IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case 214/14

In the matter between:

SITSELO MAHLALELA **Applicant**

And

CHIEF MLUNGELI MAHLALELA **Respondent**

Neutral citation: *Sitselo Mahlalela vs Chief Mlungeli Mahlalela(214/15) [SZHC 10] 5th February, 2016)*

Coram: **MAPHALALA PJ**
Heard: **12 October, 2015**
Delivered: **5 February, 2016**

For Applicant: **Mr. Ginidza**
(of N.E. Ginindza Attorneys)

For Respondent **Mr. Mavuso**
(of Mavuso Attorneys)

Summary: Civil Procedure – Appeal of an Order of the Magistrate Court – whether an appeal or review – Respondent contends Appellant used wrong procedure – this court agrees with the Respondent – dismisses the Appeal with costs.

JUDGMENT

The Appeal

[1] Before this court is an Appeal against the ruling by Magistrate **N.J. Dlamini** in the Magistrates Court for the District of Lubombo, at Siteki on the 19th September, 2015 under Case No. 472/15 on the following terms:

> **1. The Learned Magistrate erred and misdirected himself by not exercising the discretion vested in him judicially in that;**
>
> **1.1 He exercised his discretion capriciously**
>
> **1.2 He misdirected himself.**
>
> **2. The Learned Magistrate erred and misdirected himself by exercising his discretion capriciously;**
>
> **2.1 The Learned Magistrate erred in fact and in law in holding that appellant has no locus standi to challenge ownership of the property as the rightful person to do that is his mother who is not a party to the present proceedings, when in fact the aforesaid mother did challenged such per her confirmatory affidavit.**
>
> **2.2 the Learned Magistrate erred in fact and in law in holding that the Respondent would not have successfully imposed Zandile Mahlalela, his daughter from LaMkhabela, to**

collect rent in both complexes for the exclusive benefit of her mother's household as he (Respondent) would have encountered opposition from Respondents' mother if she did contribute to its construction (without hearing the merits).

2.3 The Learned Magistrate erred in fact and in law in holding that there a likelihood that the butchery will be-re-claimed by Respondent hence the Appellant should have engaged the Respondent at Peace-Binding in Simunye Magistrate Court for an alternative mode of maintenance to LaMngometulu's household.

2.5 The Learned Magistrate erred in fact and in law in dismissing the point of law of dispute of facts while at the same time acknowledge its existence by holding that the Appellant should have engaged the Respondent at the peace-binding time even though the veracity of such an agreement cannot be ascertained in the absence of both parties leading *viva voce* evidence.

3. The Learned Magistrate erred in law and thereby exercising his discretion capriciously;

3.1 The Court a quo erred in fact in law in holding that there are no serious or genuine dispute of facts necessitating the referral of the matter to oral evidence.

3.2 The Court a quo erred in law in dealing with the merits, and making a final judgment of the matter between the parties prematurely when in fact the issue before the Court at that material time was only the point of law (dispute of facts) and the parties had specifically agreed to deal with the same before the merits.

3.3 The Court a quo erred in law in giving a final judgment in terms of the application without affording the Appellant the

opportunity of being heard on the merits being mindful of the fact that at the specific time the Court a quo had before it only the dispute of facts (point of law), a point which in the event of its dismissal, normally requires the matter to be referred to arguments on merits.

3.4 The Court a quo erred in law in issuing a final judgment of matter being mindful of the fact Respondent have no prayed for such but only prayed for dismissal of the point of law, hence granting Respondent orders not asked at that material time was total legally misdirection.

4. The Learned Magistrate erred in law by not finding that the dispute of fact has been corroborated by the confirmatory affidavit of Respondent sister at paragraph 4 as attached to the respondent's replying affidavit.

5. The Learned Magistrate erred in finding that the admitted facts together with those alleged by Appellant justified the decision neither to dismiss the application nor to refer it to oral evidence, as he applied the wrong legal principle not applicable in the instant case.

[2] I must state at the onset that inspite of the above grounds of appeal the gravamen of the Appellant's case is that the court **a quo** erred in law in granting a final order on the merits without affording the Appellant the right to address the court on the merits. The Applicant contends that only points of law were argued, but not the merits. In essence the Applicant is contending that his right to be heard **("audi alteram parterm"** was violated by the Magistrates **a quo**.

[3] On the other hand the Respondent contends that the complaint by the Appellant is one of procedure, being that the Magistrate committed on irregularity on issuing an order on the merits whereas the matter had not been argued on the merits. That the Appellant is failing to draw a distinction between appeal and review proceedings.

The background

[4] The facts of the dispute as gleaned at paragraph 5 of the Appellant's Head of Arguments are that Respondent (Appellant in **court a quo**) brought an Application to the court seeking a relief as set out in Respondents' Notice of Application. However, the court **a quo** has to listen to arguments from both attorneys for the parties on the points of law raised by the Applicant.

[5] That when the matter was heard, that in the oral submission / arguments on points of law, the merits were never touched save for the disputes of facts as a point of law. Literally at the concluding stage of arguments in the court **a quo** after the Respondent's attorney had finished making his submission where he only prayed that:

> **"the points of law of dispute of facts referring the matter to oral evidence be dismissed with costs,"**

[6] However, in .contrast and without any explanation or justification being advanced in court **a quo** after hearing the arguments on points of law held as follows:

> **"The Applicant (Respondent) had satisfied the requirements for the grant of the order sought and consequently the Court make the following orders;**

(a) The Respondent be and is hereby ordered to forthwith surrender the business premises and keys of the butchery trading as Lomahasha butchery situated at Sibonelo 1 shopping complex at Lomahasha area in the Lubombo region.

(b) The Respondent (Appellant) be and is hereby interdicted and restrained from interfering in any manner whatsoever with the business operations of the Applicant (Respondent) at Sibonelo 1 and 2 and shopping complex.

(c) Each party is ordered to pay its own costs."

The arguments

(i) For the Appellant

[7] The attorney for the Appellant filed comprehensive Heads of Arguments and at paragraph 3 thereof framed the three issues in the Appeal to be the following:

3.1 Was the Court a quo entitled to grant a relief to Respondent (Applicant in Court a quo) not sought when the matter, especially the points of law, was argued in open Court on the 27th August, 2015?

3.2 Did the Respondent make out a case during the arguments of the 27th August, 2015, to be granted a final order on the merits?

3.3 Was the Court a quo permitted or entitled in law to issue a final judgment without hearing arguments on the merits of the matter thus breaching the audi alteram pertem rule?

[8] The attorney for the Appellant proceeded to state that if the answer to any of the above questions is the negative, then the Appeal should be upheld.

[9] The attorney for the Appellant then at great length advanced the arguments that were advanced in the court **a quo** and the various grounds of Appeal from paragraph 6 to 7 of his Heads of Arguments and cited a plethora of decided cases in support of his arguments.

[10] In summary, that the court **a quo** exercised its discretion capriciously and misdirection itself in getting into the merits of the matter without being invited by either of the parties. In this regard the court has referred the legal by text book by **Herbstein and Van Winsen, in Civil Practice on the High Court of South Africa Vol 2 at page 1254** on the question of the exercise of discretion by a High Court to the following:

> **"Traditionally, it was accepted that where a lower court has given a decision on a matter within its discretion, the Supreme Court of Appeal would interfere only <u>if the comes to the conclusion that the Court a quo had not exercised a judicial discretion, i.e exercised its discretion capriciously or upon a wrong principle,</u> has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons."** (underlining my emphasis)

[11] Finally, that the court **a quo** should have upheld the points **in limine** to refer the matter for **viva voce** evidence. Further the court should not have issued a final judgment without first hearing arguments on the merits, above all, the Respondent did not ask for the relief granted as it was never even mentioned in arguments.

(ii) The Respondent's arguments

[12] The attorney for the Respondent also advanced arguments for his client and filed Heads of Arguments. The first point raised thereon is a point **in limine** to

the legal proposition that the Appellant has approached this court with a wrong procedure, being an appeal instead of a review. That the gravamen of the Applicant's case is that the court **a quo** erred in law in granting a final order on the merits without affording the Applicant a chance to address the court on the merits.

[13] The attorney for the respondent contends that the complaint by the Applicant is one of procedure, being that the Magistrate committed an irregularity in issuing an order on the merits whereas the matter had not been argued on the merits. In this regard the attorney for the Respondent contends that the Appellant is failing to draw a distinction between appeal and review proceedings citing **dictum** in the case of **Ngwenya Glass (Pty) Ltd vs Presiding Judge of the Industrial Court of Swaziland and Others case no. 3206/2008** to the following:

> **[9] Booysen J in Anchor Publishing Co. (Pty) v Publications Appeal Board 1987 (4) S.A. 708 at 728 D – F defining the distinction between an appeal and a review pointed out as follows:**
>
> **"It is important, when considering a matter such as this, to hear in mind the main distinction between an appeal an da review and that is that the court will on appeal set aside a decision when it is satisfied that it was wrong on the facts or the law, whilst judicial review is in essence concerned not with the decision but with the decision-making process. ----- upon review, the court is thus in general terms concerned with the legality of the decision and not its merits."**

[14] It is contended on behalf of the Respondent that the Applicant is blowing hot and cold.

[15] On the merits of the appeal the attorney for the Respondent contends that according to the Applicants own submission in the court **a quo**, their case stood or fell solely on the point **in limine**, **viz** the dispute of facts. That at paragraph 16 to 17 of the transcribed record that Mr. Ginindza for the Appellant submitted as follows:

> **[16] Ginidza: I would have expected that since we have raised a point of law we will start and argue the point of law. The background however has covered all the application of the applicant. I honestly believe the issue of the keys to the butchery and the issue of ownership is neither here nor there.**
>
> **[17] Our case rests on the issue of the dispute of fact. It would seem that the issue between the parties is contractually based, what was said when the keys were given.**

[16] In this regard the attorney for the Respondent agreed that the court **a quo** correctly followed the Appellant's own concession that their case rested on the dispute of fact. Further, that Appellant is not complaining about the court's decision to dismiss the point of law. Therefore, the decision to dismiss the point of law disputes still stands. That in mind and the Appellant having concluded he had no case on the merits, the court **a quo** was perfectly entitled to venture to the merits of the case.

[17] In support of the above arguments the court has referred the Court of Appeal decision in the case of **Nonhlanhla Ndlangamandla vs Motor Vehicle Accident Fund and Another case no. 12/2006** (see) where **Tebbutt JA** stated the following:

> **[14] There is a further principle that must also be borne in mind. It is this. The Court should not hesitate to decide an issue of fact on affidavits merely because it may be difficult to do so. In**

SOFFIANTINI V MOULD 195(4) SA 150 C at the following appears:

It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.

[18] That a robust common sense approached to the issue therefore was to straight way decide the issue holistically after finding that there were no real, genuine and **bona fide** disputes of fact. More so, because the Appellant had conceded the ownership of the premises was not in dispute and the case rested on the disputes of fact.

[19] It is contend further for the Respondent that on the totality of the facts this court ought to dismiss the appeal with costs.

Court's Analysis and conclusions thereof

[20] Having considered all the papers filed and the arguments of the Attorneys of the parties it will appear to me firstly that the Respondent is correct in its contention that the Applicant has approached the court adopted a wrong procedure, being an appeal in stead of a review. I say to because the Applicant's case in essence is that the court **a quo** erred in law in granting a final order on the merits without affording the Appellant the chance to address the court on the merits of the case. The Applicant contends that only points of

law were argued, but not the merits that in essence the Appellant contends that his right to be heard **(audi alteram paterm)** was violated by the court **a quo**.

[21] The complain by the Appellant is one of procedure, being that the Magistrate committed an irregularity or illegality in issuing an order on the merits whereas the matter has not be argued on the merits.

[22] However on the facts this position by the Appellant is dispelled by what is found in the transcription of the record of the court **a quo** outlined at paragraph [14] page 6 of this judgment. For the sake of clarity I shall reproduce this potion of the record of the **court a quo** for one to understand the issue for decision by this court. Following is the portion of the record:

> **[16] Ginidza: I would have expected that since we have raised a point of law we will start and argue the point of law. The background however has covered all the application of the applicant. I honestly believe the issue of the keys to the butchery and the issue of ownership is neither here nor there.**
>
> **[17] Our case rests on the issue of the dispute of fact. It would seem that the issue between the parties is contractually based, what was said when the keys were given.**

[23] It would appear to me in my reading of the above extract of the record of the court **a quo** that the attorney for the Appellant conceded that their case rested on the disputes of facts. It is also clear that the Appellant is not complaining abut the court's decision to dismiss the point of law. With that in mind no case on merits, the court **a quo** was perfectly entitled to venture to the merits of the case.

[24] In this regard I find the **dictum** in Supreme Court case of **Nonhlanhla Ndlangamndla (supra)** reproduced at paragraph [16] of this judgment apposite.

[25] Finally, I agree with the submissions of the Respondent as paragraph 9 of Respondent's Heads of Arguments that a robust commonsense approach to the issue therefor was to straightway decide the issue holistically after finding that were no real, genuine and **bona fide** disputes of facts. More so, because the Appellant hand conceded that ownership of the premises was not in dispute and the whole case rested on the disputes of facts.

[26] In the result, for the aforegoing reasons, the Appeal is dismissed with costs.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE