



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No. 17/14

In the matter between

WILDFIRE INVESTMENTS (PTY) LTD	1ST APPLICANT
PORTIA BHACILE TSABEDZE	2ND APPLICANT
SIBUSISO MSIBI	3RD APPLICANT

And

QUAYSIDE LOGISTICS (PTY) LTD	1ST RESPONDENT
WEST AFRICA VENTURES (PTY) LTD	2ND RESPONDENT

Neutral citation: *Wildfire Investments (Pty) Ltd and Two Others vs Quayside Logistics (Pty) Ltd and Another (17/14) SZSC 53 (3 December 2014)*

Coram: **RAMODIBEDI CJ, OTA JA AND DR ODOKI JA**

Heard **11 NOVEMBER 2014**

Delivered: **3 DECEMBER 2014**

Summary: **Civil Procedure: unopposed application for leave to appeal the interlocutory decision of the High Court in terms of section 14 (1) (b) of the court of Appeal Act; guiding principles discussed; application granted.**

JUDGMENT

OTA. JA

[1] CHRONOLOGY

- What appears to be the facts of this case are that the Respondents, who allege that the Applicants fraudulently defrauded them of a sum in excess of E2,000,000.00 (Two Million Emalangeni), under a verbal agreement entered by the parties sometime in July 2013, in terms of which the 1st Applicant allegedly distributed and sold fertilizers to local farmers in Swaziland on behalf of the Respondents, sought and obtained ex-parte interim anti dissipation order against the Applicants, on 5 December 2012.
- [2] The order which was granted pending the institution of proceedings by the Respondents to recover the said money from the Applicants, authorized the 4th Respondent (First National Bank), in its capacity as the holding bank, to freeze account No. 6209007786 belonging to the Applicants.
- [3] In the same vein, the order also authorized the 5th to 8th Respondents (Standard Bank, Nedbank, Swazi Bank and Swaziland Building Society), to freeze any accounts they may have in the name of the Applicants.
- [4] A *rule nisi* issued returnable on 13 December 2013 in terms of the orders.

- [5] Subsequent thereto, the Applicants appointed Fakudze Attorneys to represent them in the application.
- [6] A notice to oppose was filed by the said attorneys and pursuant to various meetings and written proposals of settlement, the parties entered a consent order on the return date 13 December 2013.
- [7] The consent order directed that the 1st, 2nd and 3rd Applicants pay the sum of E800,000.00 (Eight Hundred Thousand Emalangeni) to the Respondents on or before 31 December 2013, plus collection commission of 10% on the first E20,000.00 and 2.5% on the balance (as allowable in terms of the Legal Practitioners Regulations).
- [8] Thereafter, by notice of appointment and substitution of attorneys dated 23 January 2014, the Applicants changed their attorneys to the present attorneys of record, who then raised a myriad of objections, including the ones detailed *in casu*.
- [9] The present attorneys also disowned the consent agreement entered into by the previous attorneys.
- [10] In instituting the proceedings before the court *a quo*, the 1st Applicant had been erroneously cited as Wildlife Investments (Pty) Ltd (Wildlife), instead of Wildfire Investments (Pty) Ltd (Wildfire). This error was discovered after the interim relief was granted.

- [11] Standard Bank which had frozen the account maintained with it by the 1st Applicant in compliance with the interim order, sought to unfreeze the said account upon its realization of the error, on the strength of the fact that the account it maintains is in the name of Wildfire and not Wildlife.
- [12] In a bid to remedy this situation, the Respondents approached the court *a quo* with a formal application by way of notice of motion, wherein they sought the amendment of the name of the 1st Applicant from Wildlife to Wildfire.
- [13] The Applicants opposed the application for amendment with an affidavit in which they also addressed the main application for an interdict.
- [14] In their affidavit, the Applicants challenged the authority of one Phillip Godfrey Kay, the deponent of the affidavit in support of the Respondents' application, to commence proceedings on behalf of the Respondents. Their contention was that Godfrey Kay failed to exhibit a resolution of the Board of Directors of the Respondent companies authorizing him to institute the proceedings. The Applicants also took the position, that the Respondents failed to make out a case for the reliefs sought by failing to satisfy the requisites of an interim interdict.
- [15] On 10 March 2014, the matter wholistically served before the High Court per **M Dlamini J** for determination. The Applicants allege that the amendment to the citation of the name of the 1st Applicant was not granted on that day or any of the subsequent days that the matter appeared before

court. The Respondents argue to the converse that it was granted on 10 March 2014.

[16] It is however common cause that the court *a quo* ordered the Respondents to file the resolution of their respective Boards of Directors authorizing Godfrey Kay to institute proceedings on their behalf by 11 March 2014 and thereafter, postponed the matter to 29 May 2014 for oral evidence, to be led on whether there is a contract between the parties. The oral evidence as is apparent from the record, was to be led before the same presiding Judge.

