THE HIGH COURT OF SWAZILAND

Civil Case No.3692/02

In the matter between:

WINNIE MUIR	**Plaintiff**
And	
S.C. DLAMINI N.O. THE MASTER OF THE HIGH COURT GARY MUIR DIANA MUIR RICHARD MUIR MELANIE MUIR	**1st Defendant** **2nd Defendant** **3rd Defendant** **4th Defendant** **5th Defendant** **6th Defendant**
CORAM	**: MASUKU J.**
For the Plaintiff For the Defendants	**: Mr P.M. Shilubane : Mr C.J. Littler**

JUDGEMENT
15th June, 2004

The question for determination in this matter is whether this Court is at large to pronounce upon the validity or otherwise of an appeal noted by a party in respect of an interlocutory order granted by this Court.

A brief synopsis of the relevant facts reveals that the Plaintiff, by a Combined Summons, dated 28th Nov ember 2002, sued the Defendants for an Order directing the Ist Respondent, the Executor, to alter and rectify his account in respects that are not material to this judgement; payment of amount allegedly due to the Plaintiff and for costs *tie bonis propriis* against the 1st Defendant.

The Defendant excepted to the Combined Summons on the grounds that it did not disclose cause of action. I pause to mention that the grounds upon which it was claimed that thi Combined Summons bore no cause of action were not disclosed in the Notice of Exception. The hearing of the exception served before Maphalala J., who dismissed the Defendant's exception with costs and on grounds which are again not material to this judgement.

It would appear that the Defendants thereafter lodged an appeal against the said judgement to the Appeal Court. The Plaintiff, in response thereto, moved an application in terms of the provisions of Rule 30 for the setting aside of the Notice of Appeal on the grounds that it constitutes an irregular step on the following grounds:-

1) the Defendants are not entitled to appeal against the judgement of Mr Justice Maphalala aforesaid, inasmuch as it is an interlocutory order and not a final judgement;

2) the Defendants are appealing against the Order as to costs only and have not obtained leave to appeal as required by Section 14 (1) (b) at the Court of Appeal Act No. 74 of 1954.

The Defendants on the other hand, contend that even if the Plaintiffs Rule 30 Notice is correct in law this Court lacks the jurisdiction necessary to set the Notice of Appeal aside, that being the exclusive preserve and domain of the Appeal Court.

The Law Applicable

Rule 30(1), of the High Court Rules provides the following:-

"A party to a cause in which a step or proceeding has been taken by any other party, may, within fourteen days after becoming aware of the irregularity, apply to court to set aside the step or proceeding: Provided that no party who has taken any further step in the cause with knowledge of the irregularity shall be entitled to make such application. "

Sub-Rule 3 thereof provides the following:-

> *"Ifat a hearing of such application the court is of the opinion that the proceeding or step is irregular, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems fit. "*

The necessity of referring to the above Sub-Rules will become evident in the course of the judgement. A mere reading of the papers clearly shows that the application in terms of Rule 30 was unquestionably brought within the relevant period set out therein. Section 14 (1) of the Court of Appeal Act No.74 of 1954 reads as follows:-

> *"An appeal shall lie to the Court of Appeal-fa) from all*
>
> *final judgments 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. "*

The Defendants' Grounds of Appeal contained in the Notice dated 7th May 2004, read as follows:-

3) The Court *a quo* erred in law, after having dismissed the exception on mere technicality, by totally failing to consider the Respondents summons for purposes of exercising its judicial discretion in order to determine whether or not costs were to be awarded against the Appellants, or whether such costs ought to have been reserved or declared to be costs in the course.

4) The Court *a quo* erred in law in awarding costs against the Appellants in as much as if it exercised its judicial discretion at all, which from the judgement is'evidently did not do, then such exercise of its discretion was based upon a wrong view of the facts. Such salient facts being that none of the Appellants, *ex facie* the summons, are in any way connected to the subject matter of the dispute.

c) The decision to award costs against the Respondent, was erroneous in that there was absolutely no exercise by the lower court of its judicial discretion before arriving at the decision regarding costs and had it done so it would have reserved them or ordering that they be costs in die cause.

A plain reading of the Notice clearly shows that the appeal is solely confined to the question of costs. In terms of the provisions of Section 14 (1) (b) quoted in full above, this is a matter in respect of which the leave of the appeal Court is a *sine qua non* i.e. one may not note an appeal before leave has been sought before and granted by the Appeal Court.

