



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil case No: 58/2013

In the matter between:

**HLANGANYELANI HARVESTING AND
BUSINESS GROUP (PTY) LTD**

APPELLANT

AND

**STANDARD BANK SWAZILAND LTD –
VEHICLE AND ASSET FINANCE**

RESPONDENT

Neutral citation: *Hlanganyelani Harvesting and Business Group (Pty) Ltd vs Standard Bank Swaziland Ltd – Vehicle and Asset Finance (58/2013) [2014] SZSC80 (03 December 2014)*

Coram: **DR. S. TWUM JA
M.C.B. MAPHALALA JA
DR B.J. ODOKI JA**

**HEARD : 21 NOVEMBER 2014
DELIVERED : 03 DECEMBER 2014**

Summary

Civil Appeal – application for condonation for failure to comply with section 15 of the Court of Appeal Act seeking leave to appeal judgment of the High Court – Rule 17 of the Court of Appeal Rules, 1971 dealing with condonation considered – held that sufficient cause as well as prospects of success on the merits of the appeal have not been

established on a balance of probabilities – application for condonation dismissed – appeal consequently dismissed with costs.

JUDGMENT

M.C.B. MAPHALALA JA

[1] This is a civil appeal against the judgment of the court *a quo* granted on the 7th October 2014, in which the court dismissed an appeal lodged by the appellant from a judgment of the Manzini Magistrate’s Court.

[2] The court *a quo* was seized with four grounds of appeal: Firstly, that the Magistrate’s Court erred in law and in fact in concluding that the appellant had consented specifically to the jurisdiction of the Manzini Magistrate’s Court. Secondly, that the Magistrate’s Court erred in law and in fact in finding that the Manzini Magistrate’s Court had the necessary jurisdiction over the matter notwithstanding the explicit provisions of the agreement concluded between the parties. Thirdly, that the Manzini Magistrate’s Court erred in law and in fact in finding that the cause of action had arisen wholly within the jurisdiction of the court; however, during the hearing of the appeal, the appellant abandoned this ground on the basis that it was subsumed in the first and second grounds of appeal. The last ground of

appeal was that the Magistrate's Court erred in granting a final judgment against the appellant.

- [3] In its judgment the court *a quo* found that the Manzini Magistrate's Court had jurisdiction to entertain the matter on the basis of section 15 (d) of the Magistrate's Court Act 66/1938, and, in particular on the ground that the cause of action had arisen wholly within the jurisdiction of the court. On the appellant's contention that the amount claimed exceeded the jurisdiction of the Magistrate's Court, the court *a quo* held that the Manzini Magistrate's Court had jurisdiction on the matter by virtue of section 22 of the Magistrate's Court Act 66/1938 on the basis that the principal reliefs claimed were within the jurisdiction of the Magistrate's Court.

It is not in dispute that that the principal claims were the cancellation of the Lease Agreement as well as the repossession of the merx. The claim relating to arrear payment as well as the value of the merx were ancillary to the principal reliefs. The learned judge also emphasized that the appellant could not complain that the amount involved in the matter exceeded the jurisdiction of the Magistrate's Court on the basis that the appellant had consented to its jurisdiction in terms of clause 13.1 of the Lease Agreement irrespective of the amount in dispute.

[4] The court *a quo* further held that the Magistrate's Court was correct in confirming the *rule nisi* without having afforded the appellant the opportunity of filing papers on the merits. The court rejected the appellant's contention that such a confirmation was, in the circumstances, a violation of its constitutional right to a fair trial as enshrined in section 21 (1) of the Constitution of 2005. The learned Judge in the court *a quo* noted that the appellant had merely raised preliminary objections to the application without filing an opposing affidavit dealing with the merits or seeking condonation to file the opposing affidavit out of time.

[5] The facts of the matter are generally not in dispute. The parties concluded a written lease agreement on the 10th June, 2011 at Manzini in terms of which the respondent leased and delivered to the appellant a trailer, to wit, a 2011 Interlink Cane Trailer (H) with chassis and serial No. 9H235HABAKA 1080 valued at E273 502.00 (two hundred and seventy three thousand five hundred and two emalangeni). Finance charges of E73 705.03 (seventy three thousand seven hundred and five emalangeni three cents) when added to the principal debt brought the total amount due and payable to E347 207.04 (three hundred and forty seven thousand two hundred and seven emalangeni and four cents). The appellant was obliged to pay a monthly rental of E8 106.41 (eight thousand one hundred and six emalangeni forty-one cents) until the full purchase price was paid.

