



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No: 79/12

In the appeal between:

MBHEKWA MTHETHWA N.O.

APPELLANT

VS

**WINILE DUBE
BETTA PARTS (PTY) Ltd
ABDUL SINDHI
THE MASTER OF THE HIGH COURT
ATTORNEY GENERAL**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT**

Neutral citation: *Mbhekwa Mthethwa N.O. vs Winile Dube and 4 Others (79/12)*
[2013] SZSC31 (31 May 2013)

**CORAM: DR. S. TWUM, JA
M.C.B. MAPHALALA, JA
E.A. OTA, JA**

Heard : 09 May 2013
Delivered : 31 May 2013

Summary

Civil Procedure – material disputes of fact - appeal against the decision of the Court *a quo* that a material dispute of fact exist in the matter and that the appellant should institute action proceedings within a specific period of time – section 14 (1) (b) of the Court of Appeal Act invoked by first respondent that the order was interlocutory in nature requiring appellant to obtain leave of Court to appeal and that he had not done so – held that a dispute of fact exist as conceded by the appellant in his Founding Affidavit – held further that the order of the Court *a quo* is interlocutory in nature because it is not final in effect and is not definitive of

the rights of the parties to the suit – in addition the Order did not dispose of any portion of the relief claimed in the proceedings – appeal struck off the roll with costs.

JUDGMENT

M.C.B. MAPHALALA, JA

[1] This is an appeal against the judgment of the Court *a quo* delivered on the 5th October 2012. The trial Court ordered that pending the action proceedings to be filed by the appellant not later than 25th October 2012, the first respondent is interdicted and restrained from disposing or alienating the Mitsubishi Pajero; it further ordered that should the Nissan Navara be in the possession of the first respondent as at the date of the Order, the first respondent is interdicted and restrained from disposing or alienating the said Mitsubishi Navara. There was no order as to costs.

[2] It is common cause that the appellant did not institute action proceeding as directed by the Court *a quo*, but he noted an appeal to this Court. There were two grounds of appeal: firstly, that the Court *a quo* erred in law in holding that there was a material dispute of fact relating to the ownership of the motor vehicles; secondly, that the Court *a quo* erred in fact and in law in ordering that the appellant should institute action

proceedings in view of its finding that a material dispute of fact existed with regard to the ownership of the motor vehicles.

[3] The appellant had instituted an urgent application in the Court *a quo* for the following orders: Firstly, directing the first respondent to forthwith release, return and/or deliver to the appellant the Nissan Navara as well as the Mitsubishi Pajero as fully described in the Notice of Motion. Secondly, an order interdicting and restraining the first and second respondents from selling the Nissan Navara. Thirdly, that failing the return of the motor vehicles to the appellant, the deputy sheriff be authorised and directed to attach and remove the motor vehicles wherever same may be found and to deliver same to the appellant to hold in safe custody.

[4] The appellant contends that he was appointed as an executor of the estate of the late Dumisani Thomson Dube who died on the 13th August 2012. On the 27th September 2012, he attended a meeting of the next of kin at the Master's office where he was to be introduced to the family of the deceased. He concedes that during the meeting, and when perusing the inventory with the family of the deceased, he discovered that there was a dispute amongst the family members with respect to the ownership of the two motor vehicles. The first respondent contended that the Nissan

Navara belongs to one M.J. Dlamini, a South African male, in whose name the motor vehicle is registered; and, that the Mitsubishi Pajero belongs to her.

[5] The first respondent was one of the deceased's three wives. During the meeting at the Master's office, the other two wives and three brothers of the deceased disputed the evidence of the first respondent and argued that both motor vehicles belong to the deceased's estate. They contended that the Nissan Navara, in particular, was bought by the deceased in Silverton in South Africa but was subsequently registered in the name of M.J. Dlamini at the instance of the deceased; the reason for such an arrangement being to avoid harassment by criminals in South Africa who always target Swazi registered motor vehicles. It was argued that the deceased travelled regularly between Swaziland and South Africa; hence, he registered the motor vehicle in the name of his friend M.J. Dlamini.

[6] The deceased's other two wives and a brother to the deceased conceded that the Mitsubishi Pajero was bought for the use of the first respondent; however, they argued that she did not acquire ownership of the motor vehicle because it was not registered in her name at the time the deceased died. The appellant, however, concedes that the Mitsubishi Pajero has since been registered in the name of the first respondent on the 5th

September 2012; however, they argued that the motor vehicle falls under the estate on the basis that the motor vehicle was not registered in her name at the time the deceased died.

