



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO.: 33/2020

In the matter between:

MALUSI NDAYI

Appellant

and

MINISTER OF POLICE

Respondent

JUDGMENT

TOKOTA J

Introduction

[1] One Malusi Ndayi (the deceased) instituted an action in the Magistrate's Court, Tsolo district, against the respondent claiming damages arising from the alleged unlawful arrest and detention. The respondent

resisted the claim. The Magistrate dismissed the claim with costs. The appeal is against that order.

The Process of Appeal

[2] The process of the appeal has been so carelessly handled to the extent that it becomes unnecessary to deal with the merits thereof. Consequently, I deem it expedient to deal with the process followed in the prosecution thereof in order to establish whether or not a foundation has been laid for this Court to entertain the appeal.

[3] Section 84 of the Magistrates' Court Act 32 of 1944 provides, inter alia, that every party noting an appeal shall do so within the period and in the manner prescribed by the rules. The periods for noting an appeal are laid down by Rule 51(3) of the Magistrate's Court rules and the periods for prosecuting appeals from the Magistrate's Court in the High Court are governed by Rule 50 of the Uniform Rules of Court. In other words, although the noting of an appeal is an act done in the Magistrate's Court, it lays the foundation of the proceedings in the High Court.

[4] An appeal must therefore be noted within the period and in the manner prescribed by Magistrate's Court Rule 51 and prosecuted within the period and in the manner prescribed by Rule 50 of the Uniform Rules of Court. In the present appeal before us, the Magistrate delivered a written judgment on 3 March 2020.

[5] There was no request by the appellant for judgment in writing as provided for in Rule 51(1) of the Magistrates' Court rules. Rule 51(3) provides, inter alia, that an appeal may be noted within 20 days after the date of the judgment appealed against. This will be the case where an appellant has not made a written request for judgment in writing as provided for in Rule 51(1) of the Magistrates' Court rules.

[6] A notice of appeal was served on the respondent or his attorney on 25 August 2020. Rule 51(4) provides that an appeal shall be noted by the delivery of notice, and, unless the court of appeal shall otherwise order, by giving security for the respondent's costs of appeal to the amount of R1000.

[7] In this matter the appeal was not served on the respondent within the prescribed period, and, in addition, no security for costs was paid as provided for in the rules. In light of the failure to comply with the rules by bringing the appeal to the notice of the other party in a manner which is in accordance with that prescribed by the rules, there is no foundation for the appeal.¹ Counsel for the appellant has conceded that there is no proof filed of record to indicate that security for costs has been paid. Incidentally, in the affidavit filed in relation to costs of the appeal, Mr S Vapi has attached a notice of appeal dated 15 May 2020 which was never served on the respondent.

¹ *Nunlal v Pillay* 1948 (4) SA 720(N) at 721; *Botha and Another v Hendriks N.O and Others*(700/2008) [2008] ZANHC 25 (6 June 2008)

[8] Rule 51(8) of the Magistrate's Court rules provides, inter alia, as follows:

"(8)(a) Upon delivery of a notice of appeal the relevant judicial officer shall within 15 days thereafter hand to the registrar or clerk of the court a statement in writing showing (so far as may be necessary having regard to any judgment in writing already handed in by him or her) -

- (i) the facts he or she found to be proved;
- (ii) the grounds upon which he or she arrived at any finding of fact specified in the notice of appeal as appealed against;
- (iii) and

his or her reasons for any ruling of the law or for the admission or rejection of any evidence so specified as appealed against.

(b) A statement referred to in paragraph (a) shall become part of the record".

[9] The provisions in sub-rule (8)(a) are mandatory. The Magistrate's written explanation forms an integral part of the appeal record and serves to assist the Court of Appeal in dealing with the appeal in a speedy and cost-effective manner.²

[10] If a notice of appeal has been filed without a prior request for the Magistrate's written judgment in terms of Rule 51(1), as in this case, the Magistrate must thereafter give his findings of fact and rulings of law in

² *Regent Insurance Co Ltd v Maseko* 2000 (3) SA 983 (W) at 990A-E)

terms of subrule (8)(a). A Magistrate is entitled, despite having given reasons, to give further reasons dealing specifically with any ground of appeal set out in the Notice of Appeal.

[11] Rule 51(9) reads in relevant part as follows:

"(9) A party noting an appeal shall prosecute same within such time as may be prescribed by rule of the Court of appeal and, in default of prosecution, the appeal. shall be deemed to have lapsed, unless the Court of Appeal shall see fit to make an order to the contrary"

Prosecution of an appeal is meant by applying in writing to the registrar of the High Court on notice to all other parties, for a date of hearing.³

[12] As stated above the prosecution of appeals from Magistrates' Courts is dealt with in terms of Rule 50 of the Uniform Rules of Court. The relevant time limits prescribed by Uniform Rules 50(1) to (4) are as follows:

- (a) the appeal must be prosecuted within 60 days after the noting thereof;
- (b) if the appellant has not within 40 days after noting the appeal applied to the registrar for a date of hearing, the respondent may do so within the remaining 2 weeks;
- (c) if no application for a date of hearing is made by either the appellant or the respondent within 60 days, the appeal lapses.

