



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No.1581/2012

In the matter between:

TASTY TREATS (PTY) LTD

T/A TT TRUSSON

vs

KS DISTRIBUTORS (PTY) LTD

T/A BUILD PLUS HARDWARE

Applicant

Respondent

Neutral citation: *Tasty Treats (Pty) Ltd t/a TT Trusscon vs KS Distributors (Pty) Ltd t/a Build Plus Hardware (1581/2012) [SZHC] (4th October 2013)*

Coram: **MAPHALALA PJ**

Heard: 13th August 2013

Delivered: 4th October 2013

For Applicant: Mr. L. Mzizi

For Respondent: Mr. B. Magagula

- Summary:
- (i) An Application to declare a writ of execution null and void on the ground that the basis of such is not on a final judgment.
 - (ii) Applicant has lodged an appeal against the judgment where the writ of execution emanates.
 - (iii) This court finds in favour of the Applicant that the writ of execution null and void by virtue of the fact that the judgment issued by *Hlophe J* was not a final judgment and therefore no writ of execution could emanate from it.

The application

[1] On the 12th August, 2013 the Applicant filed an Application under a Certificate of Urgency for orders in the following terms:

- “1. Dispensing with the normal Rules of Court as relates to service and time limits and hearing this matter as an urgent one.
- 2. Condoning Applicant’s non-compliance with the Rules of Court.
- 3. That pending determination of the Application the execution of the writ of execution of the main proceedings be and is hereby stayed.
- 4. That a *rule nisi* do hereby issue calling upon the Respondents to show cause at a date and time as shall be determined by the Honourable Court why an order in the following terms should not be made final:
 - 4.1 That the execution of the writ of execution of the main matter conducted on the 30th July, 2013 be and hereby declared unlawful.

4.2 That the 1st and 3rd Respondents be and hereby ordered to reimburse the Applicant the sum of E17,234.41 and bank charges of E95.00 being monies withdrawn from Applicant's account on the strength of the execution of the writ of execution of the main matter.

4.3 That the 1st and 3rd Respondents be and are hereby ordered to pay costs of suit at the Attorney and own client scale the one paying for the other to be absolved.

5. That the Respondent be and is hereby granted leave to anticipate the interim order on twenty four hours' notice to Applicant's attorneys.

6. Granting Applicant further and/or alternative relief."

[2] The Applicant has filed a Founding Affidavit outlining the history of the matter and the cause of action between the parties. Pertinent annexures are also filed.

The opposition

[3] The Respondent opposes the above orders and has filed a Notice to raise points *in limine* only. When the matter came for arguments the attorneys of both parties argued both the points *in limine* and the merits of the case.

The points *in limine*

- [4] On the 14th August, 2013 the Respondents filed with the Registrar of this Court a Notice to raise points of law being firstly, defective notice of appeal that the Notice of Appeal is defective and invalid because interlocutory decisions are not appealable in terms of law.
- [5] The second point *in limine* is that of wrong procedure that Applicant has failed to follow the proper procedure when contemplating to enter into the principal case, after the grant of a provisional sentence in terms of Rule 8 of the High Court Rules.
- [6] The third point *in limine*, is that of urgency that the matter is not urgent based on the fact that financial prejudice/hardship is not sufficient ground for urgency.
- [7] At paragraph 4 raised the point *in limine* that Applicant was called to meet the requirements for declaratory relief. In paragraph [5] thereof that of abuse of court process that the Applicant has just noted an appeal solely for delaying the effectiveness of the judgment handed down on 16th July, 2013.
- [8] At paragraph [6] that of failure to meet the requirements of an interdict and lastly in paragraph [7] that of dispute of facts in that there is a dispute of fact

with regard to the lawfulness and otherwise of the execution. That Applicant ought to have instituted action proceedings.

[9] On the 20th August, 2013 the matter was argued before me where the attorneys of the parties submitted oral submissions and filed written Heads of Arguments.

The arguments of the parties

(i) For the Respondent

[10] The first argument under this head is that the Notice of Appeal is irregular and incompetent and cited the provisions of section 14(1) of the Court of Appeal Act which states the following:

“14 (1) an appeal shall lie to a Court of Appeal

(a) from all final judgments of the High Court

(b) by leave of the Court of Appeal from an interlocutory order, an order made *ex parte* or an order as to cost only.

4.2 The Applicant has decided to file a notice of appeal pursuant to a judgment in terms of Rule 8, which is a Provisional Sentence Summons. By its very nature a Provisional Sentence Summons is interlocutory.”

[11] That the Applicant has decided to file a Notice of Appeal pursuant to a judgment in terms of Rule 8 which is a provisional sentence summons. That by its very nature a provisional sentence summons are interlocutory.

