IN **THE HIGH COURT OF** ESWATINI

CASE NO.1056/2023

HELD AT MBABANE

In the matter between:

KENNETH MNYAKENI	**APPELLANT**
AND	
MUNICIPAL COUNCIL OF MBABANE	**RESPONDENT**

NEUTRAL CITATION:	**KENNETH MNYAKENI VS MUNICIPAL COUNCIL OF MBABANE (1056/2023) SZHC-253 [24/09/2023]**
CORAM:	**BW MAGAGULA J**
HEARD:	**09/08/2023**
DELIVERED:	**21/09/2023**

SUMMARY: *Appeal fi·om a decision of the Principal Magistrate Court of Mbabane - An appeal against a dismissal of an application to intervene in proceedings already pending in the court a quo -*

Requirements of an application to intervene - Appellant not showing how the Magistrate could have erred. In fact the Magistrate considered the Applicant's representations and therefore dismissed the case on the merits as he adduced reasons for the decision -Appeal dismissed with costs.

JUDGMENT

BW MAGAGULA J

BACKGROUND FACTS

[l] The Appellant has lodged an appeal against the decision of the Principal Magistrate, S. Vilakati dated the 14th November 2022. Ostensibly, the ruling refused the Appellant's application he had made before that court for him to intervene in a matter between the Respondent and one Cheldon Clu·istian Litchfield.

[2] The Appellant's ground for appeal as per the notice of appeal dated the 5th May 2023 is as follows;

2.1 *The court a qou erred in/act and in law and dtsmissing the application for intervention, when an order by consent had been entered by the Appellant and Respondent to allow the Appellant to intervene and same entered as an order of court.*

[3] In essence, what the Appellant projects as the ground for appeal in his notice of appeal, is that the court erred in dismissing the application for intervention because earlier on, a consent order that the Appellant intervenes had been granted by the court.

Appellant's arguments in support of the appeal

[4] The Appellant argues that after he filed the application to intervene, the Respondent after having received such an application consented to the granting of prayer 1 (one) of the application for intervention.

[5] This concession then enabled the Appellant who was then the intervening party in the court *a quo* to be granted leave to appeal through the consent order.

[6] The Appellant (intervening party then) went ahead to file an answenng affidavit to the Respondent's application. The Respondent duly filed a replying affidavit. In the replying affidavit, the Respondent raised a legal point, where it challenged the Appellant's *locus standi injudicio* to oppose the order sought.

[7] It is upon hearing the arguments, which include the representations made by the intervening party that the court *a quo* upheld the point in *limine* and granted the application by the Respondent (the Applicant in the court *a qou.*

Respondent's arguments

[8] The Respondent in effect, agrees that at the court *a qou* allowed the intervening to intervene. Hence an answering affidavit was filed by consent. The Respondent therefore argues that by agreeing that the intervening party must enter the fray, did not necessarily mean that they were waiving their rights to raise any legal issues apparent in the intervening paiiy's papers. In essence, what the Respondent is arguing is that by agreeing that the Appellant intervenes in the matter that was between it as the Municipality and one Cheldon Litchfield, it did not necessarily waive it's right to flag any defect in the intervening parties' papers. Including his *locus standi* to be a party in those proceedings.

[9] The Respondent fmiher argues that the point of law raised, is key. The intervening pa1iy does not have a *locus standi* in the matter because the owner of the property that was owing rates was one Cheldon Christian Litchfield, not the intervening paiiy (Appellant before court).

Did the Learned Principal Magistrate err in dismissing the application by the intervening party?

[1O] Ultimately, the issue that needs this comi to decide is whether once the full papers were filed by the parties before the learned Principal Magistrate, including the replying affidavit filed by the Respondent raising a legal issue, did the Magistrate err in upholding the legal point which subsequently

disqualified the Appellant to be a litigant in those proceedings. Does that ruling amounts to a refusal to intervene?

[11] An examination of the legal reasoning of the learned Magistrate when making the ruling is warranted. When reading from paragraph 12 of the judgment, the Learned Magistrate reasons that the intervening pmty had conceded that he had been paying rates in respect of that property. The Learned Principal Magistrate continues to observe that this is an indication that the intervening party appreciates that the Applicant is authorized to collect rates in terms of the Rating Act.

[12] The registered owner of the prope1ty who is not the Appellant had elected not to oppose the comt process which the Municipality had instituted for the collection of the rates outstanding. The comt a quo further observed that this means the Municipality had a valid judgment pe1taining to the rates, which it was then entitled to execute. In paragraph 15, the learned Magistrate states succinctly that the Respondent ought not to be prejudiced by the Appellant's failure to pursue the issue of ownership at the appropriate forum.

[13] The comt opined that if the judgment in favour of the Municipality is valid, the issue of the rates was still outstanding, which the Municipality was entitled to enforce. Jn essence that was the reasoning of the Learned Magistrate.

THE LAW

[14] At common law, it has often been held that a person applying for leave to intervene had to establish;

(i) An interest in the suit or that interest would probably be affected and

(ii) A common course of action or common ground with the patty with whom joinder was being sought[1].

