IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No.17/2014

In the matter between:

WILDFIRE INVESTMENTS (PTY) LTD	**1st Appellant**
PORTIA BHACILE TSABEDZE	**2nd Appellant**
SIBUSISO MSIBI	**3rd Appellant**

And

QUAYSIDE LOGISTICS (PTY) LTD	**1st Respondent**
WEST AFRICAN VENTURES (PTY) LTD	**2nd Respondent**

Neutral citation: *Wildfire Investments (Pty) Ltd and Two Others vs Quayside Logistics (Pty) Ltd and Another (17/2014) [2015] [SZSC 16] (29 July 2015)*

Coram: **S.B. MAPHALALA AJA, Q.M. MABUZA AJA and M.D MAMBA AJA**

Heard: 9 July 2015

Delivered: 29 July 2015

Summary: **Appellant appeal decisions of the court *a quo* – seeks leave to appeal said orders – the Respondents oppose the said leave – challenging *inter alia* Appellant *locus standi* – requirements of the interdict have not been proved – this court finds against such points in law – dismisses the appeal with costs on the ordinary scale.**

JUDGMENT

MAPHALALA AJA

The Appeal

[1] The Appellants appeal against the decisions of the court *a quo* **(per M. Dlamini J)** of the 10the March 20 and 16 May 2014. The decisions appealed against which are listed in the Notice of Motion in the application for leave to appeal are as follows:-

1.1 Directing that the matter be referred to oral evidence.

1.2 Directing that the applicants (the respondents herein) file their respective board resolutions authorizing institution of the proceedings by 11 March 2014.

1.3 The pronouncement in open court by the learned Judge that an amendment was made to reflect the first appellant's name as Wildfire Investments (Pty) Ltd instead of Wildlife Investments (Pty) Ltd.

2. The grounds listed in the Notice of Motion are to be found in paragraphs 1.1 to 1.3 thereof.

3. In a judgment listed in the Notice of Motion are to be found in paragraph [33][2] as follows:

"a. Whether or not an amendment was effected to the name of the 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*?".

[2] The appeal in this matter is in respect of decision made **Dlamini J** in the application in which a *rule nisi* had been granted on the 5 December 2013.

Background to the decisions appealed against

[3] The background facts leadings to this application can be gleaned in the Heads of Arguments of the Appellant's attorney to be the following:

9. On December 2013, the Respondents approached the High Court of Swaziland ex parte and obtained the following interim orders:

9.1 That pending the institution and finalization of the proceedings to be instituted by the Respondents (as Applicants) against the Appellants (as 1st, 2nd and 3rd Respondents) to recover monies in excess of E2 000 000.00 (Two Million Emalangeni) defrauded and or unlawfully held and received by the 1st, 2nd and 3rd Appellants;

9.2 First National Bank in its capacity as the holding bank, be authorised to freeze account No. 6209007786 which account is in the name of the 1st, 2nd and / or 3rd Appellants.

9.3 Standard Bank, Nedbank, Swazi Bank and Swaziland Building Society be authorized to freeze any accounts they may have in the name of the 1st, 2nd and 3rd Appellants upon service of the interim order.

See Court order at pages 30- 32 of the record.

The Arguments

[4] The attorneys of the parties advanced their arguments on the 9 July 2015 filing Heads of Arguments. In the said Heads of Arguments of the Appellant's attorney he has clearly addressed the issues for decision under various headings. I shall adopt in this judgment to assist a better understanding of the issues for decision. These being firstly **"order obtained against 1st Appellant"**; secondly **"opposition to amendment"**; thirdly "**lack of authority to institute proceedings";** fourthly **"requirements of an interdict"** and other topics I shall advert to in the course of this judgment. I shall proceed to address these topics **ad seriatim** in the following paragraphs:

(i) Court order not operating against 1st Appellant

[5] In respect of this Heads of Argument the attorney for the Appellants contended that it is clear from the court order itself that the 1st Respondent against what the operations was an entity or company cited as Wildlife Investments (Pty) Ltd (Wildlife) and not the 1st Appellant which is Wildfire Investments (Pty) Ltd (Wildfire). That indeed, the Certificate of Urgency, Notice or Motion and

Founding Affidavit on which the court order in question was founded reference is made to Wildlife.

[6] On the other hand the Respondents contends that the Appellants in the application for leave to appeal refer to an application dated 29 January, 2014 which was an application to amend the name **"Wildlife"** to **"Wildfire"** and that this Application was because Appellants' attorneys wrote the letter being **"A6"** 3 to the Registrar questioning the correctness of the name **"Wildfire"** on the consent order which has been made on 13 December 2014. That it was only after the appointment of the Appellant's present attorney on 23 January, 2014 that the name of the first Appellant became an issue raised by them.

