IN THE HIGH COURT OF SWAZILAND

Case No. 325/16

In the matter between:

SWAZI MTN LIMITED	Applicant
VS	
THE PRESIDING JUDGE OF INDUSTRIAL COURT	1st Respondent
THANDI KUNENE	2nd Respondent
MAKHOSI ANDILE VILAKATI	3rd Respondent
DAVID MDLOVU	4th Respondent

In re:

THANDIE KUNENE	1st Applicant
MAKHOSI ANDILE VILAKATI	2nd Applicant
DAVID MDLOVU	3rd Applicant
AND	
SWAZI MTN LIMITED	Respondent

Neutral citation: *Swazi MTN Limited v Presiding Judge of Industrial Court and Others (325/16)[2016] SZHC33 (23 February2015)*

Coram: FAKUDZE, J

Heard: 17February, 2016

Delivered: 23 February, 2016

RULING ON POINTS OF LAW

Summary: ***Civil Procedure – A party raising point of law must be mindful of the wider interests of justice – Points of law should be resorted to only in fitting cases – Issues of urgency under consideration – Points of law dismissed on the basis that sufficient grounds of urgency under Rule 6 (25) (a) and (b) have been canvassed in the founding affidavit.***

JUDGMENT

[1] On the 17th February 2016, Applicant filed an urgent application for an Order condoning non compliance with the normal rules relating to forms, services and time limits and hearing the matter as one of urgency; and reviewing and setting aside the judgment or ruling of the 1st Respondent handed down on the 16th February, 2016 and substituting same with that "*the Order of the 1st Respondent handed down on the 26th January, 2016 ordering the trial to proceed on the 17th and 18th February is hereby varied and the trial to proceed on dates as may be agreed between the parties with the assistance of the Registrar.*" The Respondent filed the Notice to Oppose**.**

POINTS OF LAW

[2] On the 17th February, 2016 and just before the matter was heard on the merits, the Respondent filed from the bar, a Notice to raise points of law, on the following grounds-

(a) That Applicant has been aware over a month ago that its chosen counsel was engaged in other matters for the dates that had been allocated to the matter at the Industrial Court;

(b) That the Applicant's papers failed to comply with the requirements of Rule 6 (25) (a) and the mere fact that the hearing is proceeding on the 17th and 18th February 2016, can hardly be a basis for urgency when that factor was known in December 2015 when the roll was published. The Applicant has not met the mandatory requirement of Rule 6 (25) (a) as no further grounds have been alleged why it avers that the matter is urgent: and

(c) That the Application has also not complied with the mandatory requirement of Rule 6 (25) (b) by failing to state why Applicant claims it cannot be afforded substantial redress at a hearing in due course.

[3] At the end of the arguments by counsel for both parties, I issued out an *ex tempore judgmen*t dismissing the points of law raised by the Respondent's Counsel. I promised to notify the Parties of the reasons for dismissing the Application in due course and the purpose of this Ruling is to fulfill what I promised to do .

<u>BORNE OF CONTENTION</u>

[4] For purposes of the Ruling on the points of law, I shall refer to the Respondents in the main Application as Applicants and refer to the Applicant as the Respondent. Applicants' case is that the urgency is self created because the dates which are the subject of this Application were made known to the Respondent in December, 2015. Applicants' Counsel avers that the Urgent Application does not comply with Rule 6 (25) (a) and (b) in that the purported dates for the matter to be heard are not a sufficient basis for establishing urgency. It is therefore not clear on the papers why Respondent says that the matter is urgent. Applicants' Counsel argues that Respondent has failed to state why Applicant cannot be afforded substantial redress at a hearing in due course. Applicant's Counsel states

that the requirements of Rule 6 (25) (a) and (b) are mandatory or peremptory. Applicants' Counsel referred this court to the case of **Twentieth Century Fox Film Corporation V Anthony Blade Film (Pty) Ltd 1982** (3) SA 582 (w) in support of his proposition.

[5] Applicants' Counsel submits that there was an attempt to address the issues raised above on non compliance with Rule 6 (25) (a) and (b); unfortunately this attempt is partial.

This attempt is contained in paragraph 45 of the Founding Affidavit which states that:-

"45 The matter is rendered urgent by the fact that the trial is set to proceed on the 17th February, 2016 at 9.30 A.M, in the absence of advocate Snider, the Applicant's Counsel in a part-heard matter."

