IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

APPEAL CASE NO.52/09

In the matter between:

JABULILE PERSIS MAZIYA **1st** APPELLANT

ELSIE LOBATSAKATSI MAZIYA 2nd APPELLANT

VS

THEMBI KHANYISILE BHIYA **1st** RESPONDENT

MASTER OF THE HIGH COURT 2nd RESPONDENT

ATTORNEY GENERAL 3rd RESPONDENT

CORAM

RAMODIBEDI

ACJ MAGID AJA

MASUKU AJA

FOR THE APPELLANT MR. T. NDLOVU

FOR THE **1st** RESPONDENT MR. M. SIMELANE

FOR THE 2nd & 3rd RESPONDENTS MR. N.M. DLAMINI

JUDGMENT

MAGID AJA:

[1] In the Court *a quo* the first respondent (then the applicant) launched an application against the appellants, as first and second respondents, for the following relief, namely:

> "1. Dispensing with form, service and time limits as prescribed by this Honorable *(sic)* Court and hearing this matter as a matter of urgency.
>
> 2. Granting a *rule nisi* with interim immediate *(sic)* returnable on the 17th of October 2008 calling upon the Respondent cause why the following should not be made final;
>
> 2.1 That the Deputy Sheriff of Lubombo be authorized to attach and remove a double cab Toyota Hilux registered SD 367 RL from 1st & 2nd Respondent (sic) pending finalization of the matter.
>
> 2.2 That the Deputy Sheriff thereafter restores the applicant with possession of the car.
>
> 3. That the 3rd Respondent appoints an executor or curator in the estate late (sic) of Nkosinathi Emmanuel Maziya EL 1/07 within 14 days after the order has been granted.
>
> 4. Costs in the case of opposition.

The Master of the High Court and the Attorney General were joined in the application as third and fourth respondents but took no part in the proceedings. Before us, they were represented by Mr. N.M. Dlamini who, on behalf of his clients, elected to abide the decision of this Court.

[2] The appellants did not file any affidavit in response to the merits of application but chose to launch an application claiming the following relief:

> "1. Setting aside and/or deeming the Applicants founding affidavit as an irregular step in terms of rule 18(12) for failure to comply with Rule 18(6) of the Rules of Court.
>
> 1.1 The plaintiffs cause of action is based on a contract of a sale of a motor vehicle, described in the applicants' application.

1.2 Inasmuch as the applicants' papers are fatally inconsistent with one another, i.e.

a) At paragraph 15.1 and 15.2 of the applicants founding affidavit, the applicants claims to have entered into the agreement of sale with one Father Emmanuel Lutaya;

b) However, in an earlier affidavit, made by the same applicant at the masters office, attached to the same application and marked page 8, the applicants claims to have entered into the sale and/or ownership agreement with "the family" in particular one Nkosinathi Maziya;

1.3 Whichever one of the two parties she decides to allege to have contracted with, applicant, in terms of Rule 18(6) has failed to state whether or not such contract of sale, to her, of the motor vehicle was in writing or oral, where and by whom it was concluded.

2. Costs of suit."

[3] Maphalala J held that the appellant's application was misconceived in that (to quote the learned Judge):

> "... the manner the Respondents have objected to the Applicants case is quite irregular as they were only entitled to apply for striking out in terms of Rule 23. Clearly, Rule 30 applies only to irregularities of form and not matters of substance."

[4] In my view the learned Judge was correct in holding that the appellants' application under Rule 30 was misconceived but I arrive at this conclusion by a different route.

[5] Rule 18(6), on which the appellants relied for the allegation that the application constituted an irregular proceeding, applies to allegations in "pleadings". Indeed the heading to Rule 18 is "Rules Relating to Pleading Generally". Rule 18(1) provides that:

> "A combined summons, and every other pleading shall be signed by an advocate or attorney acting for the party..."

It is unnecessary to refer to further sub-rules of Rule 18 to demonstrate that its provisions refer to pleadings properly so-called and not to affidavits. If the word "pleading" were intended to apply to an affidavit, it would mean that every affidavit filed in motion proceedings would, in terms of Rule 18(1), have to be signed by the party's attorney or counsel, a manifest impossibility.

[6] It is important to note that Rule 6(27) renders Rules 10, 11 & 12 *mutatis mutandis* applicable to applications but none of the sub-rules of rule 18 is similarly made applicable to applications. It follows that the matters complained of by the appellants, not being contained in pleadings, were insufficient to found an application in terms of Rule 30 on the grounds alleged. For similar reasons, Rule 23, which refers to EXCEPTIONS AND APPLICATIONS TO STRIKE OUT, applies only to pleadings and not to applications. Rule 6(28) deals with applications to strike out in relation to applications. Hence my conclusion that the learned Judge *a quo* was, to this extent, right but for the wrong reasons.

