted, are peripheral and arose in a consolidated context, there having been consolidation with a matter concerning a recusal application which served before the Honourable Justice M Dlamini but this consolidation subsequently was unbundled; the appeal is not concerned with what had gone before. The August Record as presented was certified by the Registrar. In practice, it would be in order for an appellant to prepare a record on their own if there is nothing contentious and appellants often prepare records in this fashion. Further, the submissions continued, in line with the of cited case of ***Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors*** [12] an overly technical approach should not be adopted by the Court.

[12] *(23 of 2006) [2006] SZSC 11 (21 June 2006)*

[16] Mr Bester in reply submitted that the certification by the Registrar clearly was based on the erroneous assumption that consultations duly took place as is required by the Rules and reiterated that the Rules had not been complied with.

[17] For purposes of condonation *per se*, in respect of which no opposition was filed, and without at that stage deciding whether or not the August Record was complete, the Court was satisfied that a delay was occasioned by undisputed non-responsiveness on the part of the Appellants. The alleged mismanagement of the administration of the estate *prima facie* raises a serious red flag and in the absence of formal opposition by the Appellants to the Condonation Application, it must be held that the Respondents would have prospects of successfully challenging the appeal.

[18] It followed therefrom that condonation, insofar as it may have been required, should be granted and condonation was granted accordingly.

[19] This left for determination the question whether or not the August Record was complete for purposes of the Rules of Court and judgment on this question was reserved.

C JUDGMENT ON COMPLETENESS OF APPEAL RECORD

C.1 DOCUMENTATION LISTED BY RESPONDENTS

[20] The definition of ***"record"*** was reproduced *supra* and the Court would underline the word ***"proper"*** therein:

> ***"... the aggregate of papers relating to an appeal (including the pleadings, proceedings, evidence and judgments) proper to be laid before the Court of Appeal on the hearing of the appeal."***[13]

[21] At the hearing the Fifth to Seventh Respondents aligned themselves with the argument of the First to Fourth Respondents that the August Record was defective. Mr Magagula on behalf of the Appellants, as aforesaid, was adamant that it was complete and that the criticisms in respect thereof are unfounded. It then behooves the Court to revisit the table contained in the qFounding Affidavit in the Condonation Application and to deal *seriatim* with the documentation listed therein in order to determine whether same are *"proper"* for purposed of appeal:

[13] The 2023 Rules contain a similar provision which would also cover reviews

21.1 **Affidavit of Rosemarie McEwen (Fifth Respondent) and Supplementary affidavit of Robert Crabtree (First Respondent)**: "*The Judgement of Judge Mlangeni refers to litany of complaints. This affidavit formed part of the pleadings before court and no objection or regular proceedings were raised therefore affidavit to be part of these proceedings.*"

The statement to the effect that these affidavits formed part of the proceedings as alleged is not contested under oath and should be accepted as pertaining to facts material to the matter.

21.2 Recusal **application before the Honourable Justice M Dlamini**: *'This is relevant to paragraph 2-5 of notice of appeal of 14.06.2023 as the 2-4th Respondent's (Applicants) had been joined."*

21.2.1 The factual background includes that the First Respondent is the father of the Second to Fourth Respondents, the latter who were minors at the time of institution of the proceedings *a quo*, and who subsequently on attaining the age of majority were joined as parties.

21.2.2 The Grounds of Appeal referred to deal with the *locus standi* of the First Respondent and the joinder of the Second to Fourth Respondents, reading as follows:

"2 The *Learned Judge erred in disregarding the fact that the 1st Respondent lacks locus standi to bring proceedings for the removal of the 1st Appellant and to have the 2nd Appellant declared unfit and incompetent to be Executrix.*

3 *The Learned Judge erred in disregarding the fact that the 1st Respondent was conflicted and should not have been allowed to bring the proceedings on account of him having been excluded by the Will.*

4 *By allowing, the 1st Respondent to institute the proceedings, the court a quo ignored the express wishes of the Testator.*

5 *The court a quo erred in disregarding the fact that the 2nd, 3rd and 4th Respondents were irregularly joined in the proceedings by an order granted in the absence of other parties to the proceedings."*

21.2.3 Reverting to the recusal application[14], which was under High Court Case number 748 of 2017, *inter alia* the following is contained therein: [15]

"*[9] A second point taken as evidence of bias which is described by applicant as in favour of the 1st respondent was that on the day of consolidation, I proceeded to grant a joinder application which "was not served on any of the other parties who are involved in the matter and was not brought as an ex parte application or under a Certificate of Urgency." Applicant further deposed on this ground, "Her Ladyship issued a Rule Nisi calling upon the Executor to show cause why Robert's children should not be joined as parties.*

