IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal No. 67/2015

In the matter between:

MBUSO SIMELANE N.O	**Appellant**
VS	
BARBARA PROMISE LITTLER N.O	**1st Respondent**
THE MASTER OF THE HIGH COURT EH 139/2010	**2nd Respondent**
THE ATTORNEY GENERAL	**3rd Respondent**

Neutral citation: ***Mbuso Simelane N.O. vs Barbara Promise Littler N.O. & Two Others (67/2015) [2016] SZSC 39 (30 June 2016)***

Coram: **J. MAGAGULA AJA, M. LANGWENYA AJA AND Z. MAGAGULA AJA**

For Appellant: **M. Mabila**

For Respondent: **L. Howe**

Heard: **26 May, 2016**

Delivered: **30 June, 2016**

Summary: ***Application proceedings – Notice to strike out - Hearsay evidence – Scandalous and vexatious matter – Consequences of striking out – Appeal from interlocutory order – What constitutes interlocutory order.***

JUDGMENT

J. MAGAGULA AJA

[1] The appellant filed an application at the High Court seeking an order in the following terms:

"***INTERIM ORDERS***

1. ***That all money held on behalf of the late Estate Cecil John Littler EH 139/2010 by the Maser of the High Court (first respondent herein)***

and the fourth respondent be and are hereby frozen pending finalization of this matter.

2. ***The first respondent be ordered to submit the estate file of late Estate Cecil John Littler EH 139/2010 to the Registrar of the High Court.***

FINAL ORDERS

3. ***The Ruling by first respondent per annexure "K" in the founding affidavit be reviewed and set aside.***

4. ***The objection filed by the appellant in the estate of the late Cecil John Littler EH 139/2010 be upheld.***

5. ***The first and fourth respondents be ordered to transfer the sum of E324 360.00 from the estate of the late Cecil John Littler EH 139/2010 into the trust account of Applicant to be distributed in the estate of the late Petrus Joubert Van Der Walt EH 139/1988……."***

Prayers in respect of costs are also made.

[2] The application is supported by a founding affidavit deposed to by the appellant herein which runs into some 49 paragraphs. Annexure "K" to the founding affidavit is a ruling of second respondent dismissing an objection lodged by the appellant against payments being made out of the estate of the late Cecil John Littler prior to payment of an amount of E324 360.00 to the trust account of the appellant for distribution in the estate of Petrus Joubert Van Der Walt, in which

appellant is an executor dative. It is appellant's contention that prior to his demise, the late Cecil John Littler, a legal practitioner, had a legal obligation to transfer the said sum of E324 360.00 to the estate of the late Joubert Van Der Walt in which he was then executor. The appellant was appointed executor dative to the same estate after the late Cecil John Littler passed on without having finished winding up the estate.

[3] The first respondent herein was sixth respondent at the High Court and the second respondent herein was the first respondent at the High Court whilst the fourth respondent at the High Court was the Accountant General. No opposing affidavits were filed but the first respondent, who was sixth respondent in the court *a quo* filed a notice to strike out in terms of Rule 6 (28) of the High Court Rules couched as follows:

> ***"BE PLEASED TO TAKE NOTICE that the sixth respondent intends at the hearing of the matter, as per set down below, shall apply for the following content of his affidavit to be struck out from the Applicant's Founding Affidavit with costs.***
>
> 1. ***Irrelevance***
>
> ***The following matter contained in the applicant's affidavit are generally inadmissible and or contain matter of opinion are speculative and argumentative and therefore irrelevant, scandalous and vexatious and should be struck off with costs including costs as between attorney and client.***

2. Body of Founding Affidavit

1.1.1 The contents of paragraph 18.1 and 18.2 and

1.1.2 The contents of paragraph 46……"

[4] The same respondent subsequently filed a Notice to raise points *in limine* and a notice requesting for security for costs to the tune of Thirty Thousand Emalangeni. Security for costs was requested on the ground that the appellant did not have sufficient funds to pay first respondent's costs should she be successful in opposing the application. This was based on an allegation in appellants' founding affidavit to the effect that the estate of the late P. J. Van Der Walt did not have sufficient funding for the litigation.