[6] The respondent annexed a provisional statement of account to the application showing that as of the 14th February, 2013, the appellant was in arrears in the amount of E30 998.05 (thirty thousand nine hundred and ninety eight emalangeni five cents); and, in terms of clause 3.1 of the Lease Agreement, the appellant was in breach of the contract. The respondent consequently opted to exercise its rights in terms of clauses 12.2.2, 12.2.2.1 and 12.2.2.2 of the Lease Agreement to cancel the contract, take possession of the trailer, retain all amounts paid by the appellant and further claim payment of arrears. The appellant had an outstanding balance of E250 707.45 (two hundred and fifty thousand seven hundred and seven emalangeni forty-five cents). In terms of clause 4 of the Lease Agreement, ownership of the trailer vested with the respondent pending payment of the full purchase price.

[7] Clause 13.1 of the Lease Agreement deals with jurisdiction and provides that the Lessee consents to the jurisdiction of the Magistrate's Court having personal jurisdiction irrespective of the amount in dispute, but that the lessor would not be obliged to institute action in the Magistrate's Court if the lessee defaults in the fulfilment of any obligation.

[8] The respondent subsequently instituted application proceedings on an urgent basis before the Manzini Magistrate's Court seeking a *rule nisi* to

issue calling upon the appellant to show cause why the Lease Agreement should not be cancelled and the trailer returned to the respondent. It further sought an order why the appellant should not pay the arrear amount of E30 998.05 (thirty thousand nine hundred and ninety eight emalangeni five cents), forfeit all amounts paid as well as return the Registration Documents of the trailer to the respondent.

The *rule nisi* was granted, and, on the return day, the appellant did not file the opposing affidavit dealing with the merits of the case. The appellant merely raised preliminary objections from the bar which in essence was a challenge to the jurisdiction of the Magistrate's Court. It is common cause that the Magistrate's Court dismissed the preliminary objections and further confirmed the *rule nisi* on the basis that the time allowed for filing an opposing affidavit had lapsed, and, the appellant had not sought condonation for the late filing of the affidavit.

- [9] Subsequent to the judgment of the court *a quo*, the appellant filed a Notice of Appeal to this Court with three grounds of appeal: Firstly, that the court *a quo* erred in law and in fact in finding that the Manzini Magistrate's Court had the necessary jurisdiction over the matter notwithstanding the explicit provisions of the agreement between the parties. Secondly, that the court *a quo* erred in fact and in law in holding that in claims for

repossession or cancellation of leases, the value of the merx sought to be repossessed, or to which such cancellation related was of no consequence in so far as the determination of the financial jurisdictional limit of a Magistrate's Court is concerned. Thirdly, that the court *a quo* erred in fact and in law in holding that the prayer by the respondent for money of a sum above the jurisdiction of the Magistrate's Court was "incidental".

[10] It is trite law that a litigant who wishes to appeal the judgment of the High Court in its civil appellate jurisdiction should seek leave to appeal to the Supreme Court. Section 147 of the Constitution which deals with the civil appellate jurisdiction of the Supreme Court provides the following:

"147. (1) An appeal shall lie to the Supreme Court from a judgement, decree or order of the High Court –

(a) as of right in a civil or criminal cause or matter from a judgement of the High Court in the exercise of its original jurisdiction; or

(b) with the leave of the High Court, in any other cause or matter where the case was commenced in a court lower than the High Court and where the High Court is satisfied that the case involves a substantial question of law or is in the public interest.

(2) Where the High Court has denied leave to appeal, the Supreme Court may entertain an application for special leave to appeal to the

Supreme Court in any cause or matter, civil or criminal, and may grant or refuse leave accordingly.”

[11] Rule 49 (1) of the High Court Rules provides the following:

“49. (1) Where the certificate of the Judge who heard the appeal is sought for leave to appeal to the Court of Appeal from a decision of the court in its civil appellate jurisdiction is required, application shall be made by the delivery within fourteen days after the date of the judgment sought to be appealed against of a notice stating that the applicant desires leave to appeal and setting forth the grounds upon which such leave is sought. The application shall be set down on a date to be arranged with the Registrar.”

[12] Sections 14 and 15 of the Court of Appeal Act 74/1954 deal with civil appeals before the Supreme Court and provide 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 only to judgments given in the exercise of the original jurisdiction of the High Court.

15. A person aggrieved by a judgment of the High Court in its civil appellate jurisdiction may appeal to the Court of Appeal with the leave or upon the certificate of the judge who heard the appeal, on any ground of appeal which involves a question of law but not on a question of fact.”