21.2.4 The above is elaborated upon and reasons are set out in Paragraphs [58] and [59] of that judgment, over the course of more than 40 (forty) lines, wherein it was concluded that:

"*I have pointed out above that having satisfied myself that the applicant was served with the joinder application and there being no opposition, I granted 2nd to 4th respondents' prayer for the rule nisi to be confirmed. With due respect, on the basis of the above, applicant is clutching at straws.*"

---

[14] Reported as ***Alan Alexander McGregor v Robert Crabtree and Others (748/2017) [2018] SZHC 128 (11th June, 2018)***

[15] Footnotes omitted

21.2.5 As regards the joinder issue, at the least, it is our view that the contents of the recusal application, presented as evidence of what had been held therein and not as legal authority for a legal contention in any other matter, is material and germane to this appeal and should have been included in the August Record.

21.3 **Contempt of Court papers**: '*Replying affidavits of Robert Crabtree to Allen McGregor's* [First Appellant] *affidavit. The reasons for Judgement at paragraph 30.1 referred to contempt of court issue*"

21.3.1 Said paragraph 30.1 and the preamble thereto read:

"*[30] The removal of the 1st respondent was, in my view, ineluctable in the circumstances that have been canvassed above. But as if that was not enough, there is a litany of other allegations against the 1st respondent. But because of the conclusion that I have stated above I only make a fleeting reference to these, if only for the 1st respondent to realise the hopelessness of the case against him. 30.1 He was ordered by this court to avail certain relevant documents and has failed to do so, and is effectively in contempt of this court.*"

21.3.2 Ground 18 of the Supplementary Notice of Appeal reads:

"The learned Judge erred in giving credence to disputed allegations against the 1st appellant (contained in paragraphs 30.1 to 30.7 of the reasons) by making the statement in paragraph 30 of the reasons that the removal of the 1st Appellant was unavoidable based on insinuations made by the learned Judge without findings and stating that "... as if that was not enough, there is a litany of other allegations against the 1st appellant. But because of the conclusions that I have stated above, I only made fleeting reference to these, if only for the 1st Appellant to realise the hopelessness of the case against him.'"

21.3.3 Ground 19.1 of the Supplementary Notice of Appeal deals with the allegation of contempt of court as follows:

> *"The allegation that the 1st Appellant is in contempt of court was denied by the 1st Appellant. The 1st Appellant is not in contempt of any order of the court. The respondents and the learned Judge, when making their allegations, aspersions and innuendos do not point to any order that the 1st Appellant is in defiance of."*

21.3.4 In the light of all the above, we are of the view that these affidavits are material and germane to this appeal and should have been included in the August Record.

21.4 **Deconsolidation appeal case No: 50/2018 Judgement**; *"The Appellant's supplementary reasons* for *appeal refer to the deconsolidation Judgement and paragraphs 31 & 32."*

21.4.1 The essence of Appeal Grounds 31 and 32 is that the Court *a quo* erred by proceeding to hear and decide the removal proceedings and disregarding the factual findings of this Court in the matter between ***Dups Holdings (Pty) Ltd and Others v Walter Bennett, Civil Appeal Case No 50/2018***[16] and thereby rendering academic the High Court proceedings in respect thereof under Case No 2006/2016.

---

[16] Reported as ***Dups Holdings (Pty) Ltd and Two Others vs Walter Bennett and Thirteen Others (50/2018) [2019] SZSC 27 (31 May 2019)***

21.4.2 It is our view that the contents of said appeal judgment, presented as evidence of what had been held therein and not as legal authority for a legal contention in any other matter, is material and germane to this appeal and should have been included in the August Record.

21.5 **Full set of Pleadings for Case No: 299/2017:** *"In Paragraph 21 of the reasons for the Judgement handed down on 7 July 2023 by Judge Mlangeni and paragraph 7 of supplementary notice of appeal."*

21.5.1 In Case No 299/17 the now Fifth Respondent, Mr Walter Bennett, sought the setting aside of a ruling by the now Ninth Respondent, the Master of the High Court as well as of the second distribution account in the estate, concerning the sale of shares previously held by the deceased in the companies T1 Property (Pty) Ltd and T2 Property (Pty) Ltd which held immovable property referred to as the Tonkwane Farm. The Respondents therein were the Master, the Appellants and some of the Respondents in the instant appeal.

