IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

JUDGMENT

APPEAL CASE NO: 7/2019

In the matter between:

DUMSANI DOCTOR TSELA **APPELLANT**

And

WELILE MAZIBUKO **RESPONDENT**

Neutral Citation: *Dumsani Doctor Tsela vs. Welile Mazibuko (7/2019) [2019]* SZICA *(11) 16th October 2019*

Coram: **MLANGENI AJA, MAPHANGA AJA, SHABALALA AJA**

Heard: **25th September 2019**

Delivered: **16th October 2019**

Summary: *The Industrial Court heard and dismissed an application for leave to amend pleadings by adding a Second Respondent. In an attempt to lodge an appeal the Applicant filed a notice of motion under a certificate of urgency, styled* ***"Notice of Motion for Appeal",*** *with a plethora of prayers and accompanied by an affidavit.*

Held: *The Rules of the Industrial Court of Appeal have no provision for urgent appeals.*

Held, further: *The Appellant did not comply with the peremptory rule in respect of lodging an appeal, hence there is no appeal pending before this court.*

JUDGMENT

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[1] This appeal could easily have been avoided if the Appellant had paid attention to the Rules of the Industrial Court in respect of the amendment of pleadings. And again the potpouri, both in form and substance, that has been presented to this court in the name of an appeal could easily have been obviated if the Appellant had paid attention, even cursory attention, to the rules of this court in respect of the lodging of appeals. The record of appeal was prepared and filed by the Appellant's representative, one Sibusiso B. Dlamini, who describes himself as an adult Swazi male **"……studying LLB (Hons) in Legal Practice in Manchester Metropolitan University – Law School, in United Kingdom".**[1] Sadly, and unavoidably, this description of self gives a hint of the misplaced energy that has been invested in the

[1] See his affidavit of Service dated 29th August 2019.

hopeless pursuit of the case on behalf of the Appellant, both in the *court-a-quo* and in this court.

[2] In the *court-a-quo* the Appellant, as Applicant, instituted proceedings against the Respondent claiming *inter alia* back pay of wages **"for unlawful suspension",** refund of **"unlawful deductions",** payment in respect of services rendered on public holidays and money in *lieu* of **"uniform and gumboots"** and **"protective clothing from January 2014 to May 2016".** In total the claim amounted to E105, 823.80 and would increase the longer the **"unlawful suspension"** lasted.

[3] This court was informed at the hearing that the initial process before the Industrial Court advanced significantly, to the extent that the Respondent, one Welile Mazibuko, filed his replies. It was suggested, without gusto, that the Applicant may have filed his replication as well. This, however, is of no immediate relevance to the issues for determination in this court.

[4] It is apparent that at this advanced stage of pleadings it came to the attention of the Applicant that there is a corporate entity that ought to have been cited as Second Respondent, on the alleged basis that it was the ***"defacto"*** employer of the Applicant, and for some reason or other this link was not perceived at the time the proceedings were instituted for conciliation, and later, for litigation in the Industrial Court. The realization by the Applicant that there was a corporate entity to be brought into the equation precipitated a flurry of activity that has culminated in this appeal.

AMENDMENT

[5] Under the cover of a filing notice dated 24th July 2018 the Applicant presented to the *court-a-quo* an **"Application for amendment"** in terms of which it sought to add **"A WORKS CIVILS (PTY) LTD"** as Second Respondent. *Ex facie* the papers, this process was issued in court on the 24th July 2018 for hearing on the same date. There is no indication that it was served either on the Respondent or on the Respondent's attorneys S.P. MAMBA ATTORNEYS. It is common cause that it was not served upon the corporate entity that was sought to be joined as a Second respondent, A WORKS CIVILS (PTY) LTD. This court is not aware what transpired on the 24th July 2018, the date that was intended for hearing of the application for amendment. On the 27th July 2018 the Respondent issued a notice of objection to the proposed amendment, which was served on the Applicant's representative on the 2nd August 2019.

[6] In the objection the Respondent raised the following issues:-

6.1 the application for amendment did not give prior notice to the Respondent to object if it was advised to do so;

6.2 the application did not comply with rule of court 23 in that the entity sought to be joined was not a party at the conciliation stage and **"may not then be mechanically brought to court without having been cited as a party and partook in conciliation during such stage."**[2]

6.3 The application was not served upon the intended Second Respondent.

[2] Page 6 of the Record, para 2.