[7] If the appellants had chosen to enter upon the main application, they could perhaps have argued that the conflicts to which they had referred in their Rule 30 application might cast doubt on the strength of the first respondent's case. I express no view as to the validity or otherwise of such an argument. However that may be, the learned Judge erred in granting final relief in relation to the first respondent's main application without giving the respondents leave to file appropriate opposing affidavits.

[8] Before us, Mr. Simelane for the first respondent stated in his Heads of Argument that in the Court *a quo* the attorney for the appellants had told the learned Judge that the appellants "would stand or fall" by the success or failure of the Rule 30 application. Mr. Ndlovu for the appellants (who, like Mr. Simelane, had appeared in the Court *a quo)* strongly disputed Mr. Simelane's allegation. This has created a conflict of fact between Counsel which, apart altogether from the undesirability of any such conflict, we are completely unable to resolve. It follows that the order made by the learned Judge *a quo* must be reversed, for he ought to have given the appellants an opportunity to deal with the merits of the first respondents' case.

[9] In an endeavour to explain why the appellants had not filed any affidavit on the merits Mr. Ndlovu referred us to the proviso to Rule 30(1) which reads as follows:

> "Provided that no party who has taken any further step in the cause with knowledge of the irregularity shall be entitled to set aside such step or proceeding."

But if Mr. Ndlovu intended to convey that the appellants were thereby precluded from filing an affidavit on the merits until the Rule 30 application had been disposed of, I consider that he was wrong. The rule relates to a "further step" taken before the application in terms of Rule 30(1) is made, not thereafter.

[10] In my opinion, therefore, there would have been nothing to prevent the appellants from filing an affidavit or affidavits on the merits after their Rule 30(1) application had been filed and served. It might have been wise, though not necessary in my opinion, to state therein that each affidavit was being filed without prejudice to the pending application in terms of Rule 30(1).

[11] Having decided that the appeal in relation to the Rule 30(1) application is bad but that against the final order granted in favour of the first respondent is good, it remains to determine the manner in which the further proceedings between the parties are to be managed.

[12] It seems to me that:

12.1 the hearing of the main application must be remitted to the Court *a quo;*

12.2 the appellants must be given a limited time to deliver opposing affidavits, if any;

12.3 directions must be given as to the further hearing of the matter;

12.4 an equitable award as to costs must be made.

[13] While I have no doubt as to Maphalala J's impartiality I think it is inadvisable that he should deal with the further hearing of the main application on the principle that justice must be seen to have been done. He has, after all, made a decision on the first respondent's claim.

[14] Mr. Ndlovu argued that the appellant had been substantially successful in that the final order granted against them will have to be set aside and that accordingly the appellants should be awarded their costs of appeal. Mr. Simelane argued that it was apparent that most of the appellants' arguments and grounds of appeal had related to the Rule 30(1) application on which they had patently not succeeded and that therefore the first respondent had been substantially successful. There is something to be said for both points of view and I believe that fact is met in the order for costs of the appeal which I propose. It has been observed that in many appeals against orders made in motion proceedings unnecessary documents, such as the parties' Heads of Argument in the Court *a quo* and transcripts of argument are copied and included in court records. Such documents are, as I have said, unnecessary and merely serve to increase costs. It is true that, in this case, a transcript of the proceedings might have helped to resolve the factual dispute between Mr. Simelane and Mr. Ndlovu. But such disputes, regrettable as they are, must be few and far between.

[15] In the result, the Order I propose is to the following effect:

1. The appeal against the first sentence of the Order contained in paragraph [13] of the judgment delivered by Maphalala J on 2nd September 2009 in Civil Case No.3778/08 is dismissed.

2. The appeal against the second sentence of the said judgment is upheld and replaced with the following order, namely:

> "No order is made on the Applicant's application for relief in terms of Notice of Motion dated 1st October 2008 and that application is adjourned to a date to be fixed by the Registrar when the matter is ripe for hearing."

3. The matter is remitted to the Court *a quo* for further hearing on the following basis:

3.1. The first and second respondents are given leave to deliver their opposing affidavits, if any, on or before 8th December, 2009 at 16h00, failing which they shall be barred from filing any further affidavits.

3.2 Whether or not the first and second respondents comply with the provisions of paragraph 3.1 above, the further proceedings will be governed by the rules and practice of this Honourable Court, save that the matter shall not be placed before Judge Maphalala for hearing.

4. The first respondent shall pay one-half of the appellants' costs, provided however that the appellants shall not be entitled to any fees or other costs occasioned by the inclusion in the record of Counsel's Heads of Argument in the Court *a quo.*

P.A.M. MAGID

ACTING JUSTICE OF APPEAL

I agree

M.M. RAMODIBEDI

ACTING CHIEF JUSTICE

I Agree

T.S. MASUKU

ACTING JUSTICE OF APPEAL

Delivered in open court on this day of November 2009.