[5] It would appear that the other objections and the request for security for costs were abandoned at the hearing of the matter in the court *a quo*. The learned judge *a quo* states at page 7 and paragraph (17) of his judgment:

> ***"I must state though that the main focus of the attorneys of the parties in their arguments…… before court was a determination of an application to strike out in terms of Section 6 (28) of the High Court Rules. Therefore this court will confine itself to the determination of this subject."***

[6] The matter was argued before Justice **S.B. Maphalala P.J on the 7th August 2015**. **At page 11 and paragraphs 34 to 37** of his judgment the learned Principal Judge makes the following findings:

> ***"34 Firstly, I agree with the contention of the sixth respondent that the averments at paragraph 18 and 18.1 of the Notice of Motion are scandalous on the basis of hearsay evidence."***

(I may hasten to point out here that there is no paragraph 18 or 18.1 in the Notice of Motion. I am sure the learned judge meant to refer to the Founding Affidavit)

> ***"35. Secondly, I agree with the arguments of the 6th respondent regarding paragraph 38.3 of the Founding Affidavit that the averments therein are intended to harass the sixth Respondent.***
>
> ***36. All in all, I agree with the arguments of the 6th respondent in respect of paragraph 44 and 49 of the Founding Affidavit.***
>
> ***37. Regarding paragraphs 10, 18 and 19 of the applicant's Founding Affidavit contain hearsay evidence which is admissible in a court of law unless there are exceptions……..."***

[7] At paragraphs (38) and (39) of his judgment the learned Principal Judge concludes his judgment as follows:

> ***"38 In the result, for the forgoing reasons I am in agreement with the 6th respondent's contentions that the offending paragraphs ought to be struck off <u>and the application is dismissed</u>." (my underlining***)

"*39 The applicant <u>may file a fresh application</u> on proper papers to allow the sixth respondent to oppose the matter by filing the requisite Answering Affidavit thus joining issue thereby." (my underlining)*

[8] Subsequent to the judgment of the High Court the appellant herein noted this appeal on the following grounds of appeal:

"*1. The Learned Judge a quo erred in law by dealing with a striking out application when the matter was not being argued on the merits.*

2.The learned Judge a quo erred in law by dismissing the appellants application after striking off the alleged offending paragraphs without due recourse to the arguments on the merits.

3. *Alternatively, the learned Judge a quo erred in law by dismissing the appellants application yet there was no prayer for dismissal of the application.*

4. *The learned Judge a quo erred in law and fact by holding that paragraphs 18 and 18.1 of the founding affidavit are scandalous on the basis of hearsay when paragraph 18.2 describes the source of information read with the report of the executors finding at annexure "H" in the said founding affidavit.*

5. ***The learned Judge erred in law and the fact that paragraph 38.3 of the founding affidavit contained averments meant to harass the first respondent when the evidence pointed out that she received the said monies.***

6. ***The learned Judge a quo erred in law and fact to hold that paragraph 44 and 49 of the founding affidavit was vexatious against the first respondent because the money she received was from the trust account of C.J. Littler and Company, not from Mr. Littler's personal account yet in actual fact the monies came from the estate file of Petrus Joubert Van Der Walt.***

7. ***The learned Judge a quo erred in law and fact by holding that paragraph 10,18,19 of the founding affidavit contain hearsay evidence when the said paragraph detail jurisdiction of the court to hear the matter and findings on how the estate of Petrus Joubert Van Der Walt was being run by the late Cecil John Littler.***

8. ***The learned Judge a quo erred in fact and law not to dismiss the striking out application as the first respondent had been barred from filing an answering affidavit."***

[9] I propose to deal with the grounds of appeal *ad seriatim*, but before doing so I think it is proper to first deal with a point touching upon the right of the appellant to bring this appeal without first obtaining leave of this court to appeal.

Leave to Appeal

[10] Mr. Howe who appeared for the first respondent first contended that the appellant was not properly before this court because in terms of Section 14 (1) of the Court of Appeal Act, 1954 a party aggrieved by a decision of the High Court on an interlocutory order can only appeal to this court by leave of this court. The first respondent contends that the order appealed against in this matter is an interlocutory order and the appellant first had to seek and obtain leave of this court before lodging his appeal.

[11] Section 14 (1) of the Court of Appeal act provides:

> ***"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."***

[12] It is common course that the appellant did not apply for leave to appeal to this court. The only question that needs to be determined by this court is whether or not the appellant was enjoined to obtain such leave. In order to determine this question it is necessary to determine whether or not the decision of the court *a quo* is an interlocutory or a final and definitive one.

[13] I have already set out the paragraphs containing the decision of the learned judge *a quo* in paragraph 9 above. The learned judge specifically stated that ***"the application is dismissed"*** and that the appellant could bring ***"a fresh application on proper papers."***

[14] My understanding of the decision is that litigation on that application had come to an end and the appellant could only bring another application and needless to say, the fresh application would have to be on a different case number. The prayers applied for in the Notice of Motion had been dismissed and there was nothing stopping the first and second Respondents herein from dealing with monies in the Estate of the Late Cecil John Littler as they deemed appropriate. There was no reason for them to wait for the appellant to bring a fresh application.

[15] In the premises it is the finding of this court that the order appealed against is final and definitive. The appellant is entitled as of right to bring this appeal and it was

not necessary for the appellant to first seek and obtain leave of this court before noting the appeal.

Merits of the Appeal

[16] I now turn to the grounds of appeal. On the first ground of appeal the appellant contends that the learned judge *a quo* erred in law by dealing with a striking out application when the matter was not being argued on the merits. The notice to strike out was filed in terms of Rule 6 (28) of the High Court Rules. This Rule provides:

> ***"The court may on application order to be struck out from an affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client, but the court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it is not granted."***

[17] The sub-rule does not state the time at which the application to strike out shall be heard. However, Rule 23 of the High Court Rules which deals with exceptions and applications to strike out provides for setting down of applications to strike out. Rule 23 (2) provides:

> ***" Where any pleadings contain averments which are scandalous vexatious or irrelevant, the opposite party may, within the period allowed***

for filing any subsequent pleading, apply for the striking out of such matter, and may set such application down for hearing in terms of Rule 6 (14)……".

[18] Rule 6 (28) was added by Legal Notice No. 38 of 1990 and in my opinion the reason it had to be added was that Rule 23 (2) deals with scandalous, vexatious and irrelevant matter in pleadings and not in affidavits. Rule 6 (28) was therefore enacted to provide for the striking out of similar matter in affidavits.

[19] In my opinion it is appropriate for a party to set down a matter for argument on an application to strike out as soon as the notice has been filed. Rule 23 (2) clearly provides for this and I do not see any reason why the situation should be different in applications to strike out under Rule 6 (28).

[20] In any event the reason for striking out offensive matter is so that the objecting party is not prejudiced in his defence. If the offensive matter is not removed before the objecting party takes the next step then the remedy is of no assistance. The affected party will not know whether or not to respond to the offensive matter and will thereby be prejudiced in his case.

[21] For the foregoing reasons it is clear that there is no merit in the first ground of appeal. The court *a quo* did not have to wait for the matter to be dealt with on the merits before hearing the application to strike out. The court *a quo* correctly heard the application to strike out at the time it heard it.

[22] In the second ground of appeal the appellant seems to contend that even after striking out the paragraphs that were struck out, the learned judge *a quo* should have heard arguments on the merits before dismissing the application. I think there is merit in this contention if one takes into account the particular circumstances in *casu.* However, it cannot, in my opinion be stated as a requirement in law that a court after striking out certain paragraphs in an affidavit it must of necessity consider arguments on the merits before it can dismiss the application. In my view if after striking out certain paragraphs the remaining ones disclose no cause of action or defence the court can justifiably dismiss the application. In *casu* however, there is still the question whether or not the court correctly struck out the paragraphs which were struck out. Further, there is still the question whether the remaining paragraphs disclosed a cause of action. I shall deal with these questions later in this judgment.

[23] Regarding the third ground of appeal the appellant merely contends that the court *a quo* erred in dismissing the application when there was no prayer for its dismissal. It is true that the Notice to Strike Out does not contain a prayer for dismissal of the application. However, in my view such prayer could be made from the bar if not contained in the notice and the court would be justified in granting it in an appropriate case. If the prayer was never made even from the bar then there was no basis for issuing the order and the court therefore misdirected itself. In any event in *casu,* and for reasons which shall be set out later in this judgment, the learned judge *a quo* misdirected himself in dismissing the application.

[24] In his fourth ground of appeal the appellant maintains that the learned judge *a quo* erred in law and fact by holding that paragraphs 18 and 18.1 of the founding affidavit are scandalous on the basis of hearsay when paragraph 18.2 read with annexure "H"

to the same affidavit identifies the source of the information.

[25] Annexure "H" to the founding affidavit is a letter written by Mbuso E. Simelane and Associates, a law firm of the appellant herein, addressed to the second respondent herein. It reads:

"***RE: ESTATE LATE CECIL JOHN LITTLER – EH 139/2010***

1. ***We refer to the letter by Barbara Promise Littler dated 21st March, 2014 received by us on the 10th April 2014.***
2. ***We attach here to a copy of the file cover showing the payments made to Douglas Littler and Barbara Littler.***

3. ***The payments were made from the Trust Account of the late C.J. Littler law firm held at Nedbank on account 020000022099.***

4. ***Douglas Littler was paid on 9th March 2010 through Trust Cheque 5838 for E15000.00.***

5. ***Barbara Littler was paid on the 9th July 2010 through cheque 6047 for E309 360.00.***

6. ***We attach hereto an extract from Littler Trust Account Statement.***

7. ***We are uncomfortable in handing over the file to yourselves as documents might get lost but we propose that we set a date where the file could be perused in our presence and if there are copies that she may need be allowed to photocopy them."***

[26] Firstly, I must state that there are no averments under paragraph 18 per se because this paragraph is divided into two sub-paragraphs being 18.1 and 18.2. It is only these sub-paragraphs that contain averments.

[27] In paragraph 18.1 the appellant states:

> ***"18.1 When I demanded that we finalise our estate, he told me that he discovered that there was a deficit in the trust account and was about to report to the first respondent and Law Society when he met his death. He had been curator for almost three (3) years. I will never know why the first respondent and Law Society never followed upon this matter.***
>
> ***18.2 I eventually reported to the first respondent about the trust deficit and I am surprised that I could be referred to the insolvent trust account."***

[28] What I understand the appellant to be contending in his third ground of appeal is that whilst in paragraph 18.1 he is relaying information passed to him by the late attorney B. Sigwane, in paragraph 18.2 he demonstrates by attaching copies of the file maintained by attorney Littler and a copy of Attorney Littler's trust account, that he eventually confirmed what was told to him by Mr. Sigwane by reading the

documents himself, hence he attaches them. He is not just relying on what was told him by Mr. Sigwane, but he has verified this himself by reading the documents which had probably been read by Mr. Sigwane when he relayed the information.

[29] This leads me to the conclusion that if appellant's allegation in paragraph 18.1 constitutes hearsay, this is not on the account that he received information from Mr. Sigwane but on the evidential value of the documents he has attached to annexure "H".

[30] The real issue before the court *a quo* was that the appellant sought an order freezing all moneys held on behalf of the estate of the late Cecil John Littler pending a decision of the court on the objection he had lodged with the second appellant. The objection which is at page 25 of the record was against the issuance of any payment from the estate late Cecil John Littler before payment of the sum of E324 360.00

to the appellant's trust account. This objection was made pursuant to a claim by the appellant jointly with attorney B. Sigwane (now deceased). The late attorney B. Sigwane was acting in his capacity as curator in the firm of C.J. Littler and

Company after the passing on of attorney C.J. littler. The claim is contained at page 20 of the record.

[31] The appellant was not saying that his claim should be paid on the basis of the papers filed in court. All he was saying was that his objection should be upheld and he be given a chance to prove his claim in due course and in the manner stipulated by law.