[7] I mentioned above that the notice of objection was served upon the Applicant's representative on the 2nd August 2018. Astonishingly, on the 1st August 2018, a day before being served with the objection, the Applicant's representative issued a **"notice for leave to amend",** and this was served on the Respondent's attorney on the 2nd August 2018. It is a matter of surmisation whether the notice for leave to amend was in response to the objection or not. Such is the extent of intrigue in this litigation. In substance the second attempt at amending is the same as the earlier notice to which the Respondent raised an objection, the quantum thereof being the same E105, 823.80 and the joinder sought of the corporate entity A WORKS CIVILS (Pty) Ltd. The issue of the intended amendment eventually came before Nsibande J.P. for legal arguments on the 13th December 2018. A ruling was handed down on the 26th March 2019. In terms of the ruling the application to amend was dismissed with costs. The Respondent purported to appeal against this ruling, and it is on that basis that the matter has come before this court.

IS AN INTERLOCUTORY RULING APPEALABLE?

[8] At common law an interlocutory order is not appealable except with leave of court sought and obtained. It appears that in this court the issue has been settled beyond doubt, by this same court and between the same parties, in appeal case No. 13/2017, wherein the question for determination was whether an interlocutory order dismissing an application to strike out **"respondent's entire reply"** was appealable without leave of court. After analysing various statutory provisions in the Court of Appeal Act, the Industrial Relations Act as well as the Industrial Court of Appeal rules, the court came to the conclusion that there is no need to seek leave of court to appeal an interlocutory order of the Industrial Court. Tshabalala AJA put the position in this manner:-

"The jurisdiction of the ICA and the nature of appeals that lie to it are stated without ambiguity in section 21 of the Industrial Relations Act, namely 'any appeal from the Industrial Court'. There is no foreseeable reason calling for reading into Section 21 of the IRA a requirement for a litigant to seek leave to appeal from the ICA any of the appeals from the IC……..I make a finding that the application for leave to appeal in this case is superfluous and that it is not required either under the IRA or the rules of the ICA.[3]

To the exposition immediately above, nothing should or can be added.

THE PRESENT APPEAL

[9] The index to the record of appeal shows that the notice of appeal is at pages 26 to 73 of the record – an incredible bulk of 47 pages. Well, in fairness to the Appellant the notice *stricto sensu*, at any rate according to his representative, is pages 26 to 47. I say this because pages 48 to 55 is the judgment appealed against, pages 56 to 64 is heads of argument for the Applicant in the *court-a-quo*, pages 65 to 69 is demand for security for costs in terms of Rule 47 of the High Court rules, pages 70 to 73 is a writ of execution in respect of legal costs and 74 – 75 is an affidavit of service in which, as noted earlier on in this judgment[4], the deponent gratuitously informs that he is studying for an honours LLB degree in the United Kingdom.

[3] At para II of the judgment.
[4] Para 1

[10] I have taken the trouble in paragraph 9 above to make the breakdown in order to demonstrate that there is a lot that is wrong in the manner that the Applicant/Appellant's case is being prosecuted, and in particular to show that the Appellant's representative does not have a sufficient understanding of what a notice of appeal entails.

[11] The purported appeal is in the form of an urgent application comprising a certificate of urgency, a **"notice of motion for appeal"** and an **"affidavit in support of notice of motion to appeal"**. At paragraph 4 the affidavit states the following:-

> **"This is a certificate of urgency with notice of motion for appeal, in terms of the Court of Appeal Act, 15th April 1955, Part III, Civil Appeals 14 (1) (a) read with Industrial Court Rule 28, Industrial Relations Act, 6th June 2000 as amended, Section 20(1) 21(1) (2) (3) and (4) Industrial Court Appeal Rules 1997, Section 9 and 10, and Common Law"[5].**

The above surely gives a good idea of the hotchpotch that purports to be a notice of appeal. One thing that it shows is that the Appellant is not sure what rule to invoke in his quest to lodge an appeal before this court.

[12] The prayers in the motion are a spectacle of no lesser magnitude. A rule *nisi* is sought, calling upon the Respondent to show cause why final orders should not be granted:-

> **"3. Compelling and directing that the execution of the judgment of the Industrial Court, Case Number 188/2017, given on Tuesday the 26th day of March 2019, by Judge of**

[5] At page 38 of the Record.

the Industrial Court, S. Nsibande J.P. sitting with nominated members of the court Mr. N. Manana and Mr. M. Dlamini, be stayed pending the determination of Notice of Motion for Appeal, against the judgment.

