IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No. 50/2013

In the matter between:

BERNARD NXUMALO **APPELLANT**

And

THE ATTORNEY GENERAL **RESPONDENT**

Neutral Citation: *Bernard Nxumalo and The Attorney General (50/2013) [2014] SZSC 33 (30 May 2014)*

Coram: RAMODIBEDI CJ, MAPHALALA JA and DR ODOKI JA

Heard: **15 MAY 2014**

Delivered: **30 MAY 2014**

Summary

Civil Procedure – Application for condonation – Sufficient cause to be shown – Reasonable explanation for delay due to difficulty in obtaining ruling of the court – Application granted – Summary judgment – Restraining order granted when not sought – Litigant cannot be granted relief not sought – Leave to defend to be granted when triable issues are disclosed by the defence – Leave to defend action granted – Appeal allowed with costs.

JUDGMENT

DR B. J. ODOKI, JA

[1] This is an appeal against an order of the court *a quo* restraining the Appellant/Defendant from using Farm No. 324, situate in the District of Shiselweni, pending the signing of a lease agreement, to be done before the next ploughing season.

[2] The Respondent/Plaintiff instituted an action by combined summons for eviction of the Applicant from the said property, claiming that it was the owner of the property. The combined summons were issued out on 7 November 2013. On 13 November 2013, the Appellant filed a Notice of Intention to Defend the Action.

[3] On 23 November 2013, the Respondent lodged a Notice of Application for Summary Judgment. The application was supported by a Founding Affidavit sworn by the Acting Principal Secretary, in the Ministry of Agriculture,

Dr. Roland Xolani Dlamini, and Supporting Affidavit of Chief Zwide Nxumalo, Chief of Ezikhotheni in the Shiselweni Region.

[4] On 12 December 2013, the Appellant swore an Affidavit resisting the Summary Judgment. On 9 August 2013, in the presence of Counsel of both parties, the court *a quo* granted the application for summary judgment and issued an order restraining and interdicting the Appellant from ploughing on Farm No. 324.

[5] On 22 august 2013, the Defendant/Appellant noted an appeal against the order of the court *a quo*. On 02 May 2014, the Respondent filed a notice to raise preliminary objection that the appeal was deemed abandoned, since the Appellant did not lodge the record or appeal, within the prescribed period of two months from the date of noting the appeal, nor had he applied for extension of time and sought condonation of time for late filing of the record. On 13 May 2014, the Appellant lodged Notice of Application for Condonation, under Rule 17 of the Rules of this Court. The application was supported by an Affidavit sworn by Counsel for the Respondent.

[6] It is necessary to deal first with the preliminary objection raised by the Respondent, that this appeal was filed out of time. Counsel for the Respondent submitted that Rule 30 (1) of the Rules of this Court states that the Appellant should lodge the record on appeal for certification with the Registrar of the High Court within two months of the date of the noting of the appeal. He

submitted further that Rule 30 (4) of the same Rules provides that where an Appellant fails to submit the record for certification within the time provided by Rule 30 (1), the appeal shall be deemed to have been abandoned. He pointed out that Rule 17 gives this court a discretion, on application and for sufficient cause shown, to condone any party for non-compliance with the Rules of the Court.

[7] It was Counsel's contention that in the present instance, the Appellant noted his appeal on 27 August 2013 when the record of appeal ought to have been submitted for certification as correct by 26 October 2013. He further contended that it was clear that the record was presented for certification out of time, on 15 November 2013. Counsel finally submitted that since the Appellant did not apply for extension of time prior to submitting the record late nor did he seek condonation of late filing in accordance with Rule 30 (4) of the Rules of the Court, the appeal is deemed abandoned and should be dismissed.

[8] As stated above the Appellant applied for condonation of the delay on 13 May 2014. The grounds in support of the application are contained in an affidavit sworn by his Attorney who has been continuously appearing for the Appellant. Counsel's first ground in support of the application is that no prejudice will be occasioned to the Respondent as the Respondent has raised the technical point late with a hope of defeating the appeal. Secondly, Counsel submitted that the Court prefers to deal with the matters on merits rather than technicalities, and

that any prejudice caused to the Respondent can be compensated through postponement or an appropriate order of costs.

