IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE Civil Appeal Case No.20/2016

In the matter between:

SWAZILAND GOVERNMENT **APPELLANT**

And

MFANUZILE VUSI HLOPHE **RESPONDENT**

Neutral citation: *Mfanuzile Vusi Hlophe vs. The Ministry of Health and Two others (20/2016) [2016] SZSC 38 (30 June 2016)*

CORAM: **S.P. DLAMINI, JA**

Z. MAGAGULA, AJA

M.J. MANZINI, AJA

Heard: 26th May 2016

Delivered: 30th June 2016

Summary: *Civil Procedure – dismissal of exception – leave of court in terms of section 14(1) of the Appeal Court Act order application of Rule 23 (1) in the High Court Rules – Appeal upheld with costs.*

JUDGMENT

S. P. DLAMINI, JA

[1] This is an Appeal against the Judgment of the High Court on 18th February 2016.

[2] The brief background of the matter is as follows:-

The plaintiff (respondent herein) instituted an action at the High Court by way of summons against three defendants including the appellant herein. The respondent's claim was for damages of Six Hundred and Fifty Thousand Emalangeni (E650, 000.00) for an injury sustained in a motor vehicle accident. The motor vehicle belonged to the appellant. The driver was employed by the appellant at the time of the accident. Respondent avers that the driver of the appellant's vehicle was the cause of the accident in that he drove negligently and that the accident occurred in the course and scope of his employment by the appellant. The appellant filed an exception to the claim and argued that damages arising out of a motor vehicle accident is the liability of the Motor Vehicle Accidents Fund established in terms of

the Motor Vehicle Accident Fund Act 1991 and that the particulars of claim do not disclose a cause of action.

[3] The Court *a quo* came to the conclusion that it was wrong for the appellant to proceed by way of exception. Instead, opined the Court *a quo*, the appellant should have raised the issue through a point *in limine*. The court *a quo* dismissed the exception and ordered appellant to file its plea.

[4] The appellant noted the appeal before this Court against the judgment of the Court *a quo*. The Appellant only states in the notice of Appeal; "***Take Notice that the Attorney General, who was the 3rd Respondent in the court below, being dissatisfied with the judgment of the High Court delivered on 18th February 2016 doth appeal to the Supreme Court on the following ground:***

1. The Court a quo erred and misdirected itself in dismissing the Defendants' exception."

[5] The notice of appeal appears to fall short of the requirements of Rule 6 (4) of the rules of the Supreme Court. Rule 6 (4) provides that:-

> **"(4)** ***The notice of appeal shall set forth concisely and under distinct heads of the grounds of appeal and such grounds shall be numbered consecutively.''***

[6] However, this issue was not raised or pursued by the respondent. In the interest of Justice the Court will reluctantly let it pass with the strongest possible warning that a care- free approach in pleadings before it shall not be tolerated and that compliance with the rules shall be enforced through appropriate remedies.

[7] The issues for consideration before this court are:-

(a) Whether the judgment on the exception in this case is interlocutory or not. Respondent avers that the exception is interlocutory and that the appellant ought to have sought the leave of Court to institute the appeal in terms of Section 14 (1) (b) of the Court of Appeal Act;

(b) Whether the Court *a quo* was correct in dismissing the exception. Appellant submits that the Court *a* quo misdirected itself in dismissing the exception; and

(c) Costs of suit.

[8] Section 14 of the Court of Appeal Act provides:-

"14 (1) an Appeal shall be to the Court of Appeal-

(a) From the 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.''***

[9] As stated above, respondent contends that the appellant ought to have sought leave of Court first in order to prosecute this appeal. The respondent prays that the Court should strike off the roll with costs in that it is unlawfully before the court due to non-compliance with Section 14 (1) (6).

[10] The respondent relies on various authorities in support of the contention that the exception in this case is final and only appealable upon leave being granted. At page 4 paragraph 12 and 13 of the respondent's Heads of Argument it stated;

" (12). The Appellate Division in the case of **Trope and Others V South African Reserve Bank** citing with approval **Zweni v Minister of Law and Order** sated the following;

> **"A "judgment or order'' is a decision which, as a general principal, has three attributes, first the decision must be final in effect and not susceptible of alteration by the court of first instance; second it must be definitive of the rights of the parties; and, third 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 requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief. The decision of the Court *a quo* and its effect must therefore be considered in order to determine whether it qualifies as an appealable judgment or order.'' (The underlining is ours).**
>
> **(13). The Respondent submit that the order of the Court *a quo* has no final and definitive effect and as such not appealable. The appellant were ordered to file their plea within the time limits prescribed by the Rules of Court, and the matter has not been dealt with to finality, and an appeal can only be permissible with the leave of the court in the present circumstances.''**