[6] Respondent's Counsel contends that urgency has been canvassed in paragraph 45. This court should therefore find against the applicants. Counsel further argues that even if there is no specific averment alleging urgency, the other consideration is that the contents of the Application manifests an element of urgency. This means that there can be situations where a party may allege urgency in compliance with Rule 6 (25) (a) and (b) only to find that the contents of the application do not show any form of urgency.

Respondent's Counsel narrated to this court the chronology of the events that led to the Ruling of the 16th February 2016 which is the subject of the main Application. This chronology shows that there are steps that Respondent took to correct the situation. He further averred that the fact that the Ruling was issued on the 16th February, 2016 and whose effect was that the matter should proceed on the 17th and 18 February, 2016, should constitute a valid reason why the matter should be enrolled and heard as one of urgency. Respondent's Counsel argued that there has been full compliance with Rule 6 (25) (a) and (b). Respondent's Counsel argues that technical issues should not be used as a shield to cause the court not to deal with the Application on its merits.

[7] In reply, Applicants' counsel re - iterated what he had said earlier that the application is indeed not urgent and that the urgency is self created. Applicants' counsel did not challenge the chronology of events narrated by Respondent's counsel which events led to the institution of this application.

THE APPLICABLE LAW

[8] Before this court pronounces its findings on the Applicants' and Respondent's counsel's contentions, it is very important to consider the law applicable to Urgent Applications. The consideration will be based on the Rules of Court and on decided cases by the Supreme Court and the High Court. Our starting point is in considering Rule 6 (25) (a) and (b) of the Rules of the High Court which states that:-

(a) In urgent applications the court or judge may dispense with the forms and service provided in these rules and may dispose of such matter at such time and place and in such a manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to the court or judge as the case may be, seems fit.

(b) In every affidavit or petition filed in support of an application under paragraph (a) of this sub-rule, the Applicant shall set forth explicitly the circumstances which the avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.

[9] We can easily dispose of the issue of Rule 6 (25) (a) by simply stating that the Respondent has, in its Notice of motion, requested this court to dispense with the forms and service and time limits provided in these rules and has asked the court to hear the matter on the basis of urgency. With due respect to Applicants' counsel, Respondent has fully complied with Rule 6 (25) (a). I therefore hold in favor of the Respondent on this point.

The next scope of enquiry pertains to compliance with Rule 6 (25) (b) of the Rules. There are two requirements that must be satisfied in order for a party

alleging urgency to succeed under this sub- rule. The Applicant must explicitly set forth the circumstances which render the matter urgent and must further furnish reasons why he claims that he cannot be afforded redress at a hearing in due course.

This court holds the view that the Respondent has made a good case for urgency by explicitly setting forth the circumstances that render the matter urgent and why he cannot be afforded redress in due course. Paragraph 45 of the Founding Affidavit is ably crafted to cause this court to conclude that the basis for urgency has been established and the fact that the Respondent would not be afforded redress in due course. This paragraph states that:-

> *"45 The matter is rendered urgent by the fact that the trial is set to proceed on the 17th February, 2016 at 9.30A.M in the absence of advocate Snider, the Applicant's Counsel in a part heard matter."*

[10] The other consideration in ruling that this matter is urgent is the fast growing approach of ensuring that matters are not easily disposed of on points of law without the merits being considered. This court also fully subscribes to this line of modern thinking. In our jurisdiction, the courts have pronounced themselves on their loatheness that a matter should be dispose of on points of law or on technical issues, without the merits being considered. Three cases suffice to establish this point. In **Savannah N. Maziya Sandanezwe V GDI Concepts and Project Management (Properties) Limited High Court Case No. 905/2005** Her Lordship, Ota J, said in page 7 of Her judgment:-

> "*The question that arises at this juncture is should the court throw this application into the waste bin, like a piece of unwanted meal by reason of this fact as is urged by the Respondent? I do not think so. I say this because the universal trend is towards substantial justice. Courts across jurisdictions have long departed from the era when justice was readily sacrificed on the altar of technicalities. The rationale behind this trend is that justice can only be done if the substance of the matter is considered.*

Reliance on technicalities tends to render justice grotesque and has the dangerous potentials of occasioning a miscarriage of justice."