21.5.2 Paragraph [21] of the reasons commenced and concluded as follows:

"Against the aforegoing there looms, like a colossus, the pervasive allegation that the Master never gave approval for the specific transaction that disposed of the property in

the manner it was done... Nowhere does The Master give approval for the sale of shares in T1 and T2 to Dups Holdings in the manner in which the properties were disposed of."

21.5.3 Supplementary Ground of Appeal 7 is some 19 (nineteen) lines long and includes in its sub-paragraphs, commencing with:

"The learned Judge erred in fact and in law and misdirected himself by failing to understand the nature of the transaction for the sale of the Tonkwane farm in that he found that there was no approval for the sale of the shares and the disposal of the Tonkwane Farm in the manner in which it was disposed of."

21.5.4 These issues tie in with the central complaint of mismanagement of the estate which in our view is material and germane to the prayer for removal.

21.6 **Proceedings of 20 April 2023 and proceedings of 14 June 2023 before the Honourable Justice Mlangeni:** '*Transcribed record for Case No: 748/2017 subject appeal.*"

21.6.1 The Appellants aver in Ground of Appeal 9 that: *"The Learned Judge in the court a quo erred in not affording the Appellants a fair hearing. The Learned Judge was partial and biased against the Appellants."* This ground *ex facie* is more suited for purposes of review [17] but be that as it may, the nature of this ground would suggest going beyond the record and scrutinizing what had occurred in Court including the conduct of the presiding Judge.

[17] *En passant*, there is no right of review of High Court judgments.

21.6.2 The Appellants elected to raise a ground of this nature which also is very wide and unspecific. In the premises, the Respondents in our view cannot be faulted for maintaining that these transcriptions would be relevant to the grounds of appeal as stated by the Appellants, at the election of the Appellants. It is noted that Mr Magagula for the Appellants did not expressly deal with this in his submissions.

C.2 CONCLUSIONS AND ORDER

[22] In view of the above findings, the challenge by the Respondents levelled against the August Record regarding completeness and failure to comply with **Rule 30(5)**, have to be upheld. In particular, the Court holds that:

22.1 The August Record indubitably is incomplete and therefore defective and not proper, including as regards the pivotal issues of *locus standi* and joinder challenged on appeal; and

22.2 On what has been placed before Court, however, we are satisfied that the aggregate of the August Record and the Supplementary Record, as a

combined record, would constitute a proper record for purposes of hearing the instant appeal.

[23] Related findings and observations rising to the fore include the following:

23.1 The Appellants are relying on a total of 53 (fifty three) grounds of appeal, some of which contain multiple sub-paragraphs. The Appellants did not abandon any of the grounds of appeal relating to the contentious documentation, including the transcriptions, which may have neutralised some of the challenges levelled against the August Record. All the deficiencies listed above therefore remained live.

23.2 Although not expressly stipulated in the Rules, it is implicit that an appeal record must be a complete and correct record subject to permissible omission as per said **Rule 30(5).** Had this not been the case an appellant can file a few scraps of paper from the proceedings *a quo,* title the ensuing product *"Record"* and lay claim to escape a declaration of abandonment under **Rule 30(4)** by pleading that a record had been filed in time. To permit this would defeat the purpose of requiring a proper record to be laid before this Court.

23.3 An incomplete record may mislead the Court and cause it to arrive at incorrect conclusions regarding what transpired in the Court *a quo* and the result of such incorrect conclusions could be incorrect decisions and a serious miscarriage of justice.

23.4 The importance of a proper record therefore cannot be emphasised enough and the purpose of **Rule 30(5)** is to ensure that all parties to the appeal and the Court are satisfied that the proper record has been placed before the Court.

23.5 It is not for a respondent to ensure that a proper and complete record is before Court; this duty squarely rests on an appellant.

23.6 The wording of **Rule 30(5)** to the effect that an appellant shall endeavour to exclude irrelevant documents and to reduce the bulk of the record, envisages a deconstruction exercise as opposed to a more onerous construction exercise. This is coupled with the responsibility to do so in consultation with the opposite party. It surely is not too much to ask for. The Appellants not only failed to comply with this Rule but were resistant to the Respondents' efforts to facilitate and achieve compliance.

23.7 Certification by the Registrar does not cure the defects and cannot render an incomplete record to be complete. It is unreasonable to seek to apportion blame or remissness to the Registrar, who is entitled to assume a high degree of *bona fides* and competence on the part of Counsel when a record for certification is submitted, including that the dictates of **Rule 30(5)** had been followed, more so where such a voluminous record is involved.

23.8 The appeal was noted on the 14th June 2023 and in terms of **Rule 30(1)** then in force, a (proper) record was to be filed within 2 (two) months thereof[18] i.e., by the 13th August 2023.