[15] In **Bitcon vs City Council of Johannesburg and Arenow Behrman and Company** [2] it was held that leave to intervene will not be granted unless a patty wishing to intervene can show;

a) Special concern in the issue;
b) That the matter is of common interest to himself and the party desires to join and see that the issues are the same.

[16] Even if the Applicant is able to show a direct and substantial interest, the comt has an overriding power to grant or to refuse intervention in the interest of justice. Other considerations that could weigh with the comt in this regard include the stage of the proceedings to who's the application for leave to intervene is put, the attitude to such application of the patties to the main

[1] See: Herbstein and Van Winsten; the Civil Practice of the High Courts of South Africa 5th Edition Volume 1 at page 255; also Eliot vs Bax, in re Bax vs African Life Assurance Society Ltd 1923 WLD 228

[2] 1931 WLD 273

proceedings: Whether the submissions which the Applicant for intervention seeks to advance raise substantially new contentions that may assist the court.[3]

[17] A third patty can intervene only with the leave of the comt upon application for leave. [4] The grant of leave to intervene as a co-Plaintiff or co-Defendant is in the discretion of the court. It has been held that the court has a wide discretion in application for leave to intervene.[5]

[18] It is not sufficient for a third patty seeking to intervene, to merely allege an interest in the action, but such party must give *prima facie* proof of the interest and right to intervene. See: **Eliot vs Becks** (supra).

[19] A patty who obtains leave to intervene is not restricted merely to opposing on the merits but may raise point's objections in *limine* unless his rights are specifically curtailed. See: **Garment Workers Union vs Minister of Labour 1945 (2) PHF 69 (W).**

ADJUDICATION

[20] The facts of the matter are somehow peculiar in the sense that the leave to intervene was actually granted by consent. Hence, the Appellant was able to file an answering affidavit and the Respondent as expected filed a replying

[3] See: Gory *vs* Kolver- NO 2007 (4) SA 97 (CC) paragraphs 11-13
[4] Serfontein *vs* Roadrick and Bucks 1903 ORC 51
[5] See: Hetz *vs* Empire Actioners and Estate Agency 1962 (1) SA 558 (T)

affidavit. The court *a quo* heard the matter in it's entirety and it is assumed after having read the full set of the papers before it filed by the parties.

[21] Infact, when one reads the judgment of the comi *a quo* it is acknowledged that the Appellant had intervened as a party. This can be deduced from the manner in which the court *a quo* refers to the Appellant. It is referred to as the intervening party. [6]

[22] On the reading of the judgment, it appears that the outcome of the judgment does not pertain to the application for intervention per se. Understandably so, as there was no need for the comi to pronounce itself on the application for intervention because the intervening pmiy had already been allowed to join the fray by consent. Hence, I do not quite follow the Appellant's arguments that the court dismissed the Appellant's application to intervene.

[23] What appears on the reading of the judgment of the court *a quo,* is that the papers that had been filed by the intervening parties including the point in *limine* that had been raised by Respondent (the Applicant in the court *a quo)* were considered. Not necessarily that the comi decided the matter on the intervention application. Put simply, the Respondent allowed the Appellant to join the battle field by consent. Once the Appellant had been allowed to answer, the replying affidavit, the Respondent raised an issue regarding the *locus standi* of the intervening party. The court then considered all the issues that were raised and arrived at a judgment. The Appellant has not produced a legal authority that supports the notion that once an intervening party is

[6] See paragraph 4, 5, 9, 15 and 16

allowed to intervene, his *locus standi* is thereafter ring-fenced and not challengeable. It cannot be. The Respondent was perfectly entitled to raise that legal issue despite that it had not opposed the application to intervene in the main matter.

[24] The court *a quo* as it appears in the judgment applied it's mind on the issues. For instance, in paragraph 13. The court makes an analysis that the main issue on which the Appellant seeks to intervene, was between the Respondent and the rate payer. Then the court goes fmther to say, the Municipality cannot be expected to suspend it's responsibility of collecting rates only on the reason that the Appellant is desirous to resolve issues of ownership regarding the prope1ty. In tenns of the reasoning of the comt, the current registration of the property is with one Cheldon Christian Litchfield who is the Respondent in the comt *a quo.*

[25] The comt a quo fmther makes a finding that the matter before it was that the Municipality sought to have the amounts owing for rates paid. Not necessarily to deprive tl1e owner of it's immovable prope1ty.

[26] Due to the aforegoing reasons, it appears that the Appellant's appeal has got no meritf and it is infact misplaced. In light of the fact that the application for intervention was not dismissed by the comt, but the court decided the matter subsequently when the intervening party had been allowed to join the fray.

COSTS

[27] There is no reason why the cardinal rule that says costs must follow the event must not be applied in the matter at hand. Clearly, the Respondent has been out of pocket in costs to defend this appeal. As such, there are no compelling reasons why costs should not follow the event. This court will accordingly order that the Appellant must pay costs of suit at the ordinary scale.

ORDER

1) The Appellant's appeal is hereby dismissed.
2) Costs to follow the event.

BWMAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For the Appellant: Mr X. Mthethwa (P.M Dlamini Attorneys)

For the Defendant: M.C Simelance (M.C Simelane Attorneys)