IN THE SUPREME COURT
OF SWAZILAND

JUDGMENT

Held in Mbabane **Case No. 3/2016**

In the matter between:

THANDI MKHATSHWA **Applicant**

AND

NOMSA STEWART	**1st**	**Respondent**
PHINEAS MKHATSHWA	**2nd**	**Respondent**
MPENDULO MKHATSHWA	**3rd**	**Respondent**
MASTER OF THE HIGH COURT	**4th**	**Respondent**
THE ATTORNEY GENERAL	**5th**	**Respondent**

Neutral Citation:	***Thandi Mkhatshwa v Nomsa Stewart &4 Others (3/2016) [2017] SZSC 07(21st April2017)***
Coram:	**MCB MAPHALALA CJ, MJ DLAMINI JA AND SB MAPHALALA, JA**
Heard:	**21stMarch 2017**
Delivered:	**5th May,2017**

Case Summary: **Civil Appeal – record not filed - appeal deemed abandoned – lapsing of appeal – no application for condonation – problem of 'deemed' – application for dismissal not opposed –is the application justified -costs - Rule 16(1) and Rule 30(4) of Act 74 of 1954**

JUDGMENT

MJ DLAMINI JA,

[1] This is an unopposed interlocutory application following a notice of appeal filed by respondents in January 2016. It appears that the notice of appeal was served on applicant on 12th January 2016 (the year mistakenly reflected as 2015).

[2] The applicant alleges that since the filing of the notice of appeal respondents have not followed up that notice as required by the rules of this court with the result that nothing has since happened on this matter other than the notice lying idle at the Registrar's office.

[3] Applicant further alleges that at the time of the filing of the notice of appeal the issue was already moot as the vacation of the premises had already taken place in terms of the order of the *court a quo*. There was therefore no apparent purpose for the noting of the appeal other than a vain attempt to delay the matter and frustrate the applicant. In paragraph 18 of the *Founding Affidavit,* it is stated:

> *"…. this appeal is now merely academic and serves only scholastic purposes as execution of the judgment was completed way before the appeal was noted. Any judgment this court would pronounce will have no bearing on the rights of the parties.*"

[4] Applicant accordingly prays (a) for a declaration that the appeal has been abandoned; (b) that the appeal be dismissed, and (c) for costs of the application, and for further or alternative relief as this Court may deem appropriate.

[5] It is also noted that notwithstanding service of the application on respondents' attorney, there has been no indication of any desire or intention to oppose this interlocutory application. And there has been no appearance on behalf of respondents at this hearing.

[6] This application is accordingly brought under Rule 30 of the Rules of this Court (1971) in that respondents have not filed the record in time or at all nor applied for condonation for that default in a period of more than a year since the appeal was noted. Counsel for the applicant accordingly submits that this application is in accordance with Rule 30(4) for respondents' failure to lodge the record as the rules require. Rule 30(4) reads:

> "*Subject to rule 16(1),if an appellant fails to note an appeal or submit or resubmit the record for certification within the time provided by this rule, the appeal shall be deemed to have been abandoned.* (Emphasis added)

Rule 16(1) allows for possible extension of time on application by appellant who has not complied with, *inter alia*, Rule 30(4).

[7] During the hearing it was not clear why the necessity for the declaration when the law treats the appeal as abandoned for failure to comply. In other words, why bother to *dismiss* a '*dead*' appeal? Or is it that the appeal is not really '*dead*' notwithstanding abandonment, so that the dismissal is to ensure that it is truly dead and buried and unlikely to resurrect? Or is the dismissal intended to secure applicant's costs? The applicant's responses were not very clear, swinging as they did between securing costs and ensuring that respondents do not wake up one day and remember that they once noted an appeal and apply under Rule 16(1) to pursue it.

[8] The problem is that the rules in this regard are somewhat fluid, providing no succour to a judgment - creditor eager to execute. Is applicant's fear of the appeal being pursued after being '*deemed to have beenabandoned*' legitimate? What is the effect of the words '*subject to Rule 16(1)'* and '*deemed… abandoned'* in sub-rule (4) of Rule 30?