23.8.1 The Appellants filed a record within the prescribed time period but the August Record was defective and despite the persistent efforts of the Second to Fourth Respondents to remedy the defects, the Appellants evidently washed their hands off the matter;

23.8.2 The allegations by the First to Fourth Respondents to the effect that the August Record is not a proper record in that it is not a complete record, are contained in the unopposed Condonation application, filed some six months

[18] 2023 **Rule 36(1)** – within 40 (forty) days

prior to the appeal hearing date. The Appellants were non-responsive thereto, as the Appellants have been to the efforts by the Respondents to ensure compliance with the said **Rule 30(5).**

23.9 The difficulty with the submission on behalf of the Appellants that appellants often unilaterally compile records in non-contentious matters, is threefold: firstly, an appellant cannot at will and without verifying with the other side decide whether a record is contentious or not; secondly, an appellant cannot unilaterally decide that the Rules need not be complied with and thirdly, reliance on such self-created autonomy can hardly serve to be exculpatory where the other side expressly took issue with the record. It goes beyond the mere technical, especially in a case with stakes as high as in the instant case and in the face of express challenges.

[24] The next question arising is what consequences should be attached to the filing of a defective record and the failure to comply with **Rule 30(5).** Examples of orders involving defective records include:

24.1 Usually, appeals involving defective records are simply struck off with costs. In some instances, the door is left open by way of coupling the striking off with an order that the appeal may be reinstated upon good cause shown;

24.2 For instance in Timothy ***Khoza vs Pigg's Peak Town Council and Another,***[19] where the record lacked the written judgment, there was an application to deem the appeal abandoned in terms of the aforesaid **Rule 30(4)**. It was held to the effect that an incomplete record is not a record and the appeal accordingly was deemed abandoned and struck off with costs, with no coupled order; and

24.3 In ***Inyatsi Construction Limited v Sunla Investments (Pty) Limited***[20] it was ordered, for the sake of finality in the proceedings and to obviate delay occasioned by an application of reinstatement, that the appeal be postponed coupled with an order that the appellant therein cure the defects in that record within a specific period.

---

[19] *(51/2015) [2016] SZSC 24 (30 June 2016)*
[20] *(40/2021) [2022] SZSC 02 (23 March 2022)*

[25] The desirability of obviating delays and the parties' interest in finality is an important consideration but cannot serve as *carte blanche* to ditch the Rule book and simply to forge ahead regardless for the sake of progress.

[26] *In casu*, matters are complicated by the fact that the Second to Fourth Respondents, at their own cost, have supplemented the defective record and filed a substantive application in regard thereto. (Their prayer for a punitive costs order was not pursued before us.) It would serve little practical purpose to order the Appellants to now duplicate the exercise of supplementing the August Record.

[27] What cannot be overlooked, is that as the date of hearing on the 3rd June 2024, some ten (10) months had elapsed since a proper record had been due. This constitutes a serious apparent disregard for the Rules and for the convenience of the Court and of the other parties.

[28] Nevertheless, in view *inter alia* of the nature and complexity of the issues, the Court is reluctant to summarily slam shut the doors of the Court in the Appellants' faces. Hence, in its discretion, the Court would rather accommodate the Appellants by affording them the opportunity to show

good cause for the appeal to proceed on the basis of the combined record, and cure prejudice to the Respondents by way of appropriate costs orders.

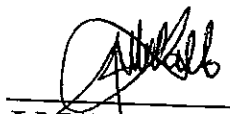
[29] Accordingly, the following Order is made:

1 The appeal is struck off.

2 Costs on the ordinary scale, up to and including the 3rd June 2024, are awarded in favour of the First to Seventh Respondents, including certified costs of Counsel in respect of the First, Second, Third and Fourth Respondents.

3 Such costs in respect of the Second to Fourth Respondents, are to include the costs occasioned by the compilation of a supplementary record and the accompanying application for condonation.

4 The appeal may be reinstated by the Appellants upon good cause shown.



J M VAN DER WALT
JUSTICE OF APPEAL

I agree

S B MAPHALALA
JUSTICE OF APPEAL

I agree

S J K MATSEBULA
JUSTICE OF APPEAL

For the Appellants: Mr F Joubert SC instructed by Magagula Hlope Attorneys
For the First to Fourth Respondents: Mr C Bester instructed by Boxshall-Smith Attorneys
For the Fifth Respondent: Attorney Mr N Manzini of C J Littler Attorneys
For the Sixth Respondent: Attorney Mr M Dlamini of Musa Dlamini and Associates
For the Seventh Respondent: Attorney Mr M Donga of SV Mdladla & Associates