[17] It appears that prior to the return date, Standard Bank unfroze the 1st Applicant's account on the basis of the error in its name.

[18] Obviously irked by this action of Standard Bank, the Respondents sued out a notice of set down for 15 May 2014, wherein they indicated an intention to contend for an order directing Standard Bank to maintain the status *quo* and keep the Applicants' accounts frozen pending finalization of the matter.

[19] The record reveals that on 16 May 2014, when the matter served before court, the court made pronouncements on the question of whether or not the amendment to the name of the 1st Applicant from Wildlife to wildfire was granted on 10 March 2014.

[20] Complaining that these orders issued by the court *a quo* on 10 March 2014 and 16 May 2014 respectively, are erroneous, the Applicants seek to approach this court for redress.

[21] **LEAVE TO APPEAL**

They have to surmount the first hurdle, which is the leave of this court to appeal the impugned decisions which are interlocutory by nature. This is because, a dissatisfied litigant does not enjoy an automatic right to appeal an interlocutory judgment of the High Court. This is in accord with section 14 (1) (b) of the Court of Appeal Act, which postulates, that 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.

[22] A recital of the Notice of Motion for leave to appeal demonstrates the following:-

“TAKE NOTICE THAT the Supreme (sic) will be moved at Mbabane on a date allowed for the appeal by the Appellants (who were the 1st, 2nd and 3rd Respondents in the High Court of Swaziland under Case No. 1912/13) or their Counsel on the hearing of an application for leave to appeal against the 10th day of March 2014 and 16th May decisions by her Ladyship Honourable Justice Dlamini as follows:-

- a) **Directing that matter be referred to oral evidence on whether there is a contract between the parties.**
- b) **Directing that the Respondents (as Applicants *a quo*) file their respective Board resolutions authorizing institution of proceedings by 11 March 2014.**
- c) **The pronouncement in open court of the Learned Judge in the court *a quo* that an amendment was made to reflect the 1st Appellant’s name as Wildfire Investments (Pty) Ltd instead of Wildlife Investments (Pty) Ltd.**

AND FURTHER TAKE NOTICE THAT the grounds of this application are as follows:-

1. **The Learned Judge in the court *a quo* did not exercise a judicial discretion and invoked wrong principles in referring the question of**

whether there is a contract between the parties to oral evidence. The Learned Judge particularly misdirected herself in:

- 1.1 Ordering *viva voce* evidence in the face of the Respondents' lack of *locus standi*.
- 1.2 Ordering *viva voce* evidence in the face of uncertainty of the issues in dispute in circumstances where there was no application for this from the Respondents.
- 1.3 Not having regard to the complexity of the aforesaid question and that its determination would not resolve the broader dispute speedily."

[23] The application is supported by the founding affidavit of the 3rd Applicant Sibusiso Msibi, who filed same for himself as well as on behalf of the 1st and 2nd Applicants.

[25] I have noted Mr Dlamini's contention on the authority of my decision in the case of **Japhet Msimuko v Sibongile Lydia Pefile NO (14/2013) [2013] SZSC 18 para 46**, to the effect that where a material allegation in an affidavit is not controverted, the allegation is deemed as admitted and established. This principle, Mr. Dlamini obviously proposes, in recognition of the fact that the application for leave to appeal is unopposed.

[26] This indeed is the correct position of the law. However, the fact that the allegation is established does not derogate the duty imposed on this Court to still interrogate the established facts to ascertain whether they satisfy the requirements for the relief sought.

[27] I say this because the grant of leave by this Court to appeal the interlocutory decision of a lower court cannot be had just for the asking. It is a

discretionary power which the law expects the Court to exercise judicially upon facts and circumstances that justify it.

[28] That being so, it is incumbent upon this Court to ascertain whether the Applicants have made out a case for the leave sought. The paramount enquiry would be whether the Applicants have shown sufficient cause for granting the application. What will amount to sufficient cause has defied precise judicial articulation. Although, it is now increasingly approved that some of the features of sufficient cause would include the following (the list is not exhaustive).

- (i) prospects of success of the appeal;
- (ii) the importance of the issues raised on appeal;
- (iii) the avoidance of piecemeal litigation;
- (iv) the respondent's interest in the finality of the litigation;
- (v) the degree of lateness.

[29] In the exercise of its discretion to grant leave, the Court considers the factors above which are largely interrelated, wholistically, within the conspectus of all material facts advanced. They are not individually decisive, as that will conduce to a piecemeal approach, which is incompatible with a true exercise of discretion. Also, any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is required is an objective assessment of the facts and circumstances of the case. Thus, strong prospects of success may serve to mitigate the avoidance of piecemeal litigation and the degree of lateness. Although, the point must be made that if there are no prospects of success there will be no point in granting leave to appeal.

