IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO. 659/04

HELD IN MBABANE

SANTOS PROPERTIES APPLICANT

AND

CELESTE INVESTMENTS (PTY) LTD 1st RESPONDENT

BONGANI INNOCENT GININDZA 2nd RESPONDENT

CORAM SHABANGU AJ

FOR APPLICANT MR WARRING

FOR RESPONDENT MR HOWE

JUDGEMENT 27th May, 2004

Before me is an application in terms of rule 30 filed on behalf of the respondents in the main application. The parties are going to be referred to as in the main application.

The rule 30 application is expressed to be founded on the fact that the applicant's notice of appeal directed against an order of this court of 29th March, 2004, wherein Mr Justice S.B. Maphalala rescinded or set aside an earlier order which he had granted, is an irregular step, in that no leave to appeal has been sought and obtained from the court of appeal prior to the filing of the notice of appeal. The notice of application in terms of rule 30 filed on behalf of the respondents reads;

"Be pleased to take notice that the 1st and 2nd Respondents intend applying to the above Honourable Court on Friday the 16"1 April, 2004 or so soon thereafter as the matter may be heard for an order that the notice of appeal filed by the applicant dated 2nd April, 2004 be and is hereby set aside as an irregular step or proceeding in that :

1. In terms of section 14 of the court of Appeal act leave has to be sort (sic) from the court of Appeal to appeal any order that is interlocketory (sic) and such leave has not been sort (sic) from the court of appeal;

2. Costs of suit;
3. Further and or alternative relief "

The background to the application is as follows. It appears that on 22nd March, 2004 the applicant represented by Mr Warring served an application upon the respondents which notified the latter of an application which was to be heard at 09.30 a.m on 25th March. 2004 or so soon thereafter as the matter may be heard. The "25th day of March, 2004 at 09.30 a.m" was the date for the hearing of the matter stated in the aforementioned Notice of motion. The application which was apparently filed in court on 23rd March, 2004 required the Respondents to file a notice of intention to oppose the application by 12.00 noon on Tuesday the 23rd day of March, 2004 giving the respondents less than one court day to file such notice. In terms of the rules, namely rule six of the Rules of this court, the Respondents were entitled to not less than five days after service of the application on them, for the purpose of filing a notice of intention to oppose the application. The application further required the respondents to file opposing affidavits if any by 4.30 p.m on Tuesday 23rd of March, 2004. The

Respondents were therefore required to file then-opposing papers, if any in less than one court day (as opposed to the fourteen days to which they are entitled in terms of the rules). The matter was on the face of the Notice of Motion enrolled for hearing on 251 March, 2004. The application was not brought on a certificate of urgency nor was there a prayer in the Notice of motion that the requirements of the rules relating to time limits and notices be dispensed with and or that the matter be treated as an urgent matter. A possible explanation for the procedure followed by the applicant may be found in what is stated by Mr Justice S.B. Maphalala in the judgement which the applicant has appealed against, as follows;

"Mr Waring on the other hand argued stremously that this matter came initially under a Certificate of urgency on the 5"' March, 2004 where a rule nisi was

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issued in terms of prayers 1,2,3 and 4 of the notice of motion. The rule was returnable on 12 March, 2004. On the return date the matter appeared before Shabangu AJ where the learned Judge confirmed certain prayers and further directed that the Applicant should file fresh papers in respect of the remaining prayers and intimated to Mr Waring that he will hear the application on the 25th March, 2004. Unfortunately there is no indication of this on the record. Mr Waring argued that urgency in the matter when it first appeared on 5th March, 2004, still continued even on the fresh application and therefore, there was no need for the Applicant to allege urgency or even attach a certificate of urgency. In short, the application of the 5th is a continuation of that of 25th March, 2004."

In the latter application the applicant was seeking an order aimed at perfecting the landlords' tacit hypothec and ejectment of the respondents from the leased premises. It appears that the application which was scheduled for 09.30 hrs on the 25th March, 2004 was granted by Mr Justice Maphalala on the same date. In a written judgement dated 29th March, 2004 Mr. Justice Maphalala rescinded the order he had granted on 25th March, 2004. This latter order followed a hearing on the 26th March, 2004, before the same judge. The learned judge describes how this hearing came about in his written reasons of the ruling he made on 29th March, 2003. He says:

"The applicant obtained an order before me on 25th March, 2004, for inter alia payment of arrear rentals and other charges in the amount of E20,204-52, ejectment of the V' Respondents, interest and costs of suit on an attorney and own client scale including collection commission. In the afternoon of the granting of the said order counsel for the Respondent approached me in chambers in the company of the Registrar to seek clarification on the circumstances leading to the granting of the abovenamed order. ...I advised Mr Howe to file an application and enrolled the matter for the following day being the motion court of the 26th March, 2004. Indeed, when the matter was called the following morning Mr Howe filed a notice to raise points in limine and submitted Heads of Argument. Mr Howe had not filed a formal application but relied on what appears at page 686 to 687 of Herbstein et al, ..."

It appears from the above statement by the learned judge that Mr Howe had not filed a formal application but had referred the learned judge to the exceptional circumstances under which a court may correct, alter or supplement an order already given, discussed in Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa. 4"' edition at page 686-7. it further appears in the written reasons for the ruling of 2V"

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March, 2003 that Mr Howe had proceeded to argue some points in limine and was allowed by the learned judge to argue this points when Mr Warring objected. It appears that the learned judge did not find Mr Howe's submissions and the passage in Herbstein and Van Winsten to which the court was referred to be applicable to the facts presented by the matter before him on 26* March, 2004. In this regard the learned judge observed at page three of his written reasons for the ruling he made on 29th March, 2004 that

"The basis of Mr Howe's approach is what is stated by the learned authors supra '...provided that the

court is approached within a reasonable time of its pronouncing the judgement or order, it may correct, alter or supplement it...'. It appears to me though that the court can only use this power in the instances mentioned in (i), (ii), (Hi) and (iv) in Herbstein supra. ...On the argument advanced by Mr Howe, it is my opinion that the present case does not fall in the categories of cases outlined by Herbstein (supra) at 686. I am also of the view that even in those cases parties are to file proper papers 'within a reasonable time.'

The ruling made by the learned judge as already mentioned rescinded the order of 25th March, 2004 and directed that the "first and second respondents are permitted to file their opposing affidavits in the normal time periods provided for in the rules. Having expressed his opinion that Mr Howe's arguments were not applicable to the matter before him the learned judge appears to me to have concluded that he could "mero motu" under the provisions of rule 42. rescind the order of 25th March, 2004 and that the case before him was a proper case for him to do so. This conclusion and ruling is expressed as follows at page six of the written reasons;

"It is clear therefore that this matter is being decided within the strictures of rule 42 (I) where the court may 'mero motu' vary any order given. In the result, the order of the court of 25"' March, 2004, is rescinded to the extent that the Applicant is to return the items taken from the Respondents to them and 1st and 2"" Respondents are permitted to file their opposing affidavits in the normal time periods provided for in the rules. Its is ordered further, that the 1st and 2"d Respondents are not to dispose of these items until this matter has been finalised."

It seems that the order made by the learned judge merely gives directions on procedural matters. The issue in relation to the rule 30 application is whether the abovementioned

order which rescinded the order of 25th March, 2004 is an interlocutary order having a final and definitive effective on the main application, for there can be no doubt that the order is interlocutory. In other words it appeared to be common cause between the parties during argument that the order was interloeulary in nature, in the sense that it relates to matters which are incidental to the main dispute and was pronounced during the progress of the litigation between the parties. However the argument by Mr Waring was that the ruling by the court delivered by Mr Justice Maphalala on 29th March, 2003 though interlocutary in nature was not a "simple" (or purely) interlocutary order as contemplated in the judgement of CORBELTT J.A in SOUTH CAPE CORPORTATION (PTY) LTD V. ENGINEERING MANAGEMENT SERVICES (PTY) LTD 1977(3) SA 534(A). In that case Corbett J.A. made the following observation in a statement that is widely approved and has been quoted in a number of other judgements and textbooks, that

"(a) In a wide and general sense the term 'interlocutary' refers to all orders pronounced by the court, upon matters incidental to the main dispute, preparatory to, or during the progress of litigation. But orders of this kind are divided into classes : (i) those which have a final and definitive effect on the main action; and (ii) those, known as 'simple (or purely) interlocutary orders' or interlocutary orders proper which do not..."

