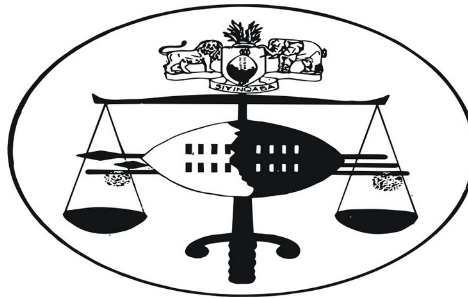

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No: 7//2012

In the matter between

SWAZILAND WATER AGRICULTURAL DEVELOPMENT ENTEPRISES LTD
Applicant

and

DOCTOR LUKHELE **Respondent**

Neutral citation: Swaziland Agricultural Development Enterprises Ltd *v Doctor Lukhele* (7/2012) [2012] SZSC 1 (21 March 2012)

Coram: RAMODIBEDI CJ, MAMBA AJA, and SEY AJA

Heard: **12 MARCH 2012**

Delivered: **21 MARCH 2012**

Summary: **Application for leave to appeal – Principles thereof – Section 14 (1) of the Court of Appeal Act –**

Interlocutory order – Whether appealable without leave – Applicant failing to show reasonable prospects of success on appeal – Application dismissed with costs.

THE COURT

[1] The principal point of dispute between the parties giving rise to the present application for leave to appeal is whether the contract of employment between them which had terminated on 30 September 2009 , as stated in paragraph [1] of the court *a quo's* judgment, has subsequently been tacitly renewed or not. It is the respondent's contention that the contract had indeed been tacitly renewed. The applicant's contention on the other hand is that it had not been so renewed.

[2] The facts show a disturbing ding-dong affair between the parties as they shuttle between the Industrial Court, the High Court and the Supreme Court respectively in search of a resolution to their dispute. It all started when the applicant employed the respondent as its Chief Executive Officer on fixed term contracts, the last of which extended from 1 October 2006 to 30 September 2009.

[3] The parties are on common ground that clause 2.1.3 read with 2.1.4 of the contract of employment between the parties enjoined the respondent to notify

the applicant's Board in writing of his intention to renew the contract at least four months prior to the end of the contract. It was also agreed that, should the Board in turn fail to give the respondent a notice of non-renewal of the agreement by 15 July 2009, the agreement would be deemed to have been tacitly renewed. As can be seen, it is this clause that has led to the present cut-throat litigation between the parties. Henceforth, the story is best told with reference to a brief chronology of the relevant events.

[4] On 30 April 2011, and following an application by the respondent dated 1 April 2011, the Industrial Court granted an interim interdict in favour of the respondent restraining the applicant from terminating the respondent's contract "pending the finalization" of the matter.

[5] Thereafter, the applicant launched an application in the High Court seeking an order to review, correct and set aside the interim order of the Industrial Court in question.

[6] On 7 December 2011, the High Court (MCB Maphalala J, as he then was) granted the applicant's application. The court set aside the interim order granted by the Industrial Court. Furthermore, it categorically held that there was no tacit renewal of the respondent's contract of employment.

[7] On 8 December 2011, the respondent filed a notice of appeal, Case No. 47/2011, against the High Court's decision referred to in the preceding paragraph. He specifically challenged the High Court's decision to the effect that his contract was tacitly renewed. He also questioned the jurisdiction of the High Court in the matter, relying on the arbitration clause 17 of the contract of employment between the parties. It is common cause that the appeal in question is still pending in this Court.

[8] It appears from the record of proceedings that the applicant took up the position that the noting of an appeal does not operate as an automatic stay of the execution of the judgment appealed against. By a letter dated 8 December 2011, it threatened to execute the judgment. This then prompted the respondent, on 20 January 2012, to launch an urgent application in the High Court seeking an order that the applicant was not entitled to carry into effect the High Court's judgment in question.

[9] On 6 February 2012, the High Court (Ota J) granted an order in favour of the respondent in these terms:-

> *"1. That the Respondent (i.e. the present applicant) is not entitled to carry into effect the judgment of the High Court rendered on the 7th December 2011, pending the finalization of the appeal noted against same by the Applicant (i.e. the present respondent).*

2. *That the Respondent's letter dated 8th December 2011, purporting to execute the said judgment, be and is hereby set aside.*

3. *No order as to costs."*

[10] Aggrieved by Ota J's judgment the applicant has now brought the present application for leave to appeal to this Court.

[11] Meanwhile, it is necessary to record that the applicant subsequently launched its own counter application in the High Court against the respondent, seeking leave to execute the High Court's judgment dated 7 December 2011 referred to in paragraph [6] above in the event that it was obliged to do so. That application is still pending in the High Court.