[9] The simple and literal meaning of the expression '*subject to Rule 16(1)'* is that the substantive statement of the rule is subordinated to the provisions of Rule 16(1). In other words, Rule 30 (4) is not complete without regard to Rule 16(1). So that in giving effect to Rule 30 (4) regard must behad to Rule 16(1). In this respect, Driedger, in his book, **Composition of Legislation (1976)** at page 42, states: *"The expression 'subject to' or 'as provided in' … is used as a warning that the enactment must not be regarded as complete*". On page

139 the learned author further states '*Subject to'* is "*used to assign a subordinate position to an enactment, or to pave the way for qualifications*". Thus the '*abandonment*' of the appeal prescribed under Rule 30(4) is not free from the shackles of Rule 16(1) – until presumably it is freed by an order of this Court as preempted by the applicant in this case. Is this the correct understanding of Rule 30(4)? Must the respondent (judgment creditor) then stand-by, mark time, for the appellant (judgment debtor) to activate Rule 16(1) as and when he so desires? That would be most intolerable, if not down-rightinequitable.

[10] The major constraint to Rule 30(4) is that it does not say that "*theappeal* shall be *abandoned*", but says "*the appeal shall be* deemed *to have been abandoned*." The latter expression has almost insoluble problems caused by the apparently innocuous word *'deemed'*. The word seems to acknowledge that something is not what it is said to be.

[11] The first thing to note is that Rule 30(4) is peremptory. It commands that the appeal which has not been followed through with filing of record should be deemed abandoned. No amount of discretion appears except may be as built into Rule 16(1) read with Rule 17. The problematic aspect of the rule lies in the term '*deemed*'. In **R v Norfolk County Council [1891] 60 LJQB 379 at 380**, Cave J observed:

> *"Generally speaking, when you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather an admission that it is not what it is to be deemed to be, and that, notwithstanding it is not that particular thing, nevertheless ... it is to be deemed to be that thing*."

It is evident from the above statement of Cave J that the word '*deems*' establishesan artificial reality or state of affairs, it is a legislative pronouncement or fiat. It says something is which may be known or not known to be so; it says a cat is a dog even though we know the reality to be otherwise.

[12] Lord Radcliffe in **St. Aubyn (LM) and Others v. Attorney General (No.2) [1951] 2 All ER 473(HL)** at 498 F-H said:

> *"The word 'deemed' is used a great deal in modern legislation. Sometimes it is used to impose for purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible."*

The first two alternative meanings of Lord Radcliffe's statement seem the more relevant or applicable in our situation; the '*deeming*' allows the court (and the parties and all concerned) to say as a matter of fact (and law) that the appeal has been abandoned when there is no verifiable objective fact or evidence to that end; it permits an artificial construction to end a state of uncertainty.

[13] Whilst accepting Lord Radcliffe's statement above, Viscount Simonds in **Barclays Bank Ltd v Inland Revenue Commissioners[1960] 2All ER 817 (HL)**was of the view that the word '*deem*' had as its '*primary function*' to *'bring in something which would otherwise be excluded'*. Lord Reid, in the same case (at page 823G) felt that "*the word* 'deemed' *has often given trouble...*" in the manner it is often used in legislation. In **R v. Brixton Prison (Governor)**

Ex parte Soblen [1962] 3 All ER 641 (CA) at page **669,** Pearson LJobserved:"*The word **'deems'** normally means only 'is of opinion' or 'considers', or at most 'decides'and there is no implication of steps to be taken before the opinion is formed or the decision is taken*". In Canada the word '*deemed*' has also been understood to mean "*capable of meaning 'rebuttably presumed', that is, presumed until the contrary is proved*." **Credit Foncier Franco–Canadien v Bennett and Attorney -General (BC) (1963) 43WWR 545** at 547. A great deal would also depend on the context in which the word is used.