[13] The manner in which the grounds of appeal have been drawn up , and, in particular with reference to the phrase, that “the court *a quo* erred in law and in fact”, as being contrary to section 15 of the Court of Appeal Act which restricts the grounds of appeal to the Supreme Court to a question of law but not to a question of fact. It may well be that the appellant would argue that substantively the grounds of appeal before this Court relate to questions of law, being the jurisdiction of the Magistrate’s Court to entertain the matter. However, litigants are advised to observe section 15 of the Court of Appeal Act when drafting their grounds of appeal.

[14] The appellant did not seek leave to appeal to the Supreme Court as required by law; hence, it subsequently filed an application for condonation for leave to appeal. Rule 17 of the Court of Appeal Rules of 1971 provides that, “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 in matters of practice and procedure as it considers just and expedient”.

[15] In the case of *Jabulani Patrick Tibane v Alfred Siphon Dlamini* Civil Appeal case No. 17/2013 at para 17, I had occasion to say the following with regard to condonation:

“[17] It is a trite principle of our law that a party seeking condonation should give a reasonable explanation for the delay. In addition he must show that there are reasonable prospects of success on appeal. Ramodibedi JA, as he then was, in *Johannes Hlatshwayo v. Swaziland Development and Savings Bank and Others* Civil Appeal case No. 17/2006 at para 17 said the following:

‘17. It requires to be stressed that the whole purpose behind Rule 17 of the Rules of this Court on condonation is to enable the Court to gauge such factors as (1) the degree of delay involved in the matter, (2) the adequacy of the reasons given for the delay, (3) the prospects of success on appeal and (4) the respondent’s interest in the finality of the matter.’ ”

[16] His Lordship Ebrahim JA in the case of *Okh Farm (Pty) Ltd v Cecil John Littler NO and Four Others* Civil Appeal No. 56/2008 at page 15 had this to say:

“As a rule, an applicant who seeks condonation will need to satisfy the court that the appeal has some chance of success on the merits. See *De Villiers v. de Villiers* 1947 (1) SA 635 (AD). A court will not exercise its power of condonation if it comes to the conclusion that on the merits there is no prospect of success, or if there is one at all, the

prospects of success are so slender that condonation would not be justified. See *Penrice v Dickinson* 1945 AD 6. . .”

[17] It has been held that the expressions “good cause” and “sufficient cause” are synonymous and mean that the defendant must at least furnish an explanation of his default sufficiently to enable the court to understand how it really came about, and to assess his conduct and motives. See *Usutu Pulp Company v. Swaziland Agricultural and Plantation Workers Union* Civil Appeal case No. 21/2011 at para 42.

In its judgment in the case of *Usutu Pulp Company* (supra) at para 43, this Court quoted with approval the judgment of Heher JA in the case of *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) at para 10 where His Lordship had this to say:

[10] “Good cause’ looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many such possible factors become relevant. These may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the *bona fides* of the applicant, and any contribution by other persons or parties to the delay and the applicant’s responsibility therefor.”

[18] It is apparent from the appellant's application for condonation that it only dealt with the reason for the delay in seeking leave to appeal but neglected to deal with the requirement of the prospects of success on the merits of the appeal. In dealing with the reason for the delay, the appellant, at paragraph 7 of the application for condonation, had this to say:

“7. In very much humble retrospect, we have realised that we did procedurally are in directly launching this appeal before this above Honourable Court without first seeking leave from the High Court in hearing the matter sat not in its original jurisdiction but sat in its appellate jurisdiction. We do herein extend our very humblest apologies to the court and to the respondents for this procedural oversight on our part in observing the above court rule and procedure.”

[19] The application for condonation is bound to fail for two reasons: firstly, the appellant did not deal with the requirement of prospects of success on the merits of the appeal. When dealing with this requirement, the appellant should have disclosed its defence to the merits of the claim, whether or not it was in breach of clause 3.1 of the Lease Agreement by failing to pay the monthly rentals. Secondly, the explanation given by the appellant for not seeking leave to appeal as required by law was allegedly caused by “a procedural oversight” on their part. Certainly, such an explanation cannot constitute ‘good cause’ or ‘sufficient cause’. Appellant’s counsel acted in

flagrant disregard of the Rules of this Court in failing to seek leave to appeal to the Supreme Court.