[7] Notwithstanding the dispute, which is apparent on the papers, and for which the appellant conceded to have discovered during the meeting at the Master's office, the appellant insists that both motor vehicles belong to the deceased. The appellant has annexed a supporting affidavit of Sibusiso Mbuso Dube, the deceased's son who confirms that the Nissan Navara was bought by the deceased in South Africa, and, that the Mitsubishi Pajero has since been registered in the name of the first respondent on the 5th September 2012. The deceased's brother Mabonga Dube filed a confirmatory affidavit that the Nissan Navara was bought by the deceased in South Africa and later registered in the name of his friend M.J. Dlamini for the reasons stated in the founding affidavit.

[8] The first respondent opposed the application and subsequently filed a Notice to Raise Points of Law. Firstly, she argued that the application constitutes irregular proceedings on the basis that the appellant was aware of the dispute with respect to the ownership of the motor vehicles and yet he instituted motion proceedings. Secondly, that the appellant acknowledged in his founding affidavit that he discovered a serious

dispute of fact on the ownership of the motor vehicles during the meeting of the next of kin but continued to institute application proceedings. Thirdly, that there was a non-joinder of M.J. Dlamini in whose name the Nissan Navara was registered; and, that the matter could not be determined without his joinder in the proceedings. Fourthly, that the appellant is not entitled to the interdict sought as he has failed to meet the requirements for the grant of an interdict; and, in particular, that he has failed to show a clear right or to show that he has no alternative remedy. Lastly, that the appellant has failed to state the reasons why the matter is urgent, and why it cannot be heard in due course.

[9] Rule 6 (17) and (18) of the High Court Rules provides the following:

“6. (17) Where an application cannot properly be decided on affidavit, the Court may dismiss the application or make such order as to it seems fit with a view to ensuring a just and expeditious decision.

(18) Without prejudice to the generality of sub-rule (17), the Court may direct that oral evidence be heard on specific issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.”

[10] The Court *a quo* acted within the ambit of the law in directing the appellant to institute action proceedings in view of the existence of a material dispute of fact as to the ownership of the motor vehicles. The material dispute is apparent from paragraph 11 of the founding affidavit, and, the appellant also conceded that it existed. It is surprising that the appellant instituted motion proceedings with the full knowledge of the existence of the material dispute of fact. The trial judge exercised her discretion judiciously when she ordered that action proceedings should be instituted to resolve the dispute of fact by *viva voce* evidence. The learned judge did not misdirect herself in this regard.

[11] The material dispute of fact cannot be resolved on the papers. It is important that M.J. Dlamini in whose name the Nissan Navara is registered should be heard and further cross-examined on the ownership of the motor vehicle; this is important when bearing in mind that the registration of a motor vehicle in the name of an individual constitutes *prima facie* evidence of ownership in the absence of extrinsic evidence to the contrary. Similarly, the other two wives and other interested family members of the deceased are entitled to be heard.

[12] It is apparent from Rule 6 (17) and (18) that where a material dispute of fact exists in an application, the Court has a judicial discretion to do one of three things: Firstly, to dismiss the application, in which case the applicant may institute action proceedings *de novo* if so advised; secondly, it may direct that oral evidence be led on specific issues in dispute; thirdly, it may direct that the matter be referred to trial with appropriate directions as to pleadings to be filed. An appellate Court will only interfere with the exercise of this discretion where the trial Court has misdirected itself. See *Herbstein and Van Winsen*, The Civil Practice of the Supreme Court of South Africa, fourth edition *Van Winsen et al*, Juta Publishers at p. 241; *Plasscon – Evans Paints (Pty) Ltd* 1984 (3) SA 623 (A) at pp 634 H-635 B.

[13] It is trite law that motion proceedings should not be instituted where there is a bona fide dispute on a material fact. Motion proceedings are less costly and more expeditious than action proceedings; however, they are not appropriate in deciding real and substantial disputes of fact which properly fall for decision by action proceedings. Motion proceedings are competent where there is no genuine dispute of fact. A material dispute of fact arises when the respondent denies material allegations made by deponents on the applicant's behalf and produces positive evidence to the contrary. Similarly, the same position obtains where the material dispute

of fact is apparent on the face of the founding and supporting affidavits as in the present matter. In this matter the appellant has conceded the existence of the material dispute of fact in paragraph 11 of the founding affidavit.

See also *Herbstein and Van Winsen* (supra) at pp 233-241; *Room Hire Co. (Pty) Ltd v. Jeppe Street Mansions (Pty) Ltd* (1949 (3) SA 1155 at pp 1161 and 1163.