[14] In **Chotabhai v Union Government 1911 AD 33** Innes CJ stated that the word '*deemed*' was employed to: "*denote merely that persons or things to which it relates are to be considered to be what really they are not ...*" *In casu*, the word '*deemed*' would then mean '*considered*' or '*regarded*' or '*held*' to be abandoned. The core meaning of the rule is not changed; it renders certain what is otherwise uncertain, that is, that the appeal has in fact been abandoned in the absence of a formal notification to that end as in terms of Rule 13(1) (or even on the basis of peremption). (Emphasis added)

[15] The corresponding South African rule seems to have used two expressions: that is, '*deemed to have lapsed'* and '*deemed to have been withdrawn'* instead of '*deemed to have been abandoned'*. In my view the literal meaning of these three expressions is the same, namely, that the appeal has not as a matter of known fact lapsed or withdrawn or abandoned. The Rule then tells us to proceed as if in fact the appeal has lapsed, abandoned or withdrawn. Even this is only half-heartedin light of Rule 16(1). But a close look at this '*lapsing*' leaves some doubt as to the reality. This makes it difficult for any affected person to

say the appeal is dead and buried just by reading Rule 30(4) or the South African equivalents. In the absence of a clear judicial pronouncement or legislative intervention the positionwill remain unclear and uncertain.

[16] Harms, **Civil Procedure in the Supreme Court** [Issue 24] writes: "*C8.7* ***Lapse of appeal or cross appeal.*** *If an appellant fails to lodge the record within the prescribed period or within the extended period, the appeal lapses. Once appeal lapses, execution can proceed immediately. The appellant may, however, apply for reinstatement of the appeal"*. (p. C-45). That is the problem: the appeal has lapsed but it could be reinstated. How then does the judgment creditor move on without the possibility of a reversal? What is the benefit of the lapsing to the judgment creditor if the appeal can be reinstated even after execution? Or should reinstatement be confined to pre-execution? Otherwise life stands still for judgment creditor having to await the occurrence of an event which may or may never occur.What is the point of immediately proceeding with execution if appellant may still apply for reinstatement? What happens to the appeal when it 'lapses'? And **Romer J** in **Batcheller (Robert) & Sons Ltd v. Batcheller [1945] Ch 169** at 176 hit the nail on the head: *"It is, of course, quite permissible to 'deem'a thing to have happened when it is not known whether it happened or not. It is an unusual but not an impossible conception to 'deem'that a thing happened when it is known positively that it did not happen. To deem, however, that a thing happened when not only is it known that it did not happen, but it is positively known that precisely the opposite of it happened, is a complete absurdity"*.

[17] **Kekana v Society of Advocates of SA [1998] 3 All S.A. 577 (A)** is unfortunately not a helpful example because the reversal was easy and without much prejudice to anyone. At page 579CHefer JA says:

> *"This is a petition for the reinstatement of an appeal which in terms of Rule 5(4) bis (b) of the Rules of this Court is deemed to have been withdrawn. Not unlike a petition for condonation, it falls to be considered upon a conspectus of all the relevant features including the degree of non-compliance with the rules, the explanation therefor, the importance of the case and the prospects of success*."

The reality is, even though '*deemed*' or '*considered*' or '*regarded*' to have been *withdrawn* or to have *lapsed* or *abandoned*, the Appellate Division was prepared to hear the application to reinstate the appeal on the roll. The applicant was not told '*Too bad, your appeal has lapsed or has been abandoned; it can no longer be entertained with a view to reinstatement.*' By majority, however, the application for condonation was dismissed shutting the door to possible reinstatement.

Kekana v Society of Advocates of SAis a case of an advocate whose name had been removed from the roll of advocates due to allegations of serious misconduct and dishonesty. After the court *a quo* had granted leave to appeal not a single step was taken in time. The case, however, leaves the issue of '*lapsing*' '*withdrawal*' or '*abandonment*' practically unresolved.

