# IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE Civil Appeal No. 31 /2008

In the matter between

THE MINISTER OF HOUSING AND URBAN DEVELOPMENT — Applicant

vs

SIKHATSI DLAMINI — 1st Respondent
ZEPHANIA NKAMBULE — 2nd Respondent
THULANI MKHONTA — 3rd Respondent
GEORGE BENITO JONES — 4th Respondent
GRACE S. BHEMBE — 5th Respondent
ARNOLD DLAMINI — 6th Respondent
BHEKI MKHONTA — 7th Respondent
BENNEDICT BENNETT — 8th Respondent
JAMES NCONGWANE — 9th Respondent
GEDLE MDLULI — 10th Respondent
JOSEPH SHONGWE — 11th Respondent

Coram: BANDA, CJ

For the Applicant: Mr. Vilakati

For the Respondents: Mr. Hlophe

**JUDGMENT**

[1] This application comes before me as a single judge of the Supreme Court of Appeal. The Constitution and the Court of Appeal Act give powers to a single judge of this Court to deal with certain matters.

[2] Section 149 of the Constitution provides as follows:

> *149(1) "Subject to the provisions of Subsections (2) and (3) a single Justice of the Supreme Court may exercise power vested in the Supreme Court not involving the determination of the cause or matter before the Supreme Court."*
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> *(2) "In criminal matters, when a single Justice refuses or grants an application in the exercise of power vesting in the Supreme Court, a person affected by such an exercise is entitled to have the application determined by the Supreme Court constituted by three Justices."*
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> *(3) "In civil matters, any order, direction or decision made by a single Justice may be varied, discharged or reversed by the Supreme Court of three Justices at the instance of either party to that matter."*

And Section 3 of the Court of Appeal Act provides in the following terms :-

> *3. "An application which may be brought before a single judge of the Court of Appeal may be dealt with by him in open court or in chambers, at his discretion."*

[3] The appeals to this Court are governed by Section 14 of the Court of Appeal Act and it provides in the following terms:-

> *Right of Appeals in Civil Cases*
> *14(1) "An appeal shall lie to the Court of Appeal -*

> *(a) from all final judgments o f the High Court; and*
> *(b) by leave of the Court of Appeal from an interlocutory order, an order made ex parte or an order as to costs only.*

[4] The brief facts in this case are that the respondents brought an application in the High Court before Maphalala J. in which they challenged the applicant's decision to dismiss the respondents as Councillors of Mbabane Municipal Council. The applicant noted an appeal against that decision and despite that notice of appeal the respondents proceeded to execute the judgment. This application seeks an order to declare that the decision by Maphalala J is appealable. The applicant also seeks, in the alternative, an order to grant him leave to appeal. The application is vigorously opposed by the respondents.

[5] Mr. Hlophe who appeared for the respondents has taken points of law against the application and ostensibly on the following four grounds:-

> (1) Leave to appeal. Mr. Hlophe has contended that the application for leave to appeal is out of time because, under the rules, the application ought to have been made six weeks after the judgment and that in terms of the relevant rule the six weeks have long elapsed and that, therefore, the application for leave is out of time and that there is no application for condonation to support. Mr. Hlophe also submitted that an application for leave is a substantive issue which only the full Court can deal

with. He referred to passages in Van Winsen 4th Edition of the Civil Practice of the Supreme Court of South Africa at pages 864 and 865. It is further Mr. Hlophe's submission that the application for leave is defective in that it lacks the necessary averments to support it.

(2) Jurisdiction: Mr. Hlophe has submitted that the order the applicant is seeking is declaratory in nature and that this court, being an appellate court, has no power to grant such an order. He has contended that this is an original prayer which can only start from a court with original jurisdiction and that the applicant had made a similar application in the High Court which was dismissed. He cited Section 146 of the Constitution which gives this court appellate jurisdiction and that, therefore, this court has no power to hear this application. Mr. Hlophe has also submitted that the matter that is being canvassed before this court can only be determined by the full court. He has contended that it is only the full court which has the jurisdiction to find whether or not the decision of the court below was proper or not.

(3) Form of Application: It is Mr. Hlophe's contention that the application is further defective in that the relevant rule requires that the application be made by petition and not by notice of motion. He cited Rule 41 of the Court of Appeal Rules which provides that every application to a judge of the Court of Appeal shall be by petition. He has argued that Rule 41 is peremptory in its effect and must be complied with

and that the court has no discretion in the matter.