[11] A similar thought was expressed by the same Judge in the matter between **Phumzile Myeza and Others v The Director of Public Prosecutions and Another Case No. 728/2009**, where Her Lordship said -

> "*I must say that I am confounded by the very proposition, that this factor is a pre - condition to the enforcement of the fundamental right to fair hearing enshrined in the Constitution. I am of the firm conviction, that this factor resides more in the realm of forms and formalities, rather than substance, and therefore should not count greatly in the determination of this matter. I say this irrespective of the reasons advanced by case law in honor of it …. I hold the view, that to rely on forms and formalities to harm strung the very constitutional right which Section 21 (1) strives to protect is in itself unconstitutional. The universal trend is that courts are interested in substance rather than mere form. This is because the spirit of justice does not reside in forms and formalities, nor in technicalities nor is the triumph of the administration of justice to be found in successfully picking ones between the pitfalls of technicalities. Justice can only be done if the substance of the matter is considered.*"

[12] The Supreme Court has also pronounced itself on similar lines as the High Court in the case of **Shell Oil Swaziland Ltd V Motor World (Pty) Ltd t/a Sir Motors: Case No 23/2006** where Tebbut J.A said in paragraph 39 –

> *"39 The Learned Judge a quo with respect also appears to have overlooked the current trend in matters of this sort, which is now well recognized and firmly established, viz not to allow technical objections to less than perfect procedural aspects to interfere in the expeditious and if possible, inexpensive decisions of cases on their real merits."*

[13] Finally, in the case of **Impunzi Wholesalers V Swaziland Revenue Authority Case No. 6 of 2015,** (before it was set aside by the Supreme Court in November, 2015**)** His Lorship Ramodibedi C.J. said in paragraph 4 of His judgment-

> *"We deem it necessary to comment in the forefront of this judgment upon a disturbing trend which is seemingly on the increase in this jurisdiction. This is in the form of an unacceptable practice of some courts in willy nilly deciding matters of the so-called preliminary points at the drop of a hat without so much as a thought for the wider interests of justice. We caution that while preliminary points may serve a legitimate purpose such as expediting proceedings and saving costs they should be resorted to only in fitting cases. Each case will of course depend on its own peculiar circumstances."*

<u>COURT'S CONCLUSION</u>

[14] It is this court's humble view that Applicants' case does not fit in the category of cases that should be decided on preliminary points and it is therefore proper for this court to dismiss the points of law for the following reasons:-

(a) As said earlier in this judgment, Paragraph 45 of the Founding Affidavit clearly states the circumstances that render the matter urgent.

(b) It is also clear from the reading of this paragraph that if the matter proceeds on the 17th February, 2016 and in the absence of Counsel instructed to handle the matter, that is sufficient ground to render the application urgent. The other consideration is that if the Ruling has been delivered on the 16th February, 2016, and the matter is to proceed on the 17th, it is clear to this court that the Respondent cannot be afforded redress in due course.

(c) The other consideration in favor of the Respondent is the fact that the reading of the entire application manifests a clear case for urgency. There is also the issue that the Ruling of the 16th February, 2016, which seems to be the subject of the main Application, was delivered on that

very same day. It was after that Ruling that Respondent immediately filed the Review Application before this court.

(d) A party who is going to succeed in convincing a court that a matter is not urgent as established by our courts in the decided cases referred to above, must show that the wider interests of justice do not require such grant.

[15] Before I conclude, I must point out that the judgments that favor the modern approach that discourage the disposal of a case on preliminary points are not a total bar to the raising of points of law where appropriate. The test is that the preliminary points should be of such a nature and magnitude that the court determining them is convinced that they are addressing serious and solid issues of law, for example, the issue of jurisdiction and the legal capacity to sue and be sued and the issue of *functus officio,* just to mention a few. A decision by a court in dismissing a case on a point of law should be resorted to in a fitting case. The circumstances of each case is the determining factor. In the case before this court, it is the court's considered view that the matter between the applicants and the respondent does not fall into this category.

[16] I must further point out that by virtue of the Applicants being the *dominus litis,* Applicants' counsel had the opportunity to explore other possible points of law like the fact that this court was asked to review "a final decision" of the Industrial court which review borders on appeal. The issue of *functus officio* could have been raised particularly on the Ruling of the 16th February, 2016 which by and large, confirmed what the President had earlier ruled on with respect to the application of the 11th December, 2015. The application that led to that Ruling was based on the same facts as the December, 2015 application. Since all these possibilities were not explored, this court cannot grant what has not been specifically prayed for in the *lis*.

[17] In the light of the foregoing and in the light of the applicable law adumbrated above, these points of law raised by the Applicant are dismissed. Since the issue of costs was not canvassed by the parties' Representatives, I order each party shall bear its own costs.

FAKUDZE J.

JUDGE OF THE HIGH COURT

For Applicant: M.P. Simelane

Respondent: M. Nsibande