Rule 10 of the Appeal Court Rules, 1971, as amended, stipulates the procedure to be followed by a party dissatisfied with an interlocutory order, an *ex parte* order or an order as to costs, given by this Court. The said Rule provides the following:-

> *"If the Court of Appeal on a petition or motion for leave to appeal has given an appellant leave to appeal, it shall not be necessary for him to file or serve a notice of appeal, the petition or motion constituting sufficient notice. "*

What becomes abundantly clear is that leave to appeal is applied for by way of petition or motion. *In casu* it is an ineluctable fact that notwithstanding that the appeal is directed at questions which require leave from the Court of Appeal, no such leave, whether by way of petition or motion was sought by the Defendants. In the sorry and unfortunate circumstances in which we find ourselves without a Court of Appeal, it would in my view be sufficient for the Defendants to file the application for leave and wait for the re-constitution of the Court of Appeal to determine the application.

Having established the foregoing, the question to be determined at this juncture is whether in view of the obvious irregularity committed by the Defendants in noting the appeal without the necessary leave from the Appeal Court, this Court is competent to set aside the purported Notice of Appeal.

1 am of the view that this is an issue that must be left for determination by the Appeal Court. By filing a Notice of Appeal, it becomes clear that this Court thereafter becomes *functus officio* in relation to the question to which the appeal relates, no matter how glaring the

irregularity may appear to a Judge of this Court. It would in my view amount to a usurpatio of the power, jurisdiction and authority of the Appeal Court for this Court to pronounce on the validity or otherwise of appeals already noted.

It is also worth remembering that the word "Court" occurring in Rule 30.(3) is described in the interpretation as referring to this Court. It is therefor clear that the Rules of this Court govern the procedure of this Court in as much as the Appeal Court has its own R-ules governing the procedure of that Court. It would in my view be absurd for this Court to use its Rules to set aside proceedings, not only before another Court, but before a higher Court.

One cannot help but sympathise with the Plaintiff in this case, particularly in view of the situation which presently prevails where we have no Appeal Court as aforesaid and it is not clear when normalcy will in this regard be restored. Such issues could have been easily disposed of by that Court.

I have in two recent judgements expressed the view that there are certain circumstances in which this Court, particularly in the absence of the Appeal Court, ought to intervene to extend justice to a deserving party even if that determination would, all things being normal, be made by the Court of Appeal. This was in appreciation of the fact that in certain cases, irreparable harm or injustice may eventuate. See **SVVAZI PHARM WHOLESALE (PTY) VS RANBAXY (SA) LIMITED t/a RANBAXY LABORATORIES AND ANOTHER** *In re:* **RANBAXY (PTY) LIMITED t/a RANBAXY LABORATORIES VS SWAZI PHARM WHOLESALE (PTY) LTD CIVIL CASE NO. 1878/03 and CYPRIAN MFANUZODLANI GULE VS MPHEZENI VILAKATI AND ANOTHER CIVIL CASE. NO. 995/04.**

In the latter case, this Court was being called upon to determine whether a party may, after realising that the record has not been fded proceed, *mero motu*, without the sanction of the Court to execute upon the judgement and, without a determination by any Court whether the stay consequent upon appeal still obtains. My opinion was that this court can make the determination, subject to the provisions of Rule 16 of the Court of Appeal Rules, for extension of time.

In the earlier case, I stated *obiter dictum,* that this Court, in the absence of the Appeal Cour can pronounce, on the fact whether or not Rule 30 (1) of the Appeal Court relating to the lodging of the record has been complied with, and by extension whether the stay of execution still obtains. I further noted that this may be necessary to prevent abuse of the absence of the Appeal Court by parties who wish to delay execution by noting what appear to be hopeless appeals.

As indicated earlier, what the Court is now called upon to do is very different and drastic. It is asked to set aside a Notice of Appeal as an inegular proceeding, a power that must reside only in the Appeal Court, which Court would have to employ its own Rules in making that determination. This is an Order that I am not competent to make. The Rule 30 application is therefor dismissed.

On the question of costs, a matter that involves the Court's discretion, I order each party to bear its own costs. It is trite that the ordinary rule is that costs must follow the event. I decline to follow that course *in casu,* for the reason that Mr Littler, in his honesty, submitted that the appeal was noted only to avoid execution in relation to the costs of the dismissed exception. This can hardly be described as a noble reason for noting the appeal. This in fact smacks of abuse of the appeal process, an occunence that must be discouraged. It is on those grounds that I must depart from the common practice.

T.S. MASUKU
JUDGE