4. **Granting leave to appeal against the judgment of the said court, case number 188/2017, S. NSIBANDE J.P. sitting with nominated members…..**
5. **Compelling and directing that notice of motion for appeal to constitute sufficient notice of appeal.**
6. **Compelling and directing Respondent to furnish security cost in an amount of Eighty Seven Thousand Emalangeni…….or payment to court money claimed ……. (E105, 823.80)……**
7. **……**
8. **Compelling and directing that Applicant application be amended to add, back pay of wages for unlawful suspension, from date of issue of judgment of main application…….**
9. **…….**
10. **…….**
11. **……**
12. **That Respondent be afforded leave to file notice to oppose the above matter and such other papers as may be necessary……"**

[13] There is an affidavit in support of the motion. Its contents are something of a revelation. It is repeatedly stated that the Honourable Judge, sitting with Nominated Members, erred in fact and in law in a number of ways, and in the process prodigious amounts of evidence is given under oath. For example I quote paragraph 9 of the affidavit, at page 41 of the Record:-

"I am advised and verily believe that the *court-a-quo* erred in law and in fact, and misdirected itself in dismissing application to amend, by saying A WORKS CIVILS (PTY) LTD was not a party at conciliation and cannot at this stage be included or joined in the litigation. The *court-a-quo* failed to consider LEGAL NOTICE of 2010, THE CONSTITUTION OF SWAZILAND ACT, 2005 (ACT No. 001 of 2005), HIGH COURT RULES NOTICE 2010 (Under Section 142), Rule 12, (1) (2) and Common Law".

[14] As I read the Appellant's papers I became exhausted and depressed. A representative, in whatever capacity, must not take on a responsibility that is beyond his or her capacity. In *casu* there is no doubt that the Appellant's representative is in the deep end. At the hearing he was asked whether the rules of the Industrial Court of Appeal do provide for urgent appeals and he gave a verbose and circuitous answer on how appeals in this court can take anything between five to ten years to be heard, and how his client would be prejudiced by the delay, and that these are the reasons why he filed an urgent appeal. In the end he did not answer the simple question that was asked by the court. And the truth is that appeals that are prosecuted with seriousness do not take anything close to the period that was suggested by the Appellant's representative.

IS THERE A PROPER APPEAL BEFORE THIS COURT?

[15] The fact of the matter is that in the Industrial Court of Appeal rules there is no provision for urgent appeals. The procedure for filing an appeal is stated in Rule 6(1) which provides that an appeal **"……shall be instituted by the filing and service of a notice of appeal as**

far as possible in accordance with form 1, signed by the Appellant." The use of the word **"shall"** makes it peremptory to comply with the procedure that is outlined. In the case before us the Appellant has not complied. Instead of complying he has created his own procedure which is not only cumbersome but also so prolix as to be confusing. In the view that we take, there is no excuse for failure to comply with a simple and straightforward rule such as Rule 6(1).

[16] There is no doubt that this fiasco is attributable to the Applicant's representative. But then the history of this matter abounds with such fiascos, such that the Appellant must, to an extent, take the blame for placing his trust on a representative whose only known credential is that he is studying for an LLB (Hons) in Manchester, England. In the case of R v CHETTY[6], the Appellate Division made the following apposite remarks:-

> **"There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this court. Considerations *ad misericodiam* should not be allowed to become an invitation to laxity."**

This dictum was quoted with approval and embraced in full in the Supreme Court judgment of TQM Textile Swaziland (Pty) Ltd v Sifiso Simelane and 354 Others and Another.[7]

[17] As the highest court in the hierarchy we are entitled, and bound in duty, to demand compliance with and respect for the rules of court.

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[6] 1943 AD 321.

[7] (47/2015) [2016] SZSC 12, 30TH June 2016

[18] Because we have come to the conclusion that there is no proper appeal before us, there is no need to go into the merits of the **"appeal".** We make the following orders:-

18.1 The matter is removed from the roll.

18.2 Costs are awarded in favour of the Respondent.

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MLANGENI AJA

I agree: _____

MAPHANGA AJA

I agree: _____

TSHABALALA AJA

For The Appellant: Sibusiso B. Dlamini

For the Respondent: Attorney S.J. Simelane