[12] The attorney for the Respondent then cited Rule 8(1) of the High Court Rules to support his arguments. The said Rule reads as follows:

“In the event a Provisional Sentence Summons is granted against a party it has a further relief in the same court which is the *court a quo* by paying the judgment debt and calling for security from the Plaintiff and thereafter it can enter into the main claim.”

[13] Mr. Magagula for the Respondent contends that the present Application emanates from the judgment that was delivered by *Hlophe J* where at paragraph [17] thereof the learned Judge clarifies and set out the procedure which the Defendant can follow in the event is desiring to enter into the principal case. In this regard *Hlophe J* stated the following at paragraph [3] of the judgment:

“Should the Defendant desire to enter the principal case, it shall follow the provisions of the Rules of this Court in that regard.”

[14] That those provisions are clearly enunciations in Rule 7(11) which states as follows:

“A Defendant entitled and wishing to enter into principal case shall within forty five days of the grant of the Provisional Sentence deliver notice of intention to do so, in which event, the summons shall be deemed to be a combined summons and shall deliver a plea within seven days thereafter, failing such notice or such plea the Provisional Sentence shall *ipso facto* become final judgment and security given by the Plaintiff shall lapse.”

[15] The last argument of the Respondent under this head is that before the application of Rule 8(11) the Defendant must have fulfilled the various stages in Rule 9 and 10 which are stated in Rule 8(9) as follows:

“Rule 8(9)

4.5.1 The Plaintiff shall on demand furnish the Defendant with security *de restituendo* to the satisfaction of the Registrar against payment of the amount due under the judgment. This means that before Rule 8(11) can be applicable, the Defendant must first make the payment of the amount as per the provisional sentence judgment after which the Plaintiff will then furnish security.”

[16] In this regard it is contended for the Respondent that the Applicant has not made such a payment which would have indicated that it intends to enter into the principal case after it had made payment. That it was supposed to demand security therefore it has not taken steps pursuant to this Rule to indicate that it intends to enter into the principal case. That further the current Notice of Appeal filed is defeated by the provisions of section 14(1) of the Act.

[17] In support of these arguments the attorney for the Respondent cited a *plethora* of judgments of this court that of *Philani Clinic Services (Pty) Ltd vs Swaziland Revenue Authority and Another, Civil Case No.36/2012; Melusi Qwabe and Another vs Sabelo Masuku NO, Appeal Case No.34/2007* and that of the *Minister of Housing and Urban Development vs Sikhatsi Dlamini and 10 Others, Supreme Court Case No.31/2008*.

[18] The Respondent's attorney then also dealt with the issues of urgency and abuse of court process in paragraphs 6, 6.1, 6.2, and 7.1 I shall revert to these submissions later on in my analysis of the issues for decision.

(ii) For the Applicant

[19] The Applicant's attorney also filed very useful Heads of Arguments on the issues addressed by the Respondent's attorney above. For ease of reference, I shall outline these arguments in brief in the following paragraphs of this judgment.

[20] The Applicant's attorney at paragraph [2] of his Heads of Arguments framed the facts that are common cause to be the following:

“2.1 That the above Honourable Court issued an order for Provisional Sentence against the Applicant on Friday the 26th July, 2013;

- 2.2 On the following Monday being the 29th July, 2013 the Applicant appealed against the decision of the above Honourable Court;
- 2.3 That on the same Monday at around 1200 hours the Notice of Appeal was served upon 1st Respondent;
- 2.4 That despite having been served with the notice of appeal the 1st and 2nd Respondent went ahead and executed a writ of execution on the 30th July, 2013;
- 2.5 That a sum of E17, 234.47 was withdrawn from the Applicant's bank account as a result of the execution of the writ of execution."

[21] Mr. Mzizi for the Applicant further dealt with each topic as argued by the Respondent's attorney outlined above and I shall briefly restate these arguments for a better understanding of the issues for decision.

[22] The first heading concerns the first point *in limine* that the test for whether a decision stands to be appealed against is whether that decision is final and definitive. That in the present case this court ordered Provisional Sentence against the Applicant. That this decision in essence means the Applicant ought to pay the amount claimed in the Provisional Sentence summons. That this is evidenced by the fact that even the Respondent issued a writ of execution on the strength of the order of the court.

[23] Mr. Mzizi contended therefore after outlining the above argument in paragraph [22] *supra* this court cannot determine this because it is only the Supreme Court that has the jurisdiction to determine whether the appeal brought before court is valid or invalid. The Applicant's attorney cited section 147 of the Constitution of Swaziland to buttress this argument.

[24] In the following paragraphs of the Heads of Arguments of the attorney for the Applicant various points *in limine* are canvassed being the point about the wrong procedure at paragraphs 3.4 and 3.5. The issue of urgency in paragraph 3.6 to 3.8 thereof and the issue of the declaratory relief in paragraph 3.9 to 3.10 of the said Heads of Arguments.

