IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CIVIL CASE NO: 822/2016**

In the matter between:

KUKHANYA (PTY) LIMITED Applicant

And

MBONGENI MSIBI 1st Respondent

RONNIE HLOPHE 2nd Respondent

Neutral Citation: *Kukhanya (Pty) Limited vs Mbongeni Msibi and another (822/2016) [2016] SZSC 36 (18 October2021)*

CORAM: **S. P. DLAMINI JA**

R. J. CLOETE JA

S. B. MAPHALALA JA

DATE HEARD: 18 October, 2021

DATE DELIVERED: 22 November, 2021

SUMMARY: *Civil Law – Application for Leave to Appeal a Ruling of the High Court – The principles relating to interlocutory orders and Leave to Appeal considered – Held that the Exception had a final effect and an appeal existed as a right – Held that the Application for leave to appeal is granted with costs.*

JUDGMENT

S. P. DLAMINI - JA

THE PARTIES

[1] The Appellant was the Defendant and the Respondents were Plaintiffs before the High Court.

[2] Different citations appear in the various documents before this court. The correct citations of the parties are that Kukhanya (Pty) Limited is the

Applicant and Mbongeni Msibi and Ronnie Hlophe are First and Second Respondents respectively before this Court.

INTRODUCTION

[3] Serving and falling for consideration before this court is an application for leave to appeal a Ruling of the High Court in terms of Rule 9 of the Court of Appeal Rules of 1971.

BACKGROUND

[4] This matter has a somewhat checkered history in that the parties entered into what should have been a happy and mutually profitable enterprise. Alas, now they are in court each one battling it out for a pound of flesh.

[5] It is common cause that the Applicant and the Respondents entered into a written Agreement ("the Agreement") on the 24 May 2013.

[6] In my view, the key points of the said Agreement were;

6.1 That the parties would work together for their mutual financial benefit whereby the Applicant would bring financial and related contributions and the Respondents would bring their skills in a venture to generate income and share profits; and

6.2 That to realize their wishes the parties agreed to form a company and open a bank account at Standard Bank. Mr. Peter Ngwenya (representing the Applicant) and Mbongeni Msibi the First Respondent, (I suppose he also looked after the interests of the Second Respondent) would be the signatories to the envisaged bank account.

[7] Notwithstanding the parties' commitments to the venture as per the Agreement, hardly three years later things went sour, as sometimes happens in relationships in life, be it business or personal.

[8] The Respondents by letter dated 16 February 2016 demanded payment of their share of profits.

[9] The said letter of demand yielded no positive results for the Respondents resulting in them approaching the High Court for relief.

PROCEEDINGS BEFORE THE HIGH COURT

[10] The Respondents, by way of combined summons dated 6 May 2016, instituted action proceedings before the High Court against the Applicant for *inter alia*, the payment of their alleged respective share of profits in the total sum of E13,086,078.08 (Thirteen Million and Eighty Six Thousand and Seventy Eight Emalangeni and Eight cents).

[11] The proceedings were opposed by the Applicant who filed a Notice of Intention to Defend dated 9 May 2016.

[12] Applicant by letter dated 22 February 2016 requested certain Further Particulars. The requested Further Particulars were supplied by the Respondents.

[13] On 8 June 2016 the Applicant filed a Notice in terms of Rule 23 (1) seeking to remove a certain aspect of the Particulars of Claim. It is not clear from the papers as to what became of the Notice in terms of Rule 23 (1).

[14] On 8 July 2016 the Applicant filed a Notice of Exception to the Combined Summons on the averment that the particulars of claim were vague and embarrassing.

[15] It is noteworthy that the ground of the challenge on which the exception was premised was the same as the one advanced in the Notice in terms of Rule 23 (1) namely that;

> *"1. In paragraph 6.4 of the Particulars of claim, where one of the material terms of the alleged joint venture agreement is laid out, the Plaintiff alleges that the joint venture would "operate independently and shall trade under the name "KUKHANYA" to take advantage of the Defendant's categorization…".*
>
> *1.1 It is submitted in terms of the provisions of the Memorandum of Understanding attached to the Plaintiffs' Particulars of claim, there are two separate and distinct entities bearing the nomenclature*

'KUKHANYA". There is 'KUKHANYA CIVIL ENGINEERING CONTRACTORS (PTY) LTD" and "KUKHANYA BUILDINGS". It is not stated explicitly which of these two entities the Plaintiffs are referring to at paragraph 6.4"

[16] The Exception was considered and dismissed by His Lordship Mamba J. in terms of the Court Order dated 26 September 2016.