(4) Record of Proceedings. Mr. Hlophe has submitted that the appeal in this case should be deemed to have been abandoned by the failure of the applicant to file a record of proceedings timeously as is required by Rule 31(4) of the Court of Appeal Rules. He contended that the Notice of Appeal which was noted on 19th June 2008 had lapsed by the failure to file the record of proceedings.

[6] Mr. Vilakati, for the applicant, has submitted and urged this court to dismiss all points of law raised as devoid of any merit. He has submitted that Rule 9(1) of the Rules of the Court of Appeal does not prescribe how time shall be computed and has suggested that where this is not done the practice under the common law is to follow the court days which exclude week-ends and public holidays. On that basis Mr. Vilakati contends that the 42 days had not elapsed at the time the application was heard. He argued that the 42 days elapsed on 19th August and that therefore, the application for leave was timeously made. Mr. Vilakati did not accept Mr. Hlophe's contention that the application was not supported by the necessary averments. He contended that the passages which Mr. Hlophe cited in **VAN WINSEN 4th EDITION** had no relevance to the practice in this country. He submitted that the passages cited were referring to the provisions of a specific Statute of South Africa which had no application to the practice and procedure followed in Swaziland. He argued that applications for leave to appeal in Swaziland are governed by Rule 9(1). He contended, therefore, that all the applicant had to show are his grounds of appeal which he said

had been annexed to this application.

[7] On jurisdiction Mr. Vilakati submitted that it was important to know what is the issue before this court. He contended that the issue before the full Supreme Court was to dismiss, reverse or confirm the judgment of the court below, whereas the matter before this court is not to determine the issue which is before the full bench of the Supreme Court. In other words the issue before this court is not whether the order or decision of Maphalala J was right or wrong, but rather whether that Mr. Vilakati has submitted that the judgment of Maphalala J constitute a final decision and is therefore appealable. Mr. Vilakati cited the Botswana case of **BOTSWANA BANK EMPLOYEES UNION, BONTLE MOTSEPE, KEOLOPILE GABORONE vs BARCLAYS BANK OF BOTSWANA** Civil Appeal No. 1/95 Industrial Court Case No. 40/95, unreported.

[9] This case and the other cases referred to therein give an instructive illustration of what is a final order or judgment. Cases in that judgment state that a final judgment or order which is appealable is one where the disputes between litigants has a final and definitive effect on the main action and that an order which is mainly preparatory or procedural is not a final order or judgment. In the case of **PRETORIA GANISON INSTITUTE vs DANISH VARIETY PRDUCTS (PTY) LTD** 1948 (1) SA 839 the principle is stated as follows:-

> "*It is also well established that every ruling of a court during the progress of a suit does not amount to an order. The court must be duly asked to grant some definitive and distinct relief before*

> *its decision upon a matter raised as preparatory or procedural question can properly be called an order.*"

decision is appealable or not. He conceded making a similar application before the High Court but contends that the High Court refused to deal with the matter as it held that it was a matter to be determined by the Supreme Court of Appeal. In answer to the contention by Mr. Hlophe that the applicant has not applied for condonation Mr. Vilakati has submitted that among the applicant's prayers in the application was one asking the court to dispense the rules and forms of the application. He has contended that even if it is accepted that a wrong form was used he has submitted that no prejudice has been shown.

[8] Mr. Vilakati has denied that there was a failure to file the record of proceedings because, in his view, the Registrar of the Supreme Court had yet to issue notice to legal practitioners when all the records for the appeals must be filed. He contends that this is the practice that is followed in this jurisdiction. It is also the contention of Mr. Vilakati that there was no failure to disclose. He contended that all the applicant had to show were his rights and the contention of the other party and that they had disclosed all the material facts necessary for the determination of the application before court.

[10] And in the case of **NXABA vs NXABA** 1926 AD 392 it is stated:

> "*A ruling is the antithesis of a judgment or order. It is a decision which is not definitive of the rights of the*

> *parties nor does it have the effect of disposing of at least a substantive portion of the relief claimed in the main proceedings.*"
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> "*It has been consistently held in South Africa that rulings are not appealable unless permitted by statute*".

There can be no doubt in my judgment, on the basis of these authorities that the judgment of Maphalala J in the court below was a decision which is definitive of the rights of parties and has the effect of disposing of the major portion of the relief that was sought. And under S 14(1) of the Court of Appeal Act it is only final judgments of the High Court which are appealable to the Supreme Court of Appeal.

[11] I have carefully considered the issues raised in the papers before me and in the oral arguments which counsel have so ably put before me. A variety of issues were raised before me but with respect they were not issues I had to determine in this application. The issues I had to resolve in this application was a narrow one namely whether the judgment of Maphalala J was appealable or not and whether this was a proper case in which I could grant leave to appeal. There can be no doubt, in my view, that the case raises a very important point of law on which it is vitally necessary that the highest court in the land should have the opportunity to express a reasoned opinion on the matter.

[12] I have also carefully considered the submissions of Mr. Hlophe which related to the alleged failure by the applicant to comply with the Rules of Court in filing the application for leave to appeal and the filing of the record of proceedings. It

seems to me that it is generally accepted that in computing time within which a judicial process must be filed, it is the court days, and not the calendar days, which must be considered. And Mr. Vilakati must, therefore, be correct when he submitted that the application for leave to appeal was timeously filed. The matter before me is not brought by way of an appeal but only as an application. I am satisfied that both parties had sufficient material in their possession to enable them to properly argue the application before me. The absence of a formal record of proceedings has not occasioned any prejudice to the respondents and none was advanced. While it is proper that rules of court should be followed technical failure to comply with the procedural rules should not be allowed to frustrate the determination of the merits of the case. In the case of **TRANS-AFRICAN INSURANCE CO. LTD VS MALULEKA** 1956(2) SA 273 at 278 - F - G the court there held as follows:

> "*No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objection to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.*"

And in the case of **PRUDENTIAL ASSURANCE CO. LTD VS CROMBIE** 1957(4) SA 699 at 702 - C - E Herbstein J held as follows:-

> "*Many of the earlier decisions in our courts must be approached with care in as much as there now exists a different attitude; instead of rigid formalism and insistence on technical perfection which appears to*
>
> *have been the approach of some courts, more and more attention is being paid to the need to avoid the delay and expense consequent on such formalism and to enable litigants to come to grips with the real issue between them. Where, therefore, there has been a failure to comply with formal legal requirements the court will, where it has a discretion, be ready to condone any irregularities provided only that this can be done without injustice or prejudice to the other party.*"

[13] I have already found that the application for leave to appeal was timeously filed and that failure to file a record of proceedings did not occasion any injustice or prejudice to the respondents. Similarly I do not see that any injustice or prejudice was occasioned to the respondents when the applicants brought their application by notice of motion, instead of by petition. It is clear to me that the failure to observe the rules in this case was purely procedural and I am satisfied that the respondents did not suffer any injustice or prejudice. It is substantial justice which must be done between the parties without undue regard for technicalities. I am prepared to condone any such failure which I hereby do.

[14] The issue before me is not whether the decision of Maphalala J was right or wrong and therefore the issue of jurisdiction does not arise. I am unable to accept Mr. Hlophe's submission that the issue of an application for leave is a

substantive matter which only a full court can deal with. Mr.Hlophe was not able to cite any authority to support his proposition. In my view, if there is any one matter which can be brought before a single judge of the court is the application for leave to appeal. I am therefore satisfied and find that the grounds of appeal which the applicant has annexed to this application raise reasonable prospects of success on appeal and I would accordingly grant leave to appeal.

[15] Mr. Vilakati has proposed that the two appeals which have been noted in this case should be consolidated. This appears to me to be a reasonable proposal to make although Mr. Hlophe opposes it on the grounds that such consolidation would deprive the respondents of their rights which they now have. It is difficult to see how consolidation would result in the deprivation of the respondents' rights. However I will reserve this matter for the full court to make a decision on it.

[16] In the light of the above findings I must come to the conclusion that the legal points raised cannot succeed and they are dismissed. The points which were argued against the merits of the application are the same as those raised in limine. I must therefore grant the application and order that the rule nisi which I granted on 13th August 2008 be extended until the determination of the appeal by the full Court.

Pronounced in open court sitting at Mbabane on the 9th day of September 2008.

R.A. BANDA

CHIEF JUSTICE