[7] Having considered the arguments of the parties in the regard and I am inclined to find in favour of the Respondent that it was only after the appointment of the Appellants' present attorneys that the name became an issue. I say so because the 1st Appellant's previous attorney had not raised an objection to the correction of the citation prior to or when the consent order was filed under the correct citation.

[8] The Appellants contended that an amendment was granted pending to the Application of the 29 January 2014. The Judge's Notes for the 10 March 2014

indicate that an amendment was granted on the proper interpretation thereof. The notes reads amendment **"Wildlife to Wildfire"** as seen at page 95 paragraph 46.

[9] It appears to me that these facts which follow as **"Respondent objection" i**s not related to Note in respect of the reference to **"adjustment"** and has no bearing on the issue of adjustment. The listed ground of objection are an entirely different issue and not in respect of amendment standing alone.

[10] In the transcript for the 16 May 2014 the Judge *a quo* insist that the amendment was made as shown at pages 172 to 174 of the Record. I find that the arguments of Mr Flynn for the Respondent are correct are on point in paragraphs 10 to 13 of his arguments and would dismiss the Appellants argument in this regard.

(ii) Lack of Authority

[11] In this regard the Appellants contend that among other defence raised in the Answering Affidavit referred to in para 13 above, the Appellants challenged the authority of Philip Godfrey Kay to institute proceedings on behalf of the Respondents.

[12] It is averred by the Appellants and page 85 paragraph 85 of the Record where Appellant deposed as follows:

> **"I dispute the deponent to the founding affidavit, Philip Godfrey Kay is authorised to act for the Applicants as he alleges. Being companies, the Applicants can only act through their respective Boards of Directors. The Applicants have not shown such authority and the Applicants are therefore not before this Honourable Court."**

[13] The 2nd Respondent at paragraph 20.1 at page 90 (Volume 1) in relation to the 2nd Respondent deposed as follows:

> **"Quite apart from the fact that annexure "WAV1" is not a power of attorney, Jon Doherty is not the repository of authority for the 2nd Applicant to institute proceedings against the Respondents. Such authority vests in the 2nd Applicant's Board of Directors".**

[14] This court is further referred to a number of other relevant averments by the parties in para 15.1, 18.2, 14.3 to the first submission that in these circumstances, the court *a quo* had neither power nor authority to consider or determine the merits of the matter. That the court *a quo* was obligated to determine the preliminary question of legal standing of the Respondents before proceeding to the merits of the matter.

[15] On the other hand a Replying Affidavit by Philip Kay was filed stating that he could file a special resolution as it is so required and the court *a quo* did allow such resolution to be filed.

[16] In my assessment of these competing views it appears to me that the point raised by the Appellants is a highly technical point in view of the fact that November, 2013 Philip Kay was authorised to institute proceedings as stated at page 175 of the Record. It is for this reason that I find that the point raised by the Appellant cannot succeed.

(ii) Requirements of the interdict

[17] In this regard the Appellants contend that there in a further ground for challenging the decision of the court *a quo* to refer the matter to oral evidence on the specified question of whether there is a contract between the parties. The question of the existence of otherwise of the contract speaks to only one requirement (clear right) of at least four (4) that the Respondents have to satisfy to found the interim order operating in their favour. That the court *a quo* did not enquire into the existence of irreparable harm, other satisfactory remedies and the balance of convenience which Respondent were not able to satisfy on the papers served before the court *a quo*.

[18] On the other hand it is contended for the Respondent that the court *a quo* had the discretion as to whether the oral evidence on a specified issue before proceeding to decide whether a case for an interim interdict had been made out in respect of all the requirements for an interdict.

[19] It appears to me that the question of whether these requirements are satisfied is still pending in the court *a quo*. This issue is still to be determined by that court *a quo*. That raising this point before this court is premature in the circumstances. Therefore, this ground of appeal ought to fail.

Conclusion

[20] Both parties have sought punitive costs, advancing various reasons. I have considered these reasons and in exercise of my discretion would levy cost to be in the ordinary scale.

Order

[21] This court dismiss the Appeal with costs to be levied in the normal scale such costs to include costs of Counsel certificate in terms of Rule 68 the High Court Rules.

_____

S.B. MAPHALALA AJA

I AGREE _____

Q.M. MABUZA AJA

I AGREE _____

M.D. MAMBA AJA

For the Appellants	:	Mr. S. Dlamini (of Magagula and Hlophe Attorneys)
For the Respondents	:	Advocate Fylnn (instructed by Henwood Associates)