[32] It was not necessary for the court to establish whether or not the trust account of C.J. Littler and Company had a deficit in order to decide whether or not the appellant was entitled to the orders prayed for. Paragraph 18.1 and 18.2 did not therefore constitute hearsay as they were not necessary to decide the issue before court. **Hoffmann and Zeffert in the South African Law of Evidence 3rd edition** pages 95-6 state:

> ***"The important point made by Phipson's definition is that all statements by non-witnesses are not necessarily hearsay. Evidence of a statement will be hearsay only where its proposed relevance is to show the truth of some fact which the person who made the statement was asserting. It will not be hearsay when the mere fact that the statement was made is either in issue or relevant to the issue."***

[33] In **R.V. Muller 1939 AD 106 Justice Watermeyer JA** stated at 119:

> ***"Statements made by non witnesses are not always hearsay. Whether or not they are hearsay depends upon the purpose for which they are tendered as evidence. It they are tendered for their testimonial value (i.e. as evidence of the truth of what they assert) their truth depends upon the credit of the asserter which can be tested by his appearance in the witness box. If on the other hand they are tendered for their circumstantial value to prove something other than the truth of what is asserted, then they are admissible if what they are tendered to prove is relevant to the inquiry."***

[34] What the appellant was asserting before the court *a quo* was that he filed a claim against the estate of late Cecil John Littler and that the first and second respondent's evinced an intention to distribute the estate without taking his claim into account. He was also asserting that second respondent had dismissed his objection to the distribution of the estate. He was therefore seeking the intervention of the court to find that his objection ought to be upheld so that he could be called upon by the first respondent to prove his claim together with all other creditors of the deceased estate if any. He was not seeking the court to find that the trust account of C. J. Littler and Company was in the deficit or insolvent.

[35] The contents of paragraph 18.1 and 18.2 could not therefore be said to be hearsay because they did not seek to prove what the appellant was asserting. These paragraphs were only included because they were relevant to the issue before court.

[36] Also by stating in paragraph 18.1 that he was told by Mr. Sigwane that there was a deficit in the Trust Account of C.J. Littler and Company, appellant obviously was not necessarily making this statement to prove that the trust account was indeed in deficit. He had no business proving such since this was not his case. He did not have to prove that this trust account was in deficit in order to get the relief he was seeking.

[37] The judge *a quo* therefore misdirected himself in holding that these paragraphs constituted hearsay evidence in the circumstances.

[38] In grounds of Appeal 5, 6, and 7 the appellant deals with paragraphs 38.3; 44 and 49; 10, 18 and 19 respectively. The notice to strike out only raised issue with paragraphs 18.1, 18.2 and 46. There was therefore no basis for the court *a quo* to

deal with paragraphs 10, 19, 38.3, 44 and 49. The court *a quo* clearly misdirected itself in striking out these paragraphs as they were not raised in the notice to strike out.

[39] In ground of appeal No. 8 the appellant contends that the notice to strike out should have been dismissed because it was filed after the respondents had been barred from filing an answering affidavit.

[40] Firstly, the allegation that the notice to strike out was filed after the respondents had been barred is not true. The notice to strike out was served and filed on the 17th June 2015 and the notice of bar was served and filed on the 7th July, 2015.

[41] Secondly, I note that the notice to strike out was actually filed timeously because it was filed within the time prescribed by the rules for the filing of a subsequent document which was the answering affidavit. The *dies* for filing an answering affidavit expired on the 30th June 2015 according to my calculation of fourteen court days from the date of filing the notice of intention to oppose which was the 10th June 2015.

[42] Finally and having found that the court *a quo* misdirected itself in striking out most of the paragraphs that were struck out except for paragraph 46 which does appear to me to be scandalous and vexatious; and, that the court *a quo* misdirected itself in dismissing the application altogether, it follows therefore that the appeal must be upheld.

[43] In the premises the appeal is upheld and the following order is made:

1. The decision of the learned judge *a quo* striking out paragraphs 10, 18.1, 18.2 19, 38.3, 44 and 49 is set aside.

2. The matter is referred back to the High Court to be further dealt with thereat before another judge.

3. The first Respondent is ordered to pay the costs of this appeal.

_____

J.S. MAGAGULA

ACTING JUSTICE OF APPEAL

I agree _____

M. LANGWENYA

ACTING JUSTICE OF APPEAL

agree

_____

Z. MAGAGULA

ACTING JUSTICE OF APPEAL