[17] The Applicant then filed its plea to the particulars of claim. The parties then proceeded to file their respective Discovery Affidavits. The pleadings were closed.

[18] The hearing commenced on 23 October 2017 at the High Court before Her Ladyship Mabuza P.J. The First Respondent was the only witness to give evidence according to the record.

[19] What follows the evidence of the First Respondent, is the Judgment of Her Ladyship on Applicant's Application for Absolution from the Instance which was apparently made at the close of the Respondents' case. Unfortunately the record before us does not contain these developments.

[20] Be that as it may, it is not in dispute that the Application for Absolution from the Instance was made by the Applicant.

[21] Her Ladyship Mabuza P.J. in terms of the Judgment delivered on 30 March 2021 dismissed the Application for Absolution from the Instance.

[22] The Applicant was dissatisfied with the said Judgment and decided to challenge it before this Court hence the Application for Leave to Appeal the Judgment.

PROCEEDINGS BEFORE THIS COURT

[23] By way of Notice of Motion in terms of Rule 9, the Applicant approached this Court seeking the following relief;

> "1. **That the above Honourable Court grants the Applicant leave to Appeal the Ruling by her LADYSHIP MABUZA PJ under High Court Case Number 822/2016 handed down on the 30th March 2021.**
>
> 2. **Staying of trial proceedings under High Court Case Number: 822/2016 pending finalization and determination of the Applicants appeal against the failure by the Court *a quo* to uphold the Application for absolution from the instance which was made on the following points.**

2.1 **The Honourable Court a *quo* erred in relying on a single document prepared by the 2nd Respondent.**

2.2 **The Honourable Court *a quo* erred in not upholding the Application for absolution from the instance on the basis that the Defendant was the wrong party to sue.**

2.3 **The Court *a quo* erred in law in not upholding the Application for absolution from the instance notwithstanding the fact that there was no evidence to prove the purported damages. Furthermore, the Respondents witnesses failed to lead the necessary evidence to support the plaintiffs claim as outlined in the particulars of claim.**

3. **That the Respondents pay costs of this application in the event of opposition thereto.**

4. **Further and/or alternative relief".**

APPLICANT'S CASE

[24] The Applicant, for the relief sought, relied on the Founding Affidavit deposed to by Bongani Magagula.

[25] Magagula, *inter alia*, stated that;

25.1 He is employed by the Applicant as Legal Officer and that he is instructed and authorized to depose to the Founding Affidavit by virtue of his position.

25.2 That in terms of Section 148 (1) of the Constitution, the Supreme Court has supervisory powers over the High Court and other subordinate courts allowing it to prevent the occurrence of injustice or irreparable harm that may be visited upon litigants appearing before the lower Courts.

25.3 That the Application for Absolution from the Instance dismissed by the High Court was well grounded at law.

25.4 That as case has been made for this Court to grant the relief sought on the following grounds;

25.4.1 That the Applicant has good prospects of success on appeal in view of the fact that according to Applicant the High Court erred in that;

(a) It relied an inadequate evidence

(b) It failed to appreciate that a wrong party was sued.

(c) It wrongly dismissed the Application for Absolution because according to the Applicant there was no evidence led to prove the damages.

(d) That even if the Applicant was well suited, the computation of the damages was wrong.

(e) That it was the joint venture and not the Applicant that was enjoined by the Agreement to declare a dividend.

25.5 That Applicant accepts that the parties have a legitimate expectation of finality in litigation but that the Application for Absolution from the Instance was not undertaken as a delaying tactic.

25.6 That the Application before this Court was filed within the stipulated *dies* found in Rule 9 of the Rules of this Court.

25.7 That this Court has the power to grant a stay of proceedings before the High Court as now the matter is pending before this Court.

25.8 That the balance of convenience favours the granting of the orders sought by the Applicant.

[26] These issues are further addressed by the Applicant in its amended Heads of Argument.

RESPONDENTS' CASE

[27] The Application for leave to appeal by the Applicant is opposed by the Respondents.

[28] The Respondents in opposing the Application for leave have relied on the Answering Affidavit deposed to by Mbongeni Msibi, the 1st Respondent.