[18] In **Santam Versekeringsmaatskappy Bpk v Pietersen 1970(4) SA 215 (AD**), the head-note reads:

> *"Sub-rule (4) bis (b) of Appellate Division Rule 5 is merely inserted to fix the date from which periods of 21 days and the periods mentioned in sub-rule (4) (a) and (b) must be calculated in the case where the appeal has not actually been withdrawn. It was never intended to apply the sub-rule to the case where the appellant has not handed in the record timeously to the Registrar of the Court.* ***In such a case,*** *i.e, where the appellant has not filed the record timeously,* ***he runs the risk of having the appeal struck off the roll, but he is always entitled to apply,*** *on sufficient cause,* ***for condonation of his failure*** *under the provisions of Rule 13"*.(Emphasis Added)

The long and short of it is that if struck off the roll the appeal may be reinstated. That is the very problem for the judgment creditor who wants to execute. The lingering spectre of reinstatement gives the judgment-creditor no assurance; it is simply inefficient. It is the judgment-creditor whocarries the expense of applying to court for a dismissal of the lapsed, abandoned or withdrawn appeal. This is inequitable. The rules do not provide that "… *in default of which [the appellant] shall be ipso facto barred*" as High Court Rule 43(4) provides in another respect. Such wording would provide some greater certainty that a defaulting appellant will not be allowed to reinstate.

[19] In **Estate Woolf v Johns 1968 (4) SA 492** at 495F the respondent wrote: "*Our client has also asked us to place on record that he reserves the right to apply for dismissal of the appeal on the grounds of inordinate delay in the prosecution thereof.*" The response from the appellant was a denial that plaintiff had the "*right to apply for dismissal of the appeal*" because plaintiff was "*fully aware of the reasons for the temporary delay.*" It is, however, not clear if the denial of the right to apply for dismissal was general or only limited to the specific facts of that case. In any case, there was no application for a dismissal and the court observed that *"…. defendant had at all stages demonstrated a firm intention to appeal"*,but no application for condonation had been made in time with the result that when ultimately made, it was dismissed with costs.The issue of the right to apply for dismissal of a lapsed appeal was not considered; it was not raised. We can only surmise that there is such a right in the absence of anything to the contrary. It is not a given. A case would have to be made outso that success would depend on the specific facts of each case.

[20] In **Schmidt v Theron and Another [1991] (3) SA 126 (CPD)** at pp. 129I-J - 130 A-D, Tebbutt J stated: "*I think it is quite clear from a number of authorities that a failure to comply with the provisions of Rules 5 and 6 of the Appellate Division Rules causes an appeal to lapse*: *... Indeed, Rule of Court 5(4) specifically provides – and I quote from Rule 5(4) bis (b):* ***'If an appellant has failed to lodge the record within the period prescribed*** *and has not within that period applied to the respondent or his attorney for consent to an extension thereof, and given notice to the Registrar that he has so applied,* ***he shall be deemed to have withdrawn his appeal'***. *The appeal having so lapsed, an application for condonation in terms of Appellate Division Rule 13 is required if an appellant who has failed to comply with the rules, wishes to revive or reinstate it"*. It would appear that the 'lapsing' is not expressly so stated in terms of the rules but the authorities are in no doubt that that is what happens, when for instance, an appellant fails to lodge the record and, application for condonation, if any, has failed. [Emphasis added]

[21] In **Napier v Tsaperas 1995 (2) SA 665 (A)** at 669 G-H, EM Grosskopf JA, after noting that Mr. Eloff on behalf of the respondent, had contended that the Court had no jurisdiction or power to grant a requested postponement of the matter "*since he said, the appeal was deemed to be withdrawn, there was nothing before us which could be postponed"*,nevertheless, avoid the issue by proposing to express no opinion on it. The crisp question would have been if the appeal has lapsed by reason of it being deemed to have been withdrawn, what else remained to be postponed? Mr. Justice Grosskopf proceeded to conclude the matter (pp 669H-670A):*"... In terms of the rules the appeal was deemed to have been withdrawn. The appellant's attention had been drawn specifically to the terms of the Rules by his opponent and by the Registrar of this Court..... The delay in the lodging of the record was a substantial one, ... Despite all of this, the appellant not only failed to apply for condonation, … No explanation for these failures was given to us. In the result there was*

nothing before us which could justify a postponement of the matter. The striking from the roll was then inevitable since the appeal was deemed to have lapsed." Is the possibility of reinstatement completely excluded?