[11] On the other hand, appellant's position is that the general principles set out in the cited authorities including **TROPE AND OTHERS V SOUTH AFRICAN RESERVE BANK 1993(1) SA 264 AND ZWENI VS MINISTER OF LAW AND ORDER 1993 (1) SA 523 (1)** regarding the interlocutory or final nature of exceptions are not disputed. Further, that the general principles are not applicable

to each and every exception. Appellant submitted that the circumstances of each case must be looked into in order to determine whether or not an exception is interlocutory or final. In support of appellant's position that in certain cases exception may be final at paragraphs 4 and 5 it is stated;

> **"4. An exception is decided on the basis that the facts alleged in the pleading objected to be true. Thus the facts in this Appeal are common cause. Briefly stated they are that the respondent was injured in a collision between his motorcycle and a motor vehicle driven by the appellant's servant. The respondent sued the appellant for general and special damages, in the amount of E 650,000.00 (Six Hundred and Fifty Thousand Emalangeni), for personal injuries sustained as a result of the collision.**
>
> **5. The appellant excepted to the particulars of claim on the basis that it did not disclose a cause of action. The court *a quo* dismissed the exception with cost.''**

It is clear in the authorities cited above, including **ZWENI VS MINISTER OF LAW AND ORDER** case, that the correct legal position is that an exception may be final in certain circumstances. The Court in the **ZWENI CASE** provides a three–tier test to determine whether a judgment or order is final or not namely;

(i) The decision must be final in effect and not susceptible by the Court of first instance;

(ii) It must be definitive of the rights of the parties; and

(iii) It must have the effect of disposing of at least a sustained portion of the relief claim in the main proceedings.

[12] It is the observation of this Court that sometimes confusion arises when applying the test in any given case. The test must be directed to the order namely as to whether it is final or interlocutory and not to enquire as to whether a party has other legal process or remedies available in a matter such as an appeal or plea pursuant to a the judgment or order. It appears to me that the respondent fell into that trap of misapplication of the test. The error is found in paragraph 13 of respondent's heads of argument where it is stated **"… The Appellant were (sic) ordered to file their (sic) plea within the time limits prescribed by the Rules of Court, and, the matter has not been dealt with to finality."** Clearly respondent is not applying the test to the question as to whether the exception is interlocutory or final in this case.

[13] It is the position of this Court when one properly applies the test to the facts of this case, all the requirements of the finality of the exception are satisfied, if the court *a quo* upheld the exception,

(a) The result would have been the dismissal of Respondent's action,

(b) The rights of the parties would have been definitive i.e. Appellant wrongly brought to Court by Respondents; and

(c) The action against Appellant would have been disposed of.

[14] In the circumstances, the court is satisfied that the matter is appealable of right. There was no need to seek leave to appeal. The exception in this case went to the validity of the claim and hence the test in the **ZWENI CASE, LILLICRAP WASSENAAR AND PARTNERS VS PILKINGTON BROTHERS (SA) (PTY) LTD 1985 (1) SA 471(A) at 493)** and a host of other authorities was satisfied.

[15] The second issue is whether the Court *a quo* misdirected itself in dismissing the exception. The Court *a quo* decided at paragraphs [11] and [12] of the judgment;

> **"(11) For the aforementioned reasons, the plaintiff has prematurely filed its claim for damages against the Defendants when it ought to have done so only when the MVA Fund is unable or refuses to pay the compensation (see: Section 13 of the Act). The Pleadings do disclose a cause of action but the plaintiff prematurely instituted proceedings against the Defendants before lodging its claim for damages with the MVA Fund that indemnifies motor vehicles owners and drivers against claims for injuries sustained in motor vehicle accidents.**
>
> (12) **In the result I find that in terms of Rule 23 (1) an exception is not competent in the circumstances. The Defendants ought to have raised this issue by a point *in limine*. I therefore orders follows:**
>
> **(a) The defendants' exception is dismissed with costs.**
>
> **(b) The Defendant is to file its plea within the time period provided for in the Rules of this Court.''**

[16] The Court *a quo*'s conclusion that the respondent prematurely brought the proceedings against appellant, in our view, is a good indication that respondent's claim against appellant is excipable. This is particularly so because the respondent in the particulars of claim made no averments regarding the issue of prescription and / or such Orders that maybe available to him in anticipation of possible legal action against Appellant. This is also a fundamental blow to the respondent's

argument at this Court, in the alternative, may order a stay of the proceedings against appellant in the event it is inclined to uphold the appeal. This argument is without basis because, as already stated, there are no averments before this Court upon which to even consider such an argument.

[17] As matter of fact, respondent was forewarned by appellant, through the exception, of the problematic nature of the Summons and particulars of claim against the appellant. Respondent failed to take any legal steps to rectify the situation through some lawful process such as an amendment of the particulars of claim.

[18] The final issue to be decided by this Court is whether an exception is a competent ground to challenge the validity of claim even though it is not based on the grounds listed under Rule 23 (1) of the High Court Rules that;

Rule 23 (1) states;

> "**Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defense, as the case may be, the opposing party may, within the period provided for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of rule 6(14):**
>
> **Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall, within the period allowed under this sub-rule, by notice afford his opponent an opportunity of removing the cause of complaint within fourteen days:**

Provided further that the party excepting shall within seven days from the date on which a reply to such notice is received or from the date on which such reply is due deliver his exception.**"**

The Court *a quo* held the view that the exception herein was not competent as it was not covered by the grounds in Rule 23 (1) because appellant based its exception on the ground that the particulars of claim did not disclose a cause of action. The Court *a quo* is correct in its interpretation if one applies the literal meaning of Rule 23 (1).

[19] However, there is a plethora of authorities that support the argument by appellant that an exception may competent even when based on grounds not listed under Rule 23 (1) and that the listed grounds in the section are not exhaustive **(See the cases of Anirudh V Samdei and Other 1975 (2) SA 706 (N) and Satellite Investments (Pty) Ltd Vs Joseph Dlamini and Two Others, Industrial Case Court of Appeal Case No.04/2010.**

The Learned Judge Masuku AJA (as he then was), in dealing with a situation whereby he was faced with the question of interpretation of a similar provision namely Section 29 of the Employment Act of 1980 at paragraph 25 of the judgment stated the following;

"(25**) In my view, the contention by the Appellants is not supportable. Firstly no authority was cited in support thereof. Secondly, society throws up a vagary of new and unprecedented situation that the Legislature, in all its manifold wisdom would not have anticipated. The question then is, if there is type of discrimination, which is obviously untenable and totally insupportable, should the Courts, when approached by a litigant to distrain such conduct, turn a blind eye**

thereon for not other reason that is not specifically proscribed in either section? My answer is an emphatic No!"

Section 29 of the Employment Act of 1980 provides as follows;

> *"No employer shall in any contract of employment discriminate against any person or between employees on grounds of race, colour, religion, marital status, sex national origin, tribal or class extraction, political or social status."*

The Learned Judge Masuku AJA in interpreting Section 29, as shown above, rejected a notion that the listing of the grounds of discrimination therein was exhaustive. This Court agrees with a reasoning of the Learned Judge. Rule 23 (1) of the Rules of the High Court is couched in similar fashion as Section 29 of the Employment Act. Therefore, this Court holds the view that the same considerations adopted by the Learned Judge in interpreting Section 29 similarly apply in interpreting Rule 23 (1). Therefore, the argument by the respondent that the exception taken by Appellant at the hearing in the Court *a quo* is not a competent ground in terms of Rule 23 (1) is accordingly rejected.

Specifically, in the **Anirudh v Samdei and Others** case was called upon to decide whether exception is competent under Rule of Court 23 (1) on the ground of a non-joinder yet this ground is not listed under the Rule. The learned Judge Howard J rejected the motion that the present Rules apparently limit the grounds of exception to those specified in Rule 23(1) and that, "in view of this limitation, it would seem that mis-joinder and non-joinder can no longer be raised on exception" (See page 707 of the **Anirudh v Samdei and Others** case). The Learned Howard J proceeded to uphold the exception with costs. Although the matter dealt with Rule 23(1) in the South African jurisdiction, their Rule 23(1) is

identical to Rule 23 (1) of the High Court Rules in our Jurisdiction hence the ratio decidendi in applicable to the matter before this Court.

[20] Nothing much turns on the question as to whether an exception is a point in *limine* or not (see Rule 23 (4) wherein it is stated that;

"**Where any exception is taken to any pleading or an application to strike out is made, no plea, replication or other pleading over shall be necessary."** (our own underlining).

Therefore, this Court is not persuaded by respondent's arguments and they cannot be sustained. Costs to follow the cause.

ORDER

In the premise, the Court orders that;

(i) The appeal is upheld with costs; and

(ii) The order of the Court *a quo* is set aside and in place its substituted by the order that;

"The **exception is upheld with costs."**

_____

S.P. DLAMINI

JUSTICE OF APPEAL

I agree

_____

Z. MAGAGULA

ACT. JUSTICE OF APPEAL

I agree

_____

M.J. MANZINI

ACT. JUSTICE OF APPEAL

For Appellant: MR M. Vilakati

For Respondent: MR L. Dlamini