[30] In the case of **Japhet Msimuko v Sibongile Lydia Pefile N.O. (Supra) para [26]**, I had occasion to pronounce on the importance of the prospects of success factor, with reference to the observation of my learned **brother Ebrahim JA, in the case of Okh Farm (Pty) Ltd v Cecil John Littler N.O. and Four Others, Appeal Case N.O. 56/08 at page 15**, as follows:-

“ ---A court will not exercise its power of condonation if it comes to the conclusion that on the merits there are no prospects of success, or if there is one at all, the prospects of success are so slender that condonation would not be justified.”

[31] Furthermore, the learned editors **Du toit et al, in Commentary on the Criminal Procedure Act, Juta 1995 at 31 – 9**, made the following condign remarks:-

“The person who applied for leave to appeal must satisfy the court that he has reasonable prospects of success on appeal. The test of a reasonable prospects has the effect that the court will refuse an application for leave in those cases where absolutely no chance of a successful appeal exists, or where the court is certain beyond reasonable doubt that the appeal will fail --- on the other hand, the trial court need not be certain that the Appellate Division would come to another view. All that is necessary is that there should be a reasonable prospect that the appeal may succeed---.”

[32] To my mind, the question of prospects of success at the very least turns on whether or not the grounds of appeal disclose arguable issues. If the grounds of appeal do not disclose arguable issues then the appeal lacks prospects of success.

[33] Without the necessity of overburdening this judgment, let me straightaway observe here, that this appeal raises serious and arguable issues, namely

- a. Whether or not an amendment was effected to the name of the 1st Applicant?

- b. Whether or not the proceedings *a quo* are incompetent?
- c. Whether or not the court *a quo* erred in referring the matter to oral evidence?
- d. Whether or not the Applicants were denied their constitutional right to fair hearing by the court *a quo*?

[34] In coming to this conclusion, I have carefully refrained from embarking on any analysis of the pertinent issues as well as forming opinions or reaching conclusions. This is clearly undesirable at this stage of the proceedings in order not to prejudge the appeal. I am also mindful of the fact that the appeal is against interim orders and the general attitude of the courts is not to entertain appeals against interim orders, which have no final effect and which are susceptible to reconsideration by a court when the final relief is granted, except in the interest of justice.

[35] *In casu*, the fact of the serious and arguable issues disclosed by the proposed appeal to my mind, balances out any negative perception of piecemeal litigation that may be portrayed by the nature of the appeal.

[36] I have also noted the reasons advanced by the Applicants for the late filing of the application for leave to appeal. I am principally persuaded by the fact that they were unable to obtain the record of appeal speedily because of technical failures to the High Court recording system. It is patently obvious that this is also the reason why the record of proceedings of 10 March 2014 which is crucial to the determination of the matter is conspicuously missing from the record. These are factors which are not entirely the fault of the Applicants.

[37] For the above stated reasons, I am convinced that the leave sought should be granted in the interest of justice.

[38] Finally, for the purpose of completeness, I have observed some procedural shortcomings in the matter relating to the record itself. When the application for leave to appeal was heard, both parties agreed that on the state of the record, which is somewhat incomplete, the proposed appeal is not ripe for hearing. Since the application presently before the court is for leave to appeal and not the appeal itself, the Court took the view that the Applicants are at liberty to rectify the pitfalls in the record which is attributed to some defects in the recording devices at the High Court. This, the court directed, could be easily achieved by a reconstruction of the record from both the Judge's note book and counsel's notes.

[39] In these premises, the application for leave to appeal succeeds.

[40] **ORDER**

1. The application for leave to appeal the decision of the High Court per **M Dlamini J**, rendered on 10 March 2014 and 16 May 2014 respectively, be and is hereby granted.
2. The Appellant is put to terms to file a complete record of appeal with the Registrar of the High Court within 30 days hereof.
3. Both counsel are ordered to reconstruct the said record of appeal from the Judge's note book as well as counsel's notes.
4. The Appellants must file heads of argument on or before 31 January 2015.

5. The Respondents must file heads of argument on or before 27 February 2015.
6. The Appeal will be heard in the May session of the Supreme Court in 2015.
7. The costs of the application shall be costs in the cause.

E.A. OTA
JUSTICE OF APPEAL

I agree

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

DR B.J. ODOKI
JUSTICE OF APPEAL

For Appellants: Mr. S.K. Dlamini

For Respondents: Advocate P.E. Flynn
(Instructed by Cloete Henwood Associated)