[25] Furthermore the point about failure to meet the requirements of an interdict in paragraph 3.14 to 3.16 and the point of disputes of facts in paragraph 3.17 and 3.19.

[26] The attorney for the Applicant further dealt with the merits of the case and cited judgments of the High Court which are pertinent to the merits of this case. These being the case of *Swazi MTN Limited and Others vs Swaziland Posts and Telecommunication Corporation, High Court Case No.1890/2010*.

The court analysis and conclusion thereon

[27] Having considered the arguments of the parties to and fro I shall proceed to examine each point *in limine* by the Respondent in the following paragraphs to the final decision by this court.

(i) Whether notice of appeal is irregular

[28] The crux of the argument of the Respondent under this head is that Provisional Sentence summons is by its very nature interlocutory and as such the appeal before the Supreme Court of the judgment of *Hlophe J* is premature before this court. Further more the argument of the Respondent is that in the event a Provisional Sentence summons is granted against a party it has further relief in the same court which is the court *a quo* by paying the judgment debt and calling for security from the Plaintiff and thereafter it can enter into the main claim.

[29] On the other hand it is contended for the Applicant that this application before this court presently is not seeking to enter into the principal case. That the application before court is in relation to the execution of an order where an appeal has been lodged by a party who is not satisfied with the decision of the court that has issued that order. That the fact of the matter is that a writ of execution has been issued on the strength of the order by *Hlophe J*.

[30] I have considered the arguments of the parties to and fro on this point *in limine* and I am inclined to agree with the argument of the Applicant on my reading of the affidavits and the papers. The Applicant is not seeking to enter into the principal case.

[31] The application before court is in relation to the execution of an order where an appeal has been lodged by a party who is not satisfied with the decision of the court that has issued that order. In view of this order a writ of execution was issued on this judgment based on Provisional Sentence. It appears that the technical arguments on the nature of the Provisional Sentence summons is overshadowed by this very real threat of a writ of execution on assets of the Applicant.

[32] Furthermore, I agree *in toto* with the submissions of the Applicant that it is only the Supreme Court that has the jurisdiction to determine whether an appeal that has been brought before it is valid or invalid.

(ii) Wrong procedure

[33] The point raised by the Respondent in this respect is that the Applicant has failed to take the proper procedure when contemplating to enter into the principal case, after the grant of a Provisional Sentence in terms of Rule 8 of the High Court Rules.

[34] In my assessment of the arguments of both attorneys to and fro I am persuaded by the arguments of the Applicant's attorney. In the present case the Applicant is not seeking to enter the principal case. The application before court is in relation to the execution of an order where an appeal has been lodged by a party who is not satisfied with the decision of the court that has issued that order. It is also clear that the very nature of Provisional Sentence was interlocutory as also stated by *Hlophe J* in his judgment appealed against. Therefore, this point cannot succeed on the facts of the matter.

(iii) Urgency

[35] Having considered the point of law on urgency the arguments of both attorneys in view of the time that has passed I do not think this point is still relevant. I take it that the matter is now determined in the long form in the circumstances of this case.

(iv) Declaration relief

[36] Having considered the arguments of both parties I have come to the view that the point of law raised by the Respondent is vague in the sense that it does not disclose how the requirement has not been met therefore the point is dismissed forthwith.

(v) Abuse of court process

[37] In my assessment of all the arguments of the parties I am inclined to agree with the Applicant's contentions in paragraphs 3.11, 3.12 and 3.13 of the attorney's Heads of Arguments.

[38] Furthermore, I agree with the submissions of the Applicant in respect of failure to meet the requirements of an interdict and disputes of facts in paragraph 3.4, 3.15, 3.16, 3.17, 3.18 and 3.19 of the Heads of Arguments of the attorney for the Applicant.

The merits of the case

[39] Having considered all the arguments and the papers on the merits of the case. The 1st and 3rd Respondents have not filed any affidavit responding to the merits of the matter. There is no application for leave to file on the merits in the event the points *in limine* are dismissed. The crisp issue for decision therefore on the merits of the case is whether a litigant has a right to proceed with execution of an order of court where the other party has appealed against the decision of the court that issued the order. In this regard I find the *dicta* in the case of *Swazi MTN Limited and Others vs Swaziland Posts and Telecommunication Corporation, High Court Case No.1896/2010* apposite.

[40] On costs the Applicant has urged this court to award costs at attorney and own client scale against the Respondents in view of their attitude. I have considered the arguments of the parties and in exercise of my discretion order costs to be in the ordinary scale.

[41] In the result, for the foregoing reasons an order is granted in terms of the prayers 1, 2, 3 and 4 of the Notice of Motion with costs on the ordinary scale.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE