IN THE HIGH COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE **Case No.220/19**

In the matter between:

SIYEMBILI MOTORS SWAZILAND **1st Applicant**

PTY (LTD)

MA PROPS (PTY) LTD **2nd Applicant**

And

SWAZILAND COMPETITION COMISSION **Respondent**

Neutral Citation: *Siyambili Motors Swaziland (Pty) Ltd & Another V. Swaziland Competition Commission (220/19) [2019] SZHC 196 (17th October 2019)*

Coram: *Magagula J*

Date Heard: *03/10/19*

Delivered: *17/10/19*

Summary: ***The competition Act, 2007 – proper proceedings to challenge a decision of the competition commission - requirements of section 40 of the competition Act, 2007.***

[1] During October 2017 the 1st applicant sold two pieces of land within the Mbabane urban area to the 2nd applicant. When the respondent eventually became aware of the transaction it came to the conclusion that the said sale constituted a merger as defined by section 35 of the competition Act, 2007 and therefore ought to be notified to the commission. The respondent therefore called upon the 1st applicant to notify the transaction within 14 days from the 25th January 2019.

[2] The applicants dispute that the transaction is notifiable. To this end the applicant's have instituted the current proceedings in which they seek the decision of the respondent to be set aside.

[3] The process used in seeking to have the decision of the commission set aside is headed:

> ***" NOTICE OF MOTION***
>
> ***NOTICE OF APPEAL IN TERMS OF SECTION 40 OF THE COMPETITION ACT OF 2007"***

This heading is somewhat confusing since a Notice of Motion cannot be a notice of appeal as well. A notice of Motion is used to institute application proceedings and a notice of appeal is used to note an appeal.

[4] However it becomes clear on the body of the process that the applicants are instituting application proceedings because immediately under the above mentioned heading the process reads:

> ***BE PLEASED TO TAKE NOTICE that an application will be made before this Honorable Court for an order in the following terms… …"***

The applicants then pray for orders setting aside the decision of the commission that the sale constitutes a notifiable transaction and declaring that the sale is not a notifiable transaction under the Act. Further, to buttress the point that this is an application and not an appeal, it is supported by a founding affidavit. Clearly therefore, this an application for review.

[5] The respondent has raised some points in ***limine*** and one such point is that the wrong procedure has been used by the applicants. Respondent maintains that section 40 of the Act prescribes the procedure to be followed in challenging decisions of the commission to be an appeal and not an application for review. Respondent maintains that the provisions of section 40 are peremptory and cannot be overlooked by this court.

[6] In supporting this contention the respondent has referred this court to the Supreme Court decision in the case of EAGLE'S NEST (PTY) LTD AND 5 OTHERS V, SWAZILAND COMPETITION COMISSION AND ANOTHER (1/2014) [2014] SZSC 39 (30 MAY 2014). In this case, after reviewing several decisions within Africa and

abroad, Dr S. Twum JA as he then was, stated at paragraph [18] and [19] of his judgment:

> ***" (18) The decided cases discussed above show that the only remedy given for any complaint about any decision of the commission made under the Act is an Appeal to the High Court…The remedy here is an appeal to the High Court within 30 days.***
>
> ***(19) In the circumstances we hold the Judge a quo's conclusion in this matter that the proper procedure for the Appellant to complain about its grievance against the commission is by way of an appeal to the High Court and not by judicial review under section 152 of the constitution."***

[7] The learned Justice of Appeal came to this conclusion after observing that judicial precedent shows that:

> ***" ……where the Legislature had created new rights not previously known to the common law and had provided special fora and procedures for their enforcement ….the intention of the Legislature has been that only those fora and procedures should be used."***
>
> The supreme court then came to the conclusion that the competition Act, 2007 created new rights and procedures and that only the procedures land down in the Act could be used to enforce any rights or challenge any decision of the commission. It accordingly concluded the only procedure prescribed by the

Act for approaching the High Court to challenge a decision of the commission is through an appeal as provided for in section 40 of the Act.

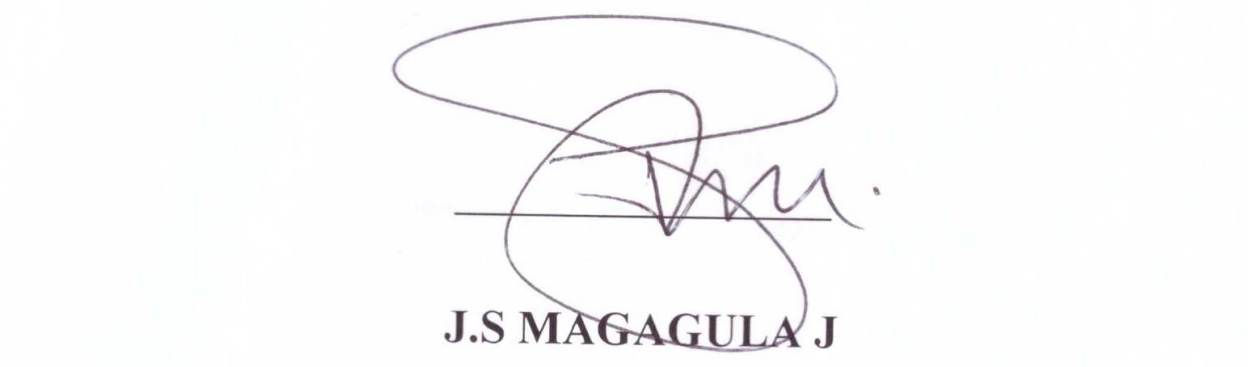
[8] In ***casu*** the applicants seek an order declaring the decision of the commission as incorrect and therefore that it be set aside. They also seek an order declaring that the transaction in question is not a notifiable one in terms of the Act. This would be clearly a review of the decision of the commission and the respondent maintains that his court has no jurisdiction to review decisions of the commission. It only has jurisdiction to hear appeals against decisions of the commission.

[9] In light of the supreme court decision cited above it is abundantly clear that the applicants have used the wrong procedure in approaching this court for the remedy sought. The respondent has challenged the procedure and sought that the case be dismissed on account of wrong procedure employed. The respondent is therefore entitled to a ruling based on its challenge of the proceedings. There is no doubt in my mind that indeed the wrong procedure has been employed and that the objection by the respondent ought to be upheld.

[10] For the foregoing reasons the following order is made:

10.1 This court has no jurisdiction to review decisions of the respondent.

10.2 This application is accordingly dismissed with costs.



J.S MAGAGULA J

For Applicants: J.M Van der Walt

For Respondent: S.M Maseko.