[14] *Murray AJP* in *Room Hire Co. (Pty) Ltd v. Jeppe Street Mansions (Pty) Ltd* (supra) at pp 1161-1162 stated the following:

“1. There are certain types of proceedings (e.g. in connection with insolvency) in which by Statute motion proceedings are specially authorised or directed.... 2. There are on the other hand certain classes of case (... matrimonial causes and illiquid claims for damages) in which motion proceedings are not permissible at all. But between these two extremes there is an area in which ...according to recognised practice a choice between motion proceedings and trial action is given according to whether there is or is not an absence of a real dispute between the parties on any material question of fact.... the deciding factor is the existence of a dispute as to fact, not as to law...”

[15] His Lordship went on to consider the options available to a Court where a dispute of fact has been found to exist. At pp 1162-1163 he stated:

“It is obvious that a claimant who elects to proceed by motion runs the risk that a dispute of fact may be shown to exist. In that event... the Court has a discretion as to the future course of the proceedings. If it does not consider the case such that the dispute of fact can properly be determined by calling *viva voce* evidence ... the parties may be sent to trial in the ordinary way either on the affidavits as constituting the pleadings or with a direction that pleadings are to be filed. Or the application may even be dismissed with costs, particularly, when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop. It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment.

The crucial question is always whether there is a real dispute of fact. That being so, and the applicant being entitled in the absence of such dispute to secure relief by means of affidavit evidence, it does not appear that a respondent is entitled to defeat the application merely by bare denials such as he might employ in the pleadings of a trial action, for the sole purpose of forcing his opponent in the witness box to undergo cross-examination. Nor is the respondent’s mere allegation of the existence of the dispute of fact conclusive of such existence.”

[16] The first respondent also contends, in *limine*, that the appellant does not have a right of appeal in terms of section 14 (1) of the Court of Appeal Act No. 74 of 1954. She argued that the appellant should have sought the leave of the Supreme Court because the Order made was interlocutory in

nature for the following reasons: Firstly, the application was dismissed not on the merits but on a procedural technicality, namely, lodging motion proceedings in the face of a material dispute of fact; secondly, that the Court *a quo* did not define the rights of the parties, and, that the merits were not determined. Thirdly, that the appellant's right to seek the same prayers within the very same court were not eroded or disposed of; fourthly, that the ruling was simply one of procedural house-keeping in which the Court simply disallowed the appellant the use of the application procedure.

[17] Section 14 (1) of the Court of Appeal Act provides the following:

“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.

(2) The rights of appeal given by sub-section (1) shall apply to judgments given in the exercise of the original jurisdiction of the High Court.”

[18] Section 14 (1) of the Court of Appeal Act was dealt with by this Court in *Philani Clinic Services (Pty) Ltd v. Swaziland Revenue Authority and*

Minister of Finance Civil Appeal case No. 36/2012. *Her Ladyship Justice Ota* quoted with approval the South African case of *Pretoria Garrison Institute v. Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (AD) at pp 846-847 where *Watermeyer CJ* said the following:

“The question therefore for determination in this case is whether the Order made by the magistrate was an order which had the effect of a final judgment.

....

Clearly the words ‘final judgment’ are not used in the sense of an unappealable judgment but in the sense of the last or ultimate judgment, i.e. the decision which has the quality of conclusiveness or finality upon the points decided in the Court pronouncing the judgment. The characteristic quality of a final judgment is its conclusiveness or definitiveness so far as the Court pronouncing it is concerned. By that I mean that the Court pronounces its ultimate decision upon the point decided by the judgment and that the same point will not in the course of the case again be open for consideration. Its effect is to determine the rights of the parties as regards the point dealt with and in the absence of an appeal, the decision becomes *res judicata* between the parties and they are then entitled to adopt whatever procedure the law lays down for the purpose of enforcing those rights. The expression ‘a rule or order’ having the effect of a final judgment’ ... means a rule or order which has a similar effect upon the legal rights of the parties affected by such rule or order as a final judgment would have upon the rights of the parties affected by such final judgment.”

[19] It is apparent from the judgment of the Court *a quo* that certain determinations were made by that Court in respect of the rights of the parties; however, they were of an interim nature pending the institution of action proceedings. Firstly, the first respondent was interdicted and restrained from disposing or alienating the Mitsubishi Pajero; secondly, in the event that the Nissan Navara was in the possession of the first respondent as at the date of the Order, the first respondent was interdicted and restrained from disposing or alienating the said motor vehicle; thirdly, the Court *a quo* found that a material dispute of fact exists, and, then directed the appellant to file action proceedings.

