IN THE COURT OF APPEAL OF SWAZILAND

CRIMINAL APPEAL NO.906/95

In the matter between:

SAMUEL SIPHO SIMELANE APPELLANT

and

DEPUTY SHERIFF (MANZINI) 1ST RESPONDENT

ORAH DLAMINI 2ND RESPONDENT

MANDLA DLAMINI 3RD RESPONDENT

CORAM : LEON JA

: SCHREINER JA

: TEBBUTT JA

FOR APPELLANT : MR.A. SHABANGU

FOR THE RESPONDENTS : MR. DUNSEITH

JUDGMENT

Leon JA:

The Appellant was the applicant in the court a quo in which he brought a notice of motion on 11th June 1996 seeking the following relief as a matter of urgency:-

1) that the case be dealt with as a matter of urgency;

2) that a rule nisi be issued calling upon the Respondents to show cause on the 21st June 1996 why an order should not be made:

a) Rescinds and setting aside a summary judgment which had been granted by the High Court on 21st July 1995;

b) Interdicting the First Respondent from proceeding into the advertised sale of the property described as the remainer of Farm 818, Lubombo District, that the order operate with immediate effect as an

interim interdict pending the confirmation of the rule and costs.

The application was opposed by the Respondents who took the point in limine that the relief sought in paragraph 1 was res judicata as the same relief that had been sought and refused in an

earlier application before Sapire ACJ (as he then was) on the 22nd November 1995. I shall refer to the facts in a little more detail later. For present purposes I should record that in the earlier application before Sapire ACJ it was the Appellant's case there were irregularities in the application for summary judgment because no proper notice had been given and that the papers were not in order. Sapire ACJ found it unnecessary to consider these points because he held on the facts the Appellant had no bona fide defence to the action.

The Appellant then, in case no.870/96 sought before Sapire ACJ a stay of execution pending an appeal against his earlier order. The judgment of Sapire ACJ had been delivered on 22nd November 1995 but the notice of appeal was only filed on 4/1/96. The learned Judge pointed out that in terms of the Court of Appeal Rules the appeal should have been noted by 20th December 1995. This had not taken place and the filing of a notice of appeal after the period had elapsed was a nullity. No application for condonation had been made and the granting of condonation could not be decided by him. He also pointed out that in terms of Rule 31 and Rule 34(1) and (2) a record on appeal must be submitted for certification within two months of the noting of the appeal. This should have been done by 4th March 1996. If it has not been done in terms of the Rules of

Appeal it is deemed to have been abandoned. That was an insuperable difficulty facing the Appellant and accordingly the learned Judge on 18th April 1996 dismissed the application with costs.

The Notice of Motion with which this Court is concerned was opposed and came before Dunn J who gave judgment on the 20th September 1996. In his judgment Dunn J took the view that the issue of the irregularities in the granting of the summary judgment had been drawn to the attention of the learned Judge who found it unnecessary to decide it as he was of the view that the appellant had no bona fide defence. The learned Judge went on to say that if the Appellant was not satisfied with the decision of Sapire ACJ his remedy lay by way of an appeal to this Court as the High Court does not sit an appeal against its own judgments. The appellant did note an appeal which was rendered a nullity by the Appellant's own failure to comply with the provisions of Rule 8. The learned Judge accordingly refused the application for rescission of the summary judgment. With regard to the prayer for the relief interdicting the Deputy Sheriff from proceeding with the sale in execution the Respondents undertook not to execute pending the outcome of the application and that that undertaking had thus fallen away.

We found this appeal to be so hopeless that we found it unnecessary to call upon counsel for Respondents. I should add that Mr. Dunseith who appeared on behalf of the Respondents took a number of points, submitted and there were a number of reasons why this appeal should be dismissed. In the view I take in this case Dunn J was so

clearly right for the reasons given by him that it is unnecessary to consider those points.

The Appellant in his Notice of Appeal has claimed that that Dunn J .; "erred in holding that the issue raised in the application had been dealt with in an earlier application rescission." And that the Court, 'erred in relying in its judgment on a supporting affidavit.' There is no substance in that last point.

Mr. Shabangu who appeared for the appellant stated in his heads of argument and in his argument before us contended that the summary judgment was errorenously sought and obtained. He contended further that Sapire ACJ never decided whether the summary judgment

was errorenously sought and granted. That is correct because the learned Judge based his decision solely on the point that the Appellant had no bona fide defence to the action. It was further contended that the court aquo had erred in holding that the question of whether the summary judgment was errorenously sought and obtained had been dealt in an earlier decision. It was therefore submitted that the question as to whether the summary judgment had been errorenously sought and obtained and never been decided.

As I understand the judgment of Dunn J the learned Judge did not decide that Sapire J had decided the question as to whether the summary judgment had been errorenously sought and obtained. What Dunn J decided was: 1. the question as to whether the summary judgment was sought and obtained had been drawn to the attention of

Sapire ACJ;

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2. if the appellant was dissatisfied with that decision or the manner in which it was disposed of, his remedy lay in bringing an appeal to this Court.

He did infact note an appeal and that is where the point should have been raised but the appeal was subsequently rendered a nullity by the Appellant's failure to comply with provisions of Rule 8 and deemed to be abandoned;.

3. The High Court does not sit on appeal against its own judgments.

I have a very clear view that the learned Judge was perfectly correct for the reasons given by him and that it is not necessary in my judgment to consider any further points which were raised by Mr. Dunseith. I do not, in the circumstances intend or do not find it necessary to elaborate In any further detail on the factual background to this matter.

Mr. Dunseith urged that in the circumstances, this is a case where the Court should award attorney and client costs. He claimed that this is a vexatious case where the Respondents have been subjected to a great deal of harassment.

In general a Court awards attorney file costs sparingly and only in exceptional circumstances. The question which arises is whether this is such a case. In my judgment it plainly is such a case. The Appellant's conduct in this matter is deserving of the strictest censure. He failed In the application before Sapire ACJ, he then having not prosecuted his appeal and his appeal having been deemed to

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have been abandoned then brought an application before Sapire ACJ to stay execution pending an appeal but there was no appeal. So that application was devoid of substance. He then appeared before Dunn J in which he sought the same relief which he had sought before Sapire ACJ in which Sapire ACJ said there was no bona fide defence to the application and therefore the application had been dismissed. There was no appeal against that decision. Dunn J correctly held, he was not there as a Court of Appeal on a judgment of the High Court. Not content with that the Appellant now brings the case a fourth case again before this Court. I think that the Respondents have been subjected to severe harassment. I think the case is vexatious and a hopeless one. There comes a time when a Court must say enough is enough. 1 regard this as an appropriate one in which to say just that and that we should mark our displeasure at the conduct of the Appellant by awarding attorney and client costs. In my judgment the appeal must be dismissed with costs upon the scale as between attorney and client.

R.N. LEON JA

I agree:

W.H.R. SCHREINERR JA

I agree:

J.H. STEYN JA

Delivered on the 4th April 1997.