[29] Msibi makes, *inter alia*, the following averments in the Opposing Affidavit;

29.1 That Magagula, the deponent to the Founding Affidavit, lacks the necessary authority and does not allege that he is authorised by the Applicant to depose to the Founding Affidavit and that in the absence of such authority the Application for Leave must be dismissed.

29.2 That the Application was filed outside the *dies* stipulated in Rule 9 of the Rules of this Court and such is bad at law and amounts to a nullity.

29.3 That the proceedings are irregular because the impugned judgment of the High Court is not attached to the Founding Affidavit and that the application bears case No.822/2016 that has nothing to do with this Court; and that the Applicant is referred to as Appellant yet it has not been granted leave to appeal.

29.4 That the Supreme Court is not entitled to stay the proceedings before having granted the Applicant leave to appeal or an existing valid application for leave to appeal is pending before this Court. That since the matter is pending before the High Court, only that Court may stay its proceeding and the Supreme Court lacks the jurisdiction to intervene in the circumstances.

[30] These arguments are further amplified in the Respondents' Head of Argument.

ANALYSIS AND APPLICATION OF THE LAW

[31] It is trite in our law that there is no direct or automatic appeal against an interlocutory order of the High Court to the Supreme Court.

[32] The approach of the parties is that an Application for Absolution from the Instance is interlocutory.

[33] Notwithstanding the approach adopted by the parties, it is now trite that some interlocutory orders have been categorized as final and direct or automatic appeals operate *vis a vis* such orders without leave of the Supreme Court.

[34] This Court, in the matter of **MFANIZILE VUSI HLOPHE** vs **THE MINISTRY OF HEALTH AND TWO OTHERS (20/2016) [2016] SZSC 38 (30 JUNE 2016)**, dealt with the issue of interlocutory orders that are categorized as final.

[35] In the **MFANUZILE VUSI HLOPHE** Case (*Supra*), the Court was called upon to decide whether the Court *a quo* misdirected itself in dismissing an exception.

In paragraph 11 at page 5 of the judgment the Court had this to say;

> **" [11] ... It is clear in the authorities cited above, including ZWENI VS MINISTER OF LAW AND ORDER case, that the correct legal position is that an exception may be final in certain circumstances. The Court in the**

ZWENI CASE provides a three- tier test to determine whether a judgment or order is final or not namely;

(i) **The decision must be final in effect and not susceptible to change (sic) by the Court of first instance;**

(ii) **It must be definitive of the rights of the parties; and**

(iii) **It must have the effect of disposing of at least a sustained portion of the relief claim in the main proceedings."**

[36] In paragraph 14 at page 7 of the judgment, the Court concluded that:

"14. In the circumstances, the Court is satisfied that the matter is appealable of right. There was no need to seek leave to appeal. The exception in this case went to the validity of the claim and hence the test in the ZWENI CASE, LILLICRAP WASSENAAR AND PARTNERS vs PILKINGTON BROTHERS (SA) (PTY) LTD 1985 (1) SA 471(A) at 493) and a host of other authorities was satisfied."

[37] I am of the view that where a party excepts to pleadings on the basis that it is non-suited, as is the case in this matter, the exception has the final effect because if the exception is upheld the rights between the parties would have been decided in a definitive way. The Plaintiff in such circumstances would have reached a legal cul de sac vis a vis the Defendant. Accordingly, the matter before us is appealable as of right.

[38] Be that as it may, I will now proceed with the approach that was adopted by the parties; namely that leave to appeal was necessary. Leave to Appeal in civil matters is provided for in Section 14 of the Court of Appeal Act of 1954 and Rule 9 of the Rules of his Court.

Section 14 provides as follows;

> **"14. (1) An appeal shall lie to the Court of appeal-**
>
> **(a) from all final judgements of the High Court; and**
>
> **(b) by leave of the Court of Appeal from an interlocutory order, an order made *ex parte* or an order as to costs only.**
>
> **(2) The rights of appeal given by sub-section (1) shall apply only to judgements given in the exercise of the original jurisdiction of the High Court."**

Rule 9 provides as follows;

> **"9. (1) An application for leave to appeal shall be filed within six weeks of the date of the judgment which it is sought to appeal against and shall be made by way of petition in criminal matters or motion in civil matters to the Court of Appeal stating shortly the reasons upon which the application is based, and where facts are alleged they shall be verified by affidavit.**
>
> **(2) The appellant shall deliver such petition and its supporting documents to the Registrar, and serve a copy on the respondent forthwith:**
>
> **Provided that if the appellant is in goal he may deliver the petition and supporting documents and a copy thereof to the officer in charge of the gaol who shall thereupon endorse them with the date of receipt and forward them to the Registrar who shall file the original and forward the copy to the respondent.**
>
> **(3) Such motion accompanied by supporting documents shall be delivered to the Registrar and a copy thereof shall be served by the appellant on the respondent forthwith.**

(4) The respondent may file an affidavit in reply to the petition or motion within seven days from the date of service or within such longer period as the Registrar may allow."