[20] I should point out, however, that the basis of the appeal is that the Court *a quo* misdirected itself in finding that a material dispute of fact existed relating to the ownership of the motor vehicles; and, that the Court *a quo* further misdirected itself in ordering the appellant to file action proceedings. I have dealt with the two grounds of appeal extensively in the preceding paragraphs. Suffice to it say that on the evidence before this Court, the learned judge *a quo* did not misdirect herself for the reasons stated above.

[21] *Schreiner JA in Pretoria Garrison Institute v. Danish Variety Products (Pty) Ltd* (supra) at p. 870 laid down the test to be applied in determining

the appealability of an order of Court. The learned judge stated the following:

“But since the decision of this Court in *Globe and Phoenix G.M. Company v. Rhodesian Corporation* 1932 AD 146, the test to be applied has appeared with some certainty, whatever difficulty must inevitably remain in regard to its application. From the judgments of *Wessels and Curlewis, JJA*, the principle emerges that a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to dispose of any issue or any portion of the issue in the main action or suit or, which amounts, I think, to the same thing, unless it irreparably anticipates or precludes some of the relief which would or might be given at the hearing.

[22] *Harms AJA in Zweni v. Minister of Law and Order* 1993 (1) SA 523 AD at pp 523-533 said:

“A judgment or order is a decision which, as a general principle, has three attributes: firstly, the decision must be final in effect and not susceptible of alterations by the Court of first instance; secondly, it must be definitive of the rights of the parties; and, thirdly, it must have the effect of disposing of at least a substantial portion of the relief claimed in the proceedings.... The second is the same as the oft-stated requirements that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief.... The fact that a decision, may cause a party an inconvenience or place him at a disadvantage in the litigation, which nothing but an appeal can correct, is not taken into account in determining its appealability.”

See also *Van Streepen & Germs (Pty) Ltd v. Transvaal Provincial Administration* 1987 (4) SA 569 (A) at 586-587, *Marsay v. Dilley* 1992 (3) SA 944 (A) at p. 962, *Willis Faber Enthoven (Pty) Ltd v. Receiver of Revenue and Another* 1992 (4) SA 202 (A) at 214 and *South African Druggists Ltd v. Beecham Group plc* 1987 (4) SA 876 (T) at 880 (Full bench decision).

[23] *Schutz JA*, in *William Graham Cronshaw and Fidelity Guards Holdings (Pty) Ltd v. Coin Security Group (Pty) Ltd* 1996 (3) SA 686 (SCA) at p.690 approved and applied the judgment in Pretoria Garrison case (*supra*) and *Zweni v. Minister of Law and Order* (*supra*) relating to the appealability of Court orders. He continued at p.690 to deal with the possible prejudice suffered by the litigant where an interim interdict has been issued:

“That such prejudice is often suffered is not an issue. That the harm caused is irretrievable is by no means true in all cases. A Court granting an interim interdict is entitled, in the exercise of its discretion, to impose reasonable conditions, one of them being that it be a condition of the grant that the applicant undertakes to be liable in such damages as the respondent may prove he has suffered as a result of the interdict, if at the trial it emerges that the interdict should not have been granted.”

[24] It is apparent that the Court *a quo* issued an interim order pending the institution of action proceedings. The order was not final in effect and

was susceptible of alteration by the Court *a quo*. Furthermore, it was not definitive of the rights of the parties to the suit. In addition it did not have the effect of disposing even a substantial portion of the relief claimed in the proceedings.

[25] The substance of the relief was that the first respondent should release, return and/or deliver to the appellant the Nissan Navara and Mitsubishi Pajero together with all documents relating to the motor vehicles. In addition the appellant sought an order interdicting and restraining the first and second respondents from selling the Nissan Navara. The basis of the application was that the motor vehicles belong to the estate of the late Dumisani Thomson Dube. It is not in dispute that the Court *a quo* did not issue any order which was definitive of the rights of the parties with regard to the ownership of the motor vehicles.

[27] In the circumstances the appellant is precluded by section 14 (1) (b) of the Court of Appeal Act from lodging the appeal without leave of the Supreme Court on the basis that the order of the Court *a quo* was interlocutory in nature. In addition the Court *a quo* went on to direct that action proceedings should be filed by the appellant not later than the 25th November 2012; this shows that the Order was interlocutory in nature.

Section 14 (1) (b) is mandatory in nature; hence, the appeal is not properly before this Court.

[27] Accordingly, the appeal is struck off the roll with costs.

M.C.B. MAPHALALA
JUSTICE OF APPEAL

I agree

DR. S. TWUM
JUSTICE OF APPEAL

I agree

E.A. OTA
JUSTICE OF APPEAL

For Appellant
For Respondents

Attorney N. Manzini
Attorney S. Dlamini

DELIVERED IN OPEN COURT ON 31 MAY 2013.