[22] It seems to me that Rule 30(4), providing for the deeming of the appeal to be abandoned but subject to Rule 16(1), means that the appeal cannot be definitively held to be abandoned unless Rule 16(1) is contended and dispatched with. But there is no stipulated time within which appellant must comply with Rule 16(1), other than that he must act as soon as he realizes that he is in default with filing of the record for certification. All that is said in **Santam Versekeringsmaatskappy Bpk** case is that appellant in default "*runs the risk of having the appeal struck off the roll.*" The balance of convenience would seem to be in favour of appellant who is "*always entitled to apply ... for condonation...*" It then seems to me that to bring the uncertainty to an end the respondent or judgment-creditor should apply to court for a dismissal of the delayed appeal which is deemed to be abandoned. In that way the issue of a live/dead pending appeal is crystallized by the Court's determination.

[23] If the appellant has failed to comply with the rules such as by not filing the record as required by Rule 30, and has not indicated desire to invoke rule 16(1) read with Rule 17, and he has been served with the application for dismissal nor made appearance at the hearing – if only to say that he does not oppose the application – the Court ought to seriously consider granting the applicant his prayers by dismissing the appeal and closing the door for possible reinstatement. Rule 16(1) does not prevent the Court from dismissing an unjustifiably out of time application. Rule 16(1)is predicated on

reasonable time after appellant becomes aware of the default. The application to court is to obviate the uncertainty of a lapsed or abandoned appeal. Going to court, however, is costly and time consuming.

[24] '*Deeming*' abandonment of the appeal under Rule 30(4) may be justified in terms of Rule 13. If appellant fails to formally notify his abandonment of the appeal, the alternative is recourse to Rule 30 (4), that is, deeming that the appellant has in fact abandoned the appeal. In that case Rule 30(4), is the flip-side of Rule 13. An appellant should not be allowed to fail to act in terms of Rule 13(1) as well as in terms of Rule 16(1) or 17. This consideration should bring some measure of balance to the rules of court regulating failure to proceed with an actual or potential appeal in the face of a judgment creditor's desire to execute without undue delay.

[25] Rule 13, however, does not provide sufficient cover for the judgment creditor/respondent. Sub-rule (1) does not say what happens where the appellant does not come out to say he abandons the appeal so that the appeal *"shall be deemed to have been dismissed …"*Sub-rule (2) entitles the respondent to *"costs up to the date on which he receives notice of such abandonment"*from the Registrar of this Court. This is of course possible where there is a formal abandonment of the appeal in terms of this Rule. But where there is no such formal notification of abandonment, what is the Registrar supposed to do? The Rule is silent and respondent is unlikely to get his costs and the matter idles at the Registrar's office until, may be, action is taken under rule 30. But Rule 30 says nothing about costs on the appeal being deemed to be abandoned. That being the case, it seems, only a not so smart appellant will act under Rule 13(1) and give a formal notification of

abandonment of an appeal so he gets mulcted with costs. But why are costs not available on the appeal being deemed abandoned under Rule 30? I do not know. Could be that the appeal under Rule 30(4) is in fact not dismissed but only abandoned? That would be a fine distinction.

[26] Because of the flexibility of the rules regarding the lapsing of an appeal, I would further propose that a respondent or judgment creditor on the lapsing of the appeal should be free to also obviate the costs and time consuming process of a court application for dismissal by simply addressing a letter to the appellant or judgment-debtor informing him that as of a specific date the respondent will execute unless there is opposition to that proposition. Such letter should be copied to the Registrar. Such a letter, it is assumed should spur an appellant who has good cause for the delay in complying with the rules to do what the rules allow him to do to avert losing the opportunity for an appeal. Going to court should not be an invariable requirement. Would a formal stay of execution improve the situation for the judgment creditor? It remains to be seen.

[27] Having regard to the foregoing, applicant is entitled to prayer 1 of her interlocutory application,that is, the appeal is declared abandoned and is accordingly dismissed. No order as to costs.

[28] It is ordered.

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MJ DLAMINI JA

I agree _____

MCB MAPHALALA CJ

I agree _____

SB MAPHALALA JA

For Applicant	**S.G. Simelane**
For Respondent(s)	**No Appearance.**