IN THE SUPREME COURT OF SWAZILAND

APPEAL CASE NO.5/09

In the matter between:

CENTRAL BANK OF SWAZILAND	**APPELLANT (1st RESPONDENT below)**
AND	
QHAWE MAMBA	**1st RESPONDENT (1st APPLICANT below)**
ULTIMATE PRODUCTIONS (PTY) LTD	**2nd RESPONDENT (2nd APPLICANT below)**
JOUZ MEDIA (PTY) LTD	**3rd RESPONDENT (3rd APPLICANT below)**
FIRST NATIONAL BANK OF SWAZILAND (LTD)	**2nd RESPONDENT below**

NEDBANK SWAZILAND	**3rd RESPONDENT below**
STANDARD BANK OF SWAZILAND LIMITED	**4th RESPONDENT below**

CORAM

RAMODIBEDIJA **EBRAHI**

MJA

MAGID

AJA

FOR THE APPELLANT	**MR. JOUBERT**
S.C.	
FOR THE RESPONDENTS	**MR. KADES**
S.C.	

JUDGMENT

MAGID AJA:

[1] On 28 November 2008 the First, Second and Third Respondents launched an urgent application against the appellant and three commercial banks for an order (omitting the prayers relating to urgency) reading as follows:

> "*3) Setting aside the seizure and freeing of the applicants' bank accounts by the 1st respondentpendingfinali^ation hereof;*
>
> 1. *Declaring the seizure of the applicants'* accounts *as* ultra vires, *null, void and without force or effect and unconstitutional;*
> 2. *Restraining and interdicting the V1*

respondent from seizing and taking possession of the applicants' bank accounts and assets without complying with the Financial Institutions Act of2005;

3. *Granting costs of application at the attorney and client scale;*
4. *Granting such further and/ or alternative relief as this court meets fit;*
5. *That prayers 3 and 5 operate with interim and immediate effect pending the return date hereof;*
6. *That a* rule nisi *do hereby issue returnable on a date to be stated by this honourable court calling upon the 1st respondent to show cause why prayers 3, 4, 5 and 6 should not be confirmed.*"

[2] Opposing and replying affidavits were duly filed, and after hearing argument Maphalala J made the following order, namely:-

"*(1) that these proceedings be converted to a Rule 53 application and the parties to file the requisite affidavits to that end.*

7. *the time for filing these affidavits to be abridged to a period within 14 days from the date of thisjudgment.*
8. *the applicants or its members acting in its name or on its behalf may not continue to make deposit to any of the affected account or at all pending the finali^ation of the review application.*
9. *the status of the account shall not be interfered with by either party or altered in any manner including the accruing of interests pending the finali^ation of the*

application.

On the issue of costs I would reserve the costs of the preliminary points to the merits of the Rule 53 application. Further, the reserved costs of the 19th December 2008, also to stand down to the merits of the Rule 53 application. Furthermore, the matter to be called for arguments after the 14 days has elapsed and so it is ordered."

The appellant has noted an appeal against this order *inter alia,* on the ground, that the learned Judge ought to have dismissed the application with costs and that he had no jurisdiction to convert an application into review proceedings.

Because the Court on reading the record had doubts as to the appealability of the order made by the learned Judge *a quo,* the learned Chief Justice addressed a letter to the attorneys for the parties requesting them to instruct counsel that that issue would be argued at the commencement of the appeal and requesting them to prepare heads of argument on the issue.

Such heads have been received from counsel on both sides and we have heard full argument on the appealability of the matter. Mr. Joubert SC, for the appellant, also addressed some argument to us on the merits of the appeal and contended that it was important, in the interests of the country that a decision be obtained from this Court as soon as possible.

On any test which is normally applied in these matters, the Order granted by the learned Judge *a quo* was not final. Indeed, I did not understand Mr. Joubert to dispute this. But, said Mr. Joubert, the learned Judge made a finding or ruling which, being *res judicata,* was final in effect. Mr. Kades SC for the respondents, on the other hand, disputed that the ruling in question was *res judicata* and he persisted, as was set out in his heads of argument, that the Order was not appealable.

[7] To understand this dispute, I append hereunder an extract from the learned Judge's judgment, namely:

> "*[28] Having considered the affidavits of the parties and their comprehensive arguments it appears to me that there are three issues for decision by the court. The first issue which is akin to a preliminary objection is that the 2nd Applicant is not a fully fledged co-operative society and therefore lacks legal capacity in law. The second issue is that this application is bad in law in that the Applicants ought to have proceeded by way of review under Rule 53 of the High Court Rules. If Ifind against the Respondent in the latter point I ought to dismiss this application without any further ado. On the other hand if I find in favour of the Applicant I have to address the merits of the case. This being the third aspect of the case. I proceed to determine these issues* ad seriatim *in the following paragraphs.*
>
> *[29] The first issue for decision is whether the 2nd Applicant has* locus standi *in this application that it is a fully fledged co-operative in law. The answer to this vexed point is not very difficult to*

find. It is common cause between the parties that the 2nd Applicant has not fully registered in that it has been provisionally registered."