[12] Now, the law relating to the right of appeal to the Supreme Court in civil cases in this jurisdiction is contained in section 14 (1) of the Court of Appeal Act 1954. It provides as follows:-

"14. (1) An appeal shall lie to the Court of Appeal –

(a) from all final judgments of 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."*

[13] The first logical question then is whether Ota J's order referred to in paragraph [9] above is interlocutory? As was stated, correctly so in our view, by Schreiner JA in Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (A) a preparatory or procedural order is a simple interlocutory order and as such it is not appealable. In South Cape Corporation v Engineering Management Services 1977 (3) SA 534 (A) at 549 Corbett JA (as he then was) defined the term "interlocutory order" as referring to "all orders pronounced by the Court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation." We agree. See, also, Jerry Nhlapho and 24 Others v Lucky Howe N.O. (in his capacity as Liquidator of VIP in Liquidation), Case No. 37/07. The Minister of Housing and Urban Development v Sikhatsi Dlamini and 10 Others, Case No. 31/08; The Chairman of the Commission of enquiry into the Operations of the Municipal Council of Mbabane and 10 Others v Sikhatsi Dlamini and 10 Others, Case No. 32/08; Sikhatsi Dlamini and 10 Others v Walter Bennett and Others, Case No. 38/08 (consolidated) (reported on line under Media Neutral Citation: [2008] SZSC 7).

[14] The next question for determination then is whether an order for leave to execute, such as the one granted by Ota J, is a simple interlocutory order. In our view the short answer to this question is to be found in the order itself. A close reading of the order as fully reproduced in paragraph [9] above plainly shows that it was granted "pending the finalization of the appeal" noted by the present respondent. The conclusion is thus inescapable in our view that this order is a simple interlocutory order pending appeal. As such, it is not appealable without leave.

[15] It is trite that in order to succeed in an application for leave to appeal the applicant must establish reasonable prospects of success on appeal. *In casu*, the applicant must make the running and show that Ota J's judgment is reasonably assailable on appeal. Furthermore, it is of fundamental importance to recognise that the Court has a discretion whether or not to grant an application for leave to appeal. This is, however, a judicial discretion which must be exercised upon a consideration of all the relevant factors. It is as such not an arbitrary discretion.

[16] In considering leave to appeal in the instant matter one must not lose sight of the fact that Ota J merely applied the common law principle in force in this jurisdiction that an appeal operates as an automatic stay of execution. It was no doubt precisely for that reason that the applicant itself has subsequently

sought to file a counter application seeking the court's leave to execute the very same judgment which the respondent has appealed against.

[17] In an able and eloquent argument, Mr. Jele, who appeared for the applicant, submitted that Ota J erred in failing to appreciate, as he put it, the "default position", namely, that the contract of employment in question terminated on 30 April 2011 as confirmed by MCB Maphalala J's judgment. Counsel submitted that, by merely noting an appeal as he did on 8 December 2011, the respondent could not thereby revive his contract of employment. It will be seen however, that MCB Maphalala J's judgment is the subject of appeal by the respondent. In fairness to Ota J, she was not called upon to determine the correctness or otherwise of the judgment in question. That is a matter for this Court when the appropriate time comes, namely, at the hearing of the appeal itself. All that the learned Judge did was to enforce the common law principle which is well-known in this jurisdiction, that an appeal operates as an automatic stay of execution. In these circumstances, we are unable to find fault with the court *a quo's* approach.

[18] In the light of these considerations we conclude that the applicant has no reasonable prospects of success on appeal in its attempt to challenge Ota J's judgment. We are of the considered view that that judgment is unassailable.

[19] In any event, we consider that the door is not closed on the applicant. Indeed, the applicant would be well advised to focus its attention on the respondent's pending appeal against the High Court's judgment dated 7 December 2011 referred to above. Doing the best in the exercise of our judicial discretion in the matter, and all relevant factors being considered, we have come to the conclusion that this is a relevant consideration against the granting of leave to appeal. Furthermore, this Court is generally reluctant to allow piece-meal litigation, something which the applicant is evidently seeking to do in the circumstances fully set out above. Apart from convenience to the Court and the opposing party, one of the underlying reasons for this reluctance stems from a consideration of potential irreparable harm to the appellant in the event that his appeal is eventually successful. This is undoubtedly such a case.

[20] In the result, the applicant's application for leave to appeal is dismissed with costs.

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M.M. RAMODIBEDI
CHIEF JUSTICE

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M.D. MAMBA
ACTING JUSTICE OF APPEAL

M.M. SEY

ACTING JUSTICE OF APPEAL

For Appellant : Mr. Z.D. Jele

For Respondent : Mr. M.P. Simelane