



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal No. 45/2015

In the matter between:

SIBONISO CLEMENT DLAMINI

Appellant

VS

WALTER P. BENNET & 3 OTHERS

Respondent

Neutral citation:

***Siboniso Clement Dlamini & Another Vs Walter P Bennet
& and 3 Others (45/2015) [2016] SZSC 44 (30 June 2016)***

Coram: MAGAGULA AJA, CLOETE AJA and NXUMALO
AJA

For Appellant: Mr. S. C. Dlamini

For 1st Respondent: Mr. S. K. Dlamini

Heard: 11 May, 2016

Delivered: 30 June, 2016

Summary: *Appeal against interlocutory order – What constitutes an interlocutory order – No written reasons of judgment of court a quo – Transcript of proceedings in court a quo not certified by Registrar of the High Court – Transcript filed out of time with no application for condonation.*

JUDGMENT

J. MAGAGULA AJA

BACKGROUND

[1] From the papers before court it appears that this matter arises from a provisional sentence summons issued by the first Respondent against the first Appellant on the

9th May, 2008. Provisional sentence was based on a trust cheque issued by the first Appellant in favour of the first Respondent purporting to settle a personal debt payable by the Appellant to the first Respondent.

[2] Provisional sentence was resisted by the first Appellant. However by judgment delivered on the 14th September 2012 the High Court granted provisional in the sum of E67 000.00 (Sixty Seven Thousand Emalangi) together with interest and costs.

[3] It would appear that the first Appellant made some payments towards settlement of the judgment debt. First Appellant actually avers that he made payments totaling E20, 000.00 (Twenty Thousand Emalangi)

[4] On the 20th February 2015 a Deputy Sheriff tried to execute a writ in respect of the amount remained unpaid on the judgment debt by attaching a tractor allegedly belonging to the first Appellant and which tractor was allegedly pointed out by the first Appellant as property which could be attached.

- [5] The execution process was not successful as it was somewhat frustrated by the first Appellant.
- [6] On the 15th July 2015 the first Appellant allegedly obtained an order of the High Court staying any further execution in the matter pending finalization of an application launched by first Appellant on 14 July 2015. The authenticity and correctness of this order is disputed by the attorneys of the first Appellant although it is said to have been made by consent.
- [7] The order staying execution was allegedly served on the Respondents on the 27th July, 2015. However on the 14th August 2015 the Respondents proceeded to issue a Notice of Sale of the tractor and published it in the Times of Swaziland. The sale was advertised to take in Manzini on the 21st August, 2015.
- [8] On the 17th August 2015 the Appellants filed at the High Court under certificate of urgency an application seeking an order inter alia cancelling the advertised sale and committing some of the Respondents cited in that application to a correctional facility for contempt of court.

[9] The application was opposed by some of the nine Respondents who were cited and which included the first and second Respondent herein. The application was eventually heard after a full set of affidavits had been filed and it was dismissed by the High Court.

[10] In the course of opposing the application the first Respondent herein filed a counter application for rescission of the order allegedly issued by the High Court on the 15th July, 2015 to wit the order staying further execution. There is nothing before this court to show how the counter application was decided or that it was heard at all. The only order that is in the papers before court is the one dismissing the Appellants' application for cancellation of the sale in execution and committal of some of the Respondents cited in that application to a correctional institution for contempt of court.

THE APPEAL

[11] The Appellants launched the present appeal in which they challenge dismissal of their application and failure of the court *a quo* to dismiss the counter-application.

IRREGULARITIES

[12] The appeal has two patent irregularities:

- (a) There are no written reasons of the judgment of the court *a quo*. This defect alone renders the appeal dismissable. In the matter of **Ezishineni Kandlovu Vs Ndlovunga Dlamini and Another (58/2012) [2012] SZSC 51 (30 November 2012)** Justice Ota stated at paragraph 13

“.....Let me quickly observe here, that it was imperative for the Plaintiff’s counsel to obtain a written judgment for the purpose of this appeal. Where that is not done, we cannot aid the Plaintiff in his adventure. This is because the Court is not clavoiryant. It is not a soothsayer with the ability to gaze into a crystal ball to know what was decided a quo. Its operational (parameter lies in the assailed decision. The court most certainly cannot engage in prophesy.”

Dismissing the appeal for the same reason the court in **Silence Gamedze and two Others Vs Thabiso Fakudze (14/2012) [2012] SZSC 52 (30 November 2012)** stated:

“Since this is a feature in this case that renders the whole appeal incompetent thus depriving this court of the jurisdiction to entertain and determine same, we cannot ignore it and in that event proceed on a voyage in futility with its attendant waste of time and expenses. The result is that this appeal fails and is dismissed accordingly.”

- (b) The appeal is against an interlocutory order of the High Court and no leave of this court has been sought to file the appeal.

Section 14 of the Court of Appeal Act 1954 provides:

“(1) An appeal shall lie to the Court of Appeal-

(a) From all final judgment of the High Court and

(b) By leave of the Court of Appeal from an interlocutory order.....”

According to Herbstein and Van Winsen, *The Civil Practice of the Superior Courts in South Africa*, 4th edition, page 709:

“An interlocutory order is an order granted by a court at an intermediate stage in the course of litigation, setting or giving directions in regard to some preliminary or procedural question which has arisen in the dispute between the parties.”

In the case of **Pretoria Garrison Institutes Vs Danish Variety Products (Pty) Ltd 1948 (1) SA 839 at 870 Shreiner JA** stated

“.....A preparatory or procedural order is simple interlocutory order and therefore not appealable unless it is such as to dispose of any issue or any position of the issue in the main action or suit or which amounts, I think to the same thing unless it irreparably anticipates or precludes some of the relief which would or might be given at the hearing.