[20] This Court in the case of *Kenneth B. Ngcamphalala v. Swaziland Development and Savings Bank and Eight Others* Civil Appeal No. 88/2012 at para 20 quoted with approval the South African Appellate Division case of *Saloojee v Minister of Community Development* 1965 (2) SA 135 (AD) at 141 where Steyn CJ had this to say about the neglect of the Rules of Court by Attorneys.

“...it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney’s lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity.... The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are....”

[21] Notwithstanding the failure by the appellant to seek leave to appeal, this appeal lacks merit. The court *a quo* was correct in its finding that the

Magistrate's Court had jurisdiction to entertain the matter on the basis of section 15 (d) of the Magistrate's Court Act. For purposes of clarity, I will reproduce the whole of the section:

“15. Saving any other jurisdiction assigned to any courts by this Act, or by any other law, the person in respect of whom the court shall have jurisdiction shall be-

- (a) Any person who resides, carries on business, or is employed within the district;**
- (b) Any partnership whose business premises are situated or any member whereof resides within the district;**
- (c) Any person whatever, in respect of any proceedings incidental to any action or proceeding instituted in the court by such person himself;**
- (d) Any person, whether or not he resides, carries on business, or is employed within Swaziland, if the cause of action arose wholly within the district;**
- (e) Any party to interpleader proceedings, if –**
 - (i) The execution creditor and every claimant to the subject matter of the proceedings reside, carry on business, or are employed within the district;**
or
 - (ii) The subject matter of the proceedings has been attached by process of the court;**
- (f) Any defendant (whether in convention or reconvention) who appears and takes no objection to the jurisdiction of the court.”**

[22] It is not in dispute that the cause of action arose wholly within the jurisdiction of the Manzini Magistrate's Court where the contract between the parties was concluded. In addition the second ground of appeal relating to the financial jurisdiction of the Magistrate's Court is inconsequential in light of clause 13.1 of the Lease Agreement which provides that, "the lessee consents to the jurisdiction of the Magistrate's Court having personal jurisdiction irrespective of the amount in dispute, but lessor shall not be obliged to institute action in the Magistrate's Court". Accordingly, section 28 of the Magistrate's Court Act provides that "subject to the provisions of section 29, the court shall have jurisdiction to determine any action or proceeding otherwise beyond the jurisdiction, if the parties consent in writing thereto".

[23] Section 29 of the Magistrate's Court Act provides for matters which are excluded from the jurisdiction of the Magistrate's Court.

"29. Magistrate's courts shall have no jurisdiction in matters in which-

- (a) the dissolution of a marriage or separation from bed and board or of goods of married persons is sought, where the parties to the action are not Swazis;**
- (b) the validity or interpretation of a will or other testamentary document is in question;**

- (c) the status of a person in respect of mental capacity is sought to be affected;**
- (d) is sought the specific performance of an act without an alternative of payment of damages (except the rendering of an account in respect of which the claim does not exceed an amount within the jurisdiction of the court, or the delivery or transfer of property not exceeding in value the jurisdiction of the court);**
- (e) is sought a decree of perpetual silence;**
- (f) provisional sentence is sought.”**

[24] The court *a quo* was also correct in its finding that the Manzini Magistrate’s Court had jurisdiction to entertain the matter by virtue of section 22 (2) of the Magistrate’s Court Act. This provision enables the court to exercise jurisdiction over a matter even if one of the reliefs sought is above its jurisdiction provided that the principal relief sought falls within its jurisdiction. The principal reliefs sought in this matter relate to the cancellation of the Lease Agreement concluded between the parties as well as the repossession of the merx; and, these reliefs are within the jurisdiction of the Magistrate’s Court. The claim for arrear payment as well as the value of the merx are reliefs which are incidental to the principal reliefs.

Section 22 (2) of the Magistrate’s Court Act provides the following:

“22. (2) where the amount claimed or other relief sought is within the jurisdiction, such jurisdiction shall not be ousted merely because it is necessary for the court, in order to arrive at a decision, to give a finding upon a matter beyond the jurisdiction.”

[26] Accordingly, the following order is made:

- (a) The application for condonation seeking leave to
- (b) appeal is dismissed.
- (b) The appeal is consequently dismissed.
- (c) The appellant to pay costs of suit.

M.C.B. MAPHALALA
JUSTICE OF APPEAL

I agree:

DR. S. TWUM
JUSTICE OF APPEAL

I agree:

DR B.J. ODOKI
JUSTICE OF APPEAL

FOR APPELLANT : Attorney T.M. Ndlovu
FOR RESPONDENTS : Attorney T.L. Dlamini

DELIVERED IN OPEN COURT ON 3 DECEMBER 2014