The learned judge went on to observe that

"Statutes relating to the appealahility of judgements or orders (whether it be appealability with leave or appealability at all) which use the word 'interlocutary' or other words of similar import, are taken to refer to simple interlocutary orders that the statute is read as prohibiting an appeal or making it subject to the limitation of requiring leave, as the case may be. Final orders, including interlocutary orders having a final and definitive effect are regarded as falling outside the purview of the prohibition or limitation. "

It was Mr Waring's submission that the order made by Mr Justice Maphalala on 29th March 2004 wherein he set aside his earlier order of 25th March, 2004 is not a purely interlocutary order. The learned authors of Herbstein and Van Wensen, The Civil Practice of the Supreme Court of South Africa 4th edition at page 878 have this to say in relation to the principle applicable in determining

whether a preparatory or procedural is purely interlocutary or is an interloutarv order having final and definitive effect.

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"The principle to be applied in determining whether a preparatory or procedural order is purely interlocutary is laid down in the leading case of PRETORIA GARRISON INSTITUTES V. DANISH VARIETY PRODUCTS (PTY) LTD, sc that a preparatory or procedural order is purely interlocutary unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit' or unless it irreparably anticipates or precludes some of the relief which would or might be given at the hearing."

At the level of principle, as already stated, the order of 29th March, 2004 made by Mr Justice Maphalala gives procedural directions in relation to the main application. It does not dispose of any issue or any portion of the issue in the main matter or application, nor does it anticipate irreparably or preclude some or any of the relief which would or might be given at the hearing of the main application, Mr Waring however submitted that the learned judge overruled him when he wished to raise a question relating to the jurisdiction of the court and in support of this referred me to a portion of the written reasons for the ruling by Mr Justice Maphalala wherein the learned judge states;

"Mr Waring, however vigorously opposed the procedure adopted by Mr Howe in casu that he should have filed a proper application so that the Applicant knew what case to meet I overruled Mr Waring and ordered that Mr Howe proceed to argue the points he had raised. "
From the abovequoted passage I can find nothing which supports Mr Warring's argument that he had raised an issue relating to the jurisdiction of the court. What seems to be indicated in a portion of the learned judges' written ruling is that Mr Waring had objected to the procedure adopted by Mr Howe of simple filing points of law in limine in respect of a matter wherein an order had already been granted. Mr Howe did not file any kind of application. That indeed was a very strange procedure, However as already observed the learned judge also rejected the submissions made in support of Mr Howe's approach and proceeded "mero motu" to vary the order given on 25th March, 2004. No question of jurisdiction arose therefore. Indeed no such question could arise at that stage of the proceedings see STEYTLER N.O V. FITZGERALD 1911 AD 295.

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However, the difficulty in the way of the rule 30 application made by the respondents is that the lodging of an appeal and the filing thereof is on the face of the applicants' notice of appeal as formulated, a step taken in the court of appeal. The notice of appeal is not lodged in the High Court. In light of this the rule 30 application is misconceived. There might be case law authority for the proposition that an appeal is noted in the court aquo and prosecuted m the appeal court. However, I need not consider the accuracy of this proposition because in the present matter, the notice of appeal filed by the applicant is as formulated clearly a step taken in the court of appeal. If there is any objection of any kind to the notice of appeal, such objection can only appropriately be taken in the court of appeal.

In the circumstances, the rule 30 application is dismissed with costs.

ALEX S. SHABAHGU

ACTING JUDGE