[8] Mr. Joubert contended that the learned Judge's finding in paragraph 29 of the judgment did not accord with the facts which showed that the Second Applicant, had not been registered, either provisionally or otherwise. Moreover, he contended that that finding was *res judicata* between the parties and that that finding was consistent only with a finding in favour of the respondents on the original application. Hence, said Mr. Joubert, almost in so many words, once the learned Judge made that finding he had no alternative but to grant the application and therefore that ruling was appealable.

[9] I expressly refrain from expressing an opinion on the question of *res judicata,* save to say that it is at least arguable in the light of the order made by the learned Judge that the finding or ruling, being *obiter,* is not *res judicata* and that therefore if the parties enter upon the review in terms of the Order, it would be open to either of them in the course of the affidavits in the review to produce more evidence than was led before the Court *a quo* on the disputed issue.

[10] If in the course of the review the learned Judge finds in favour of the appellant, the effect will necessarily be that the application will be dismissed. In that event, the appellant would have no reason to appeal. If, on the other hand, the learned Judge *a quo* finds in favour of the respondents, then will be the time for the appellant properly to note an appeal to this Court.

[11] In reply, Mr. Joubert set considerable store by what was said by Steyn JA in this Court in **Iron Engineering (Pty) Ltd v. Fridgemaster Polystyrene Products (Pty) Ltd (Appeal Case No.13/2003)** at pages 6 & 7, namely:

> "*There appears to be some merit in the contention that where a point of law arises in motion proceedings which is clear and unambiguous and there are also disputes of fact which arise, a Court should avoid the inconvenience,' expense and delay which would flow from a ruling that the matter should be referred for oral evidence. This Court would owe it to the parties not to encourage the delays with which the law and its processes have become identified. In such circumstances, i.e. where an unambiguous point of law arises and it is decisive of the dispute between the parties, there could be compelling reasons for the Court to decide such an issue rather than possibly, fruitlessly, referring the matter to trial. I leave open the question as to whether in such a case, or in a matter where there is no genuine dispute of fact and a reference to oral evidence is nevertheless, clearly wrongly decreed, such a ruling would be appealable.*"

[12] In the **Iron Engineering** case it was accepted that the referral to oral evidence in the Court *a quo* would normally not be appealable without leave, but it was held that a finding on appeal that the referral to evidence would not necessarily dispose of the issue in the case rendered it unappealable without leave. In this matter, too, as I have indicated in paragraph [10] above, it is possible that if the parties act in terms of the Order, the result may be

different from that which Mr. Joubert appears to expect.

[13] Mr. Joubert also referred us to what was said by Corbett J.A. (later CJ) in **van Streepen & Geems (Pty) Ltd v. Transvaal Provincial Administration 1987(4) SA 569 (A)** at 583H - 586F to demonstrate that there has been a gradual erosion of the difference between what are called "simple interlocutory orders" and those having a final and definitive effect. This was itself an application for leave to appeal from an interlocutory order.

[14] But the difference between the cases to which Mr. Joubert referred us and the matter with which we are dealing is that in the former the appealability of an order was disputed, whereas in this appeal what is actually appealed against is a finding or ruling, or even, in Mr. Joubert's phrase, a decision which does not appear in or directly impinge on the order made by the Court *a quo.*

[15] It is, it seems to me, unnecessary to express any view on the merits of the case or even whether the learned Judge had the power to make the order he did. That is for him to decide or re-consider when the matter comes before him. Mr. Joubert complained that the terms of the order did not make it clear what issue or issues were to be the subject of the review and where the onus would lie in the review. That, too, is not a matter for us.

[16] We are assured by Mr. Kades that the respondents would not be prejudiced by any delay which might necessarily follow if we were to find that the Order was not appealable. It will however be necessary to vary the Order to make allowance for the lapse of time since the order was made.

[17] The order I propose, therefore, is the following:

10. The appeal is struck off the roll.
11. The appellant is to pay the costs of the appeal.
12. The time for filing affidavits as set out in the order of the Court *a quo* is amended to read "within 14 days from 21 May, 2009."

P.A.M MAGID
ACTING JUSTICE OF APPEAL

I Agree

M.M **RAMODIBEDI**

JUSTICE OF APPEAL

I Agree

A.M. EBRAHIM

JUSTICE OF APPEAL

Judgement delivered in open court on the 21st day of May 2009.