[9] Thirdly, Counsel argued that the appeal has overwhelming prospects of success, as it well settled that a litigant cannot be granted a remedy it has not sought in the *Lis*. Fourthly, Counsel contended that the Applicant has a reasonable explanation for the delay as his attorney lost time trying to obtain a transcript of the hearing, wherein legal arguments were made before the trial judge, including the verbatim order which was made, but in the end he failed to obtain the transcript. Moreover, the delay was only 20 days and was not unreasonable.

[10] Finally, Counsel for the Appellant submitted that the courts in this country have stated time and again that rules of court are made for the convenience of the court and litigants to ensure order and predictability and that dogmatic adherence to the rules can in some cases be at the expense of justice and equality and that this was a proper case where the court should exercise its discretion in favour of the Appellant. Counsel relied on several authorities to support his arguments. They include ***Jessie Shongwe v Samuel Shongwe 1987-1995 (4) SLR 220, Melane v Santam Insurance Co Ltd 1962 (4) SA 531, Unitrans Swaziland Limited v Inyatsi Construction Limited Appeal Case No. 9/1966, usuthu Pulp Company v Swaziland Agricultural and Plantation***

Workers Union 2012 SZHC 104 and ***Tshivhase Royal Council v Tshivhase 1992 (4) SA 852.***

[11] It is common cause that the Appellant filed his record of appeal twenty days out of time. The only question is whether sufficient cause has been shown to justify this Court to exercise its discretion and condone the delay. Rule 17 of the Court of Appeal Rules 1971 provides for condonation as follows:

> *"17. The Court of Appeal may on application and for sufficient cause shown, excuse any party from compliance with any of these rules and may give such directions on matters of practice and procedure as it considers just and expedient".*

[12] In the case of ***Melane v Santam Insurance Co. Ltd (Supra),*** the court explained the facts which the court should take into account when determining whether an applicant for condonation has shown sufficient cause as follows:

> *"In deciding whether sufficient cause has been shown, the basic principle is that the court has discretion to be exercised judicially upon a consideration of all the facts and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation thereof, the prospects of success and the importance of the case. Ordinarily these facts are interrelated; they are individually not decisive, for that would be a piece-meal approach incompatible with a true discretion, save of course, that if there are no prospects of success, there*

would be no point in granting condonation. And the Respondent's interest in finality must not be overlooked".

[13] In my opinion, the grounds raised in the affidavit of the Appellant's counsel constituted sufficient cause for the exercise of this court's discretion to grant the application for condonation of the late filing of the record of appeal. The claim by the Attorney that he lost time while trying to obtain the transcript of the record of proceedings in the court *a quo* is reasonable and has not been seriously disputed. The delay of twenty days is not too long. The Appellant's appeal also has prospects of success in as far as the court *a quo* granted a remedy not sought by the Respondent. Moreover, it has not been shown that the Respondent will be prejudiced if this application is granted. Accordingly, the application for condonation of the late filing of the record of appeal, is granted.

[14] I shall now deal with the substantive appeal. In his Notice of Appeal, the Appellant notes the following grounds of appeal:-

"2.1 In its pleadings the Plaintiff did not seek an interdict against the Defendant; neither did it motivate an interdict at the hearing of legal submissions.

2.2 It is trite law that in civil proceedings a party cannot be granted what [it] has not sought.

2.3 In the circumstances, the Honourable Court erred in law in granting an interdict to the Plaintiff.

3. The simple issue for determination for the trial court was whether the defence of usufruct was a bona fide defence, or whether it created a triable issue. The court ought to have found that the unequivocal terms of the letter annexure 'BNI' were sufficiently significant to create a triable issue".

[15] The Appellant prayed that the order of the court *a quo* dated 9 August 2013 be set aside and be substituted with an order that the appeal be allowed with costs, and that the Defendant/Appellant be granted leave to defeat the action.

[16] In the Heads of Argument, the Appellant pointed out that upon hearing legal arguments on the application for summary judgment, the judge in the court *a quo* issued a restraining order against the Defendant/Appellant in the following terms:-

"The Defendant is restrained from using the said farm pending the signing of a lease agreement which shall be before the next ploughing season".