³ See Rule 50(4) of the Uniform Rules of Court; *Hall v van Tonder* 1980(1)SA 908 (C) at 910E

[13] In terms of Rule 50(5) of the Uniform Rules of Court the registrar shall, upon receipt of the appellant's written application for the assignment of a date, forthwith assign a date of hearing of the appeal, which date shall be at least 40 days after receipt of the said application. The registrar shall give the parties and the clerk of Court from which the appeal emanated, at least 20 days, written notice of the date of set down.

[14] Having set out herein above the prescribed procedure in civil appeals, it remains to be seen whether in the present appeal that the rules regulating the appeals from Magistrate Court to the High Court have been complied with. In what follows I will demonstrate that there was a flagrant disregard of the rules.

15] On the papers before us, it is clear that the appeal was not timeously noted as provided for in the Magistrate's Court rules. Counsel for the appellant was asked if the notice was filed timeously as prescribed and he conceded that it was not. The judgment was delivered on 3 March 2020 and the appeal was filed on 25 August 2020 more than five months after the delivery of judgment. There is no written application to the registrar by the appellant or his attorneys for the hearing date as required in terms of Rule 50(4)(a). There is also no evidence that the registrar allocated a hearing date in terms of Rule 50(5). There is no application for condonation for the late filing of the appeal.

[16] The appellant somehow procured the enrolment of the appeal by the registrar of this Court for hearing without following the procedure prescribed in Magistrate's Court rule 51(9) and Uniform Rule of Court 50(1), (4) and (5) for prosecuting the appeal. Furthermore, there is no indication in the indexed and paginated bundles that the appellant had applied for a date for the hearing of the appeal within the period provided for in the Uniform Rule of Court 50 (4)(a).

[17] In addition, the following irregular steps are apparent from the papers before us:

(a) Appellant passed away on 4 November 2022. Since the appellant is deceased the appeal can only proceed if there is a substitution of the party. In terms of Uniform Rule 15(3), where a party to the litigation dies or ceases to be capable of acting as such, his executor, curator or similar legal representative may by notice to all other parties intimate that he desires in his capacity as such thereby to be substituted for such party. Attorneys for the deceased simply filed a notice that “*the late Appellant, Mlamli Ndayi is hereby substituted by his wife Tandiswa Ndayi to continue with the prosecution of the appeal herein*”. Even the purported substitution has not been perfected because the appellant is still the deceased. Furthermore, it is not stated on what basis is the purported substitution made save for the assertion that she is the wife of the deceased, which is disputed by the respondent. It transpired during argument that she is not even an Executrix

of the deceased estate. We were told that she is the wife of the deceased and is going to apply for the appointment as the Executrix of the deceased estate.

(b) the appellant chose not to request a written judgment from the Magistrate in terms of rule 51(1);

(c) since the appellant filed the notice of appeal on 25 August 2020, a period of more than five months after the delivery of judgment, an application for condonation thereof should have been made. This was not done.

(d) the Magistrate was not called upon to hand down a written statement as required by rule 51(8) to the clerk of the Magistrate's court;

(e) The security for costs was not paid and no exemption was sought in this regard as required by the rules.

(f) Despite demand by the respondent in the notice dated 5 February 2025 there is no special power of attorney, either by the deceased or so-called substitute, to prosecute the appeal.

[18] In light of the above, there is no appeal properly before us. We do not have a party as the plaintiff is deceased and there is no proper substitution. Counsel for the 'appellant' indeed conceded that there is no proper substitution. For this reason, he submitted that the matter be postponed to enable them to bring a proper substitution for the 'appellant'. I do not agree

that the matter can be postponed. There is no legal basis for the entertainment of the appeal especially in the absence of a power of attorney by the deceased. For these reasons the appeal falls to be struck off the roll.

Costs:

[19] What remains is a question of costs. As matters stand there is no appellant before us. The question therefore is who must pay the costs in the event of us striking the matter off the roll.

[20] In view thereof that the respondent has been dragged to court someone has to indemnify him for his costs. For this reason, we adjourned the proceedings and made an order that the attorneys for the appellant/deceased should deliver an affidavit to show cause why an order of costs cannot be made against them *de bonis propriis*. We gave them ten days, five of which they had to deliver an affidavit, and five of which the respondent was given an opportunity to respond thereto, if so advised.

[21] The general principle of awarding costs *de bonis propriis* applies when a person acts or litigates in a representative capacity.⁴ Where a party or its legal representative flagrantly disregards the prescribed procedure or has adopted the wrong procedure this could result in that party being held liable for costs.

⁴ *Moller v Erasmus* 1959 (2) SA 465 (T) 467 C.

[22] In *SA Liquor Traders 'Association and Others v Chairperson, Gauteng Liquor Board and Others*,⁵ the court said the following:

‘an order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court’s displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy.’

[23] In *Multi-Links Telecommunications Limited v Africa Prepaid Services Nigeria Limited*,⁶ the following was said:

‘Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs on a punitive scale. Even more exceptional is an order that a legal representative should be ordered to pay the costs out of his own pocket. The obvious policy consideration underlying the court’s reluctance to order costs against legal representative personally, is that attorneys and counsel are expected to pursue their client’s rights and interest fearlessly and vigorously without due regard for their personal convenience. In that context, they ought not to be intimidated either by their opponent or even, I may add, by the court. Legal Practitioners must present their case fearlessly and vigorously, but always within the context of a set ethical rules,

⁵ 2009 (1) SA 565 (CC) at para 54

⁶ 2013 (4) ALL SA 346 GNP at para 34.

that pertain to them, and which are aimed at preventing practitioners from becoming party to deception of the court. It is in this context that society and the courts and professions demand absolute personal integrity and scrupulous honesty of each practitioner.’

[24] An order of costs de bonis propriis is not easily made but those costs are usually awarded under exceptional circumstances where there is negligence of a serious degree. The difficulty I have in this matter is that the negligence of the attorneys is so gross that it invokes moral indignation. Despite the notice in terms of Uniform Rule 7 by the respondent for the delivery of a special power of attorney the attorneys for the deceased persisted with the matter well knowing that there is none.

[25] Indeed, it is true that legal representatives sometimes make mistakes of law, or omit to comply with the rules of court,⁷ but these mistakes should not be blatant, obvious or litigated recklessly.

[26] Having outlined the principles above I now proceed to consider representations as contained in the attorneys’ affidavit. The affidavit addresses two issues, namely, failure to deliver a proper substitution, and

⁷ *Multi-Links* note 6 *supra*

failure to remove the matter from the roll. The affidavit has been deposed to by Mr Sifundo Vapi of S Vapi Inc. There is no explanation for the negligent disregard of the courts' rules.

Authority to prosecute the appeal

[27] According to the explanation by Mr Vapi, the appeal was noted in the Magistrate's Court on 20 May 2020 and again in the High Court on 25 August 2020. The purported appeal of 20 May 2020 was never served on the respondent. That appeal was in any event also already out of time. No explanation is proffered in regard thereto.

[28] Appellant passed away on 4 November 2022. There is no special power of attorney by the deceased to lodge and prosecute an appeal. There is no explanation for this omission by Mr Vapi. I take it since this was also raised during oral argument it should have been addressed and, if any special power of attorney was available, it should have been attached to the affidavit. This has not been done. He only attached the purported special power of attorney by Mrs Thandiswa Ndayi. This is unhelpful. Mrs Ndayi is not a party to the litigation and could only substitute a valid special power of attorney by the deceased. For that matter if Mrs Ndayi was an Executrix she could simply substitute the deceased without having to file a special power of attorney. Attaching a power of attorney by a non-litigant is putting lipstick on a pig's mouth.

[29] In light of the above, Mr Vapi had no mandate to pursue an appeal on behalf of the deceased. Mrs Thandiswa Ndayi had nothing to substitute. Accordingly, the appeal ought to have been withdrawn once it was learnt that the plaintiff had passed on.

[30] Mr Vapi explained that he wanted to remove the matter from the roll but could not do so because Mrs Ndayi was refusing to accept his advice. Where a client is not prepared to accept legal advice by his or her legal representative the appropriate thing to do is to withdraw from the case. It is no excuse to say that Mr Vapi “*lacked instruction to remove the matter or risk termination of mandate*”. Had he withdrawn as attorney of record he would not be facing this risk of an order of costs against him.

[31] In any event, the affidavit falls short of an explanation as to why there was a flagrant disregard for the courts’ rules. This aspect reflects the dereliction of duty and lack of professionalism by the attorney concerned. The condonation application in regard to the reinstatement of the lapsed appeal is in any event poor and does not cover all aspects of the defects of the case.

[32] It is trite that costs are awarded to a successful party in order to indemnify him for the expense to which he had been put through having been unjustly compelled to defend litigation. In any event, such an award is never a complete indemnity; but that does not affect the principle upon

which it is based.⁸ I am not persuaded that there should be no order as to costs in this matter. Since there is no party before the court we do not have a choice but to mulct the firm of attorneys who set the matter down for hearing.

Order

[33] In the result, I make the following order:

- 1 The appeal is struck from the roll.
2. Mr S Vapi attorney of S Vapi attorneys is ordered to pay costs de bonis propriis on scale C of Rule 67A.

B R TOKOTA
JUDGE OF THE HIGH COURT

I agree:

M MHAMBI
ACTING JUDGE OF THE HIGH COURT

⁸ *Texas Co. (SA) Ltd v Cape Town Municipality* 1926 /ad 467 at 488

APPEARANCES:

For the Appellant	:	<i>M Xozwa</i>
Instructed by	:	S Vapi attorneys Mthatha
For the Respondent	:	<i>Mr M Zilani</i>
Instructed by	:	M Zilani attorneys Mthatha
Heard on	:	21 February 2025
Judgment Delivered on	:	25 March 2025.