[39] This Court had dealt with applications under Rule 9 of the Rules of this Court. In the matter of **DIRECTOR OF PUBLIC PROSECUTIONS AND MDUDUZI ELLIOT NKAMBULE (08/2016) [2017] SZSC 03 (11 MAY 2017),** the Court had this to say;

"[23] .....it is trite law that in such matters as is this, the party seeking such an order has to demonstrate that it has prospects of success and that the other party will not suffer any prejudice. In paragraph three of his affidavit Mr Maseko merely states that "....I believe that there are reasonable prospects that another Court would come to different conclusions on the questions of law raised by the Crown." This is nothing more than a unsubstantiated and bold statement. In RUSTENBURG GEARBOX CENTRE V GELDMAAK MOTORS CC T/A M E J MOTORS 2003 (5) SA 468 (T) the Court held as follows;

"In para 14 at 419 the appellant simply submits that it has good prospects of success on appeal. (See also para 4.2 at p21 of the notice of motion of 21 February 2003.) That is not sufficient. What is required is that the deponent should set forth briefly and succinctly the essential information that may enable the Court to assess the appellant's prospects of success. A bald submission unsupported by any factual averments is not good enough to discern what the prospects of success are in this matter"."

[40] The Applicant in its papers advances the argument that it was non-suited in this matter. According to the Applicant, a special purpose vehicle in the form of a new company was to be established for the purposes of achieving the purpose and goals under the Agreement. Furthermore, the Applicant assets that the shareholding of the parties would have existed in the new company and not in the Applicant.

[41] This issue of the Applicant being not of the correct party to be sued by the Respondent for their dividends is central to the exception but appears to have not been dealt with by the High Court. The issue is simply eschewed in the impugned judgment.

[42] The Respondents at one time or another sat in Board meetings but it is unclear as to whether these were the meetings of the Applicant or the proposed new company.

[43] In my view, Applicant has made out a case for the relief sought in its papers. The application meets the requirements stated above and must succeed.

[44] Nothing much in turns on the argument advanced by the Respondents that the Applicant referred to itself in the papers as Appellant. In this regard, Rule 9 (2) of the Rules of this Court is instructive in that it refers to an Applicant as an Appellant as well.

COSTS

Our law is that costs follows the cause unless some exceptional circumstances justify a departure from this legal standpoint. In my view, the application for leave amounted to surplusage. I am not persuaded to award costs. Therefore, the parties to bear their own respective costs.

ORDER

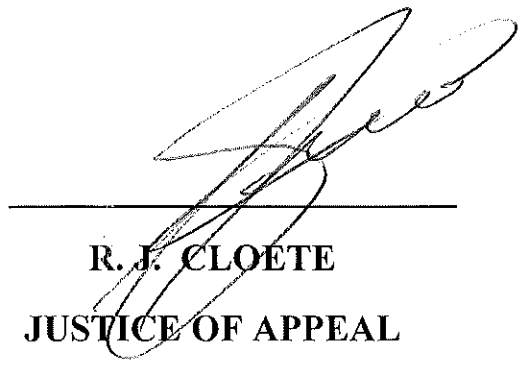
In view of the aforegoing, the Court makes the following order;

1. The application for leave to appeal the order of the High Court refusing the exception by Applicant is granted.
2. The parties to bear their own respective costs.

S. P. DLAMINI

JUSTICE OF APPEAL

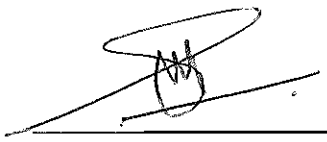
I agree



R. J. CLOETE

JUSTICE OF APPEAL

I agree



S. B. MAPHALALA

JUSTICE OF APPEAL

FOR THE APPLICANT: Advocate Barry Roux

(Instructed by S. V. Mdladla & Associates)

FOR THE RESPONDENT: Sabela Dlamini

(Magagula & Hlophe Attorneys)