[17] Counsel submitted that it is a trite principle of civil litigation that a litigant cannot be granted an order that it has not sought. He relied on the decisions of this court in the cases of ***The Commissioner of Police and Another v Mkhondvo Aaron Maseko, Civil Appeal No. 3/2011,*** *and* ***Commissioner of Correctional Services v Ntsetselelo Hlatshwako Civil Appeal No. 67/09.***

[18] In the present case, Counsel argued, an interdict was neither sought in the pleadings nor in the legal submissions. Therefore, the interdict was granted in error. Counsel further submitted that the requirements for the grant of an interdict were not satisfied as they were neither pleaded nor convassed at the hearing. It was Counsel's contention that a restraining order cannot be issued under the prayer of "further and/or alternative relief", because it is drastically different from the main prayer for summary judgment and it cannot be described as "ancillary relief". Counsel also argued that the order made by the court *a quo* was problematic as it is not clear whether the court is directing the signing of the lease agreement to be done before the next ploughing season or otherwise.

[19] In resisting the summary judgment, the Appellant relied on a letter from the Principal Secretary of the Ministry of Agriculture, which stated in paragraph two as follows:-

> *"As you are aware that the Ministry has it in command from His Majesty the King to buy this farm for exclusive use by the Zikhotheni Community, we are obliged to keep updating*

> *interested parties on the progress of the purchase process. Moreover, we are of the view that once the Bank wins the case in court, the Ministry will be given first preference to purchase the farm and comply with His Majesty the King command".*

[20] It was Counsel's contention that that defence of usufruct was based on the said letter and that it raises a triable issue regarding the purpose for which the farm was acquired particularly as the letter touches on the highest authority in the country. It was also submitted on behalf of the Appellant that in paragraph 12 of the affidavit resisting the summary judgment, the deponent states that in 2010 the then Minister of Agriculture came to the community to "hand the farm over to the community". There is a claim that the community of which the Appellant is a member paid a deposit towards the purchase price. Counsel submitted, in conclusion, that the issues raised can only be ventilated in oral evidence in a trial.

[21] Learned Counsel for the Respondent, submitted that the Government could not in law give the Appellant a right to use and enjoy immovable property that it did not own, because the letter which the Appellant purports to give him a right to use and enjoy the farm was written on December 2006, and yet the farm was transferred to the Government in 2008. It was counsel's contention that the defence was bad in law, and the court below would have been entitled to grant summary judgment.

[22] Counsel also argued that there is no allegation that the community, of which the Appellant is a member, paid the deposit towards the purchase of the farm. He further submitted that there is nothing on the papers to show what the relationship between the association and the Appellant was. It was counsel's contention that the defence of contribution was not bona fide and could not defeat the application for summary judgment.

[23] The main issues which are raised in this appeal are whether the court *a quo* erred in granting a relief which was not sought, and whether there was a bona fide defence which raised a triable issue, warranting the grant of leave to defend.

[24] It is trite law that a litigant cannot be granted a relief which it has not sought in the *Lis*. In the case of **The Commissioner of Police and Another v Mkhondvo Aaron Maseko (Supra),** Ramodibedi, CJ said:

> *"[5] In his judgment the learned judge a quo made the following order:-*
>
> *"57.1 The 1st Respondent be and is hereby ordered and directed to return forthwith to the Applicant herein possession of the thirty two herd of cattle seized from his home at Sihhoye on 25 May 2009, together with their progeny if any.*

57.2 The 1st Respondent be and is hereby ordered to pay costs of this application on the punitive scale of attorney and client".

Interestingly, it will be seen from paragraph [3] above that the Respondent did not claim any progeny of the cattle in question. It is an elementary principle of law that a litigant cannot also be granted that which it has not sought in the Lis. See for example, ***Commissioner of Correctional Services v Ntsetselelo Hlatshwako Civil Appeal No. 67/09".***

[25] In the present case, the court *a quo* made the following restraining order:-

"The Defendant is restrained from using the said farm pending the signing of a lease agreement which shall be before the next ploughing season".

In its particulars of claim, the Respondent prayed for the following order:-

"(a) Ejecting the Defendant from property.
(b) Costs of suit, and
(c) Further and/or alternative relief".

[26] It is clear from the claim, that the Respondent did not seek an interdict or restraining order against the Appellant. The order was not granted by consent of both parties. The restraining order could not be granted as an ancillary relief as it was not related to main relief of ejection which was sought. Therefore, the court *a quo* erred in granting the Respondent a relief which it had not sought in the *Lis*.

[27] The second issue is whether it was proper for the court *a quo* to grant summary judgment in the instant case. It is not clear whether the order appealed against was an interim or final order. The order "restrained the Defendant from using the said farm pending the signing of a lease which shall be done before the next ploughing season". In one sense the order was interim pending the signing of the lease agreement. In another sense, it was final since it disposed of the matter as leave to defend was not granted.

[28] Be that as it may, the law relating to the grant of summary judgment has been expounded in several decisions of this Court. These cases include the following: ***Zanele Zwane v Lewis Stores (Pty) Ltd t/a Best Electric, Civil Appeal No. 22/07, Temahlubi/Investments (Pty) Ltd v Standard Bank Swaziland Limited Civil Appeal Case No. 35/2008, Mater Dolorosa High School v RMJ Stationery (Pty) Ltd, civil Appeal Case No. 3/2005, Jeke (Pty) Limited v Samuel Solomon Nkabindze Civil Case No. 54/2013 [2013] SZSC53***

[29] In the case of ***Zanele Zwane v Lewis Stores (Pty) Ltd t/a Best Electric (Supra),*** this Court emphasized the point that the remedy of summary judgment is a stringent one, as it has the effect of closing the door to the Defendant without a trial. Since it has potential of causing injustice, it must be confined to the clearest of the cases, where the Defendant has no bona fide defence and

where appearance to defend has been made sorely for the purpose of causing delay. In that case, Ramodibedi CJ, observed:-

> *"[8] It is well recognized that summary judgment is an extraordinary remedy. It is a very stringent one for that matter. This is so because it closes the door to the Defendant without trial. It has the potential to become a weapon of injustice unless properly handed. It is for these reasons that the courts have over the years stressed that the remedy must be confined to the clearest of cases where the Defendant has no <u>bona fide</u> defence and where the appearance to defend has been made sorely for the purpose of delay. The true import of the remedy lies in the fact that it is designed to provide a speedy and inexpensive enforcement of a Plaintiff's claim against a defendant to which there is clearly no valid defence. See for example* ***Maharaj v Barclays national Bank Ltd 1976 (1) SA 418 (A), Dand Chester v Central Bank of Swaziland Court of Appeal Case no. 50/03".***

[30] In the present case, the issue is whether this was a proper case in which to grant summary judgment given the fact that the Appellant defence raised a triable issue. Rule 32 (4) (a) of the High Court Rules 1954, provides:-

> *"(4) (a) Unless on the hearing of an application under sub rule (1) either the court dismisses the application or the defendant satisfies the court with respect to the claim, or the part of the claim, to*

which the application relates that there is an issue or question in dispute which ought to be tried, or that there ought for some other reason to be a trial of that claim or part, the court may give such judgment for the Plaintiff against the Defendant on the claim or part as may be just having regard to the nature of the remedy or relief claimed".

[31] It is clear from the above provision that the Defendant need not prove his defence at this stage. All that is required is to raise a triable issue. In the instant case, the Appellant raised the defence of usufruct of the farm in question; and that the **Senabelo Paradise Farmers Association** of which he was a member had contributed towards the purchase price of the farm. The letter purporting to give the Appellant the right to use and enjoy the farm was written on 13 December 2006. But according to the Respondent the farm was transferred to the Government in 2008. Therefore, according to the Respondent the Appellant had no right to use and enjoy the property.

[32] In view of the above contentions, the issue whether the Appellant was entitled to use the land or whether the Respondent had a right to take it away, was a triable issue which could only be fairly and justly ventilated if the Appellant was given an opportunity to defend the action.

[33] For the foregoing reasons, this appeal succeeds. Accordingly, the following order is made:-

(a) The appeal is allowed with costs.

(b) The order of the court *a quo* is set aside.

(c) The Defendant/Appellant is granted leave to defend the action.

DR B. J. ODOKI
JUSTICE OF APPEAL

I Agree

M. M. RAMODIBEDI
CHIEF JUSTICE

I Agree

M. C. B. MAPHALALA
JUSTICE OF APPEAL

For the Appellant: Mr. T. Mlangeni

For the Respondent: Mr. Mndeni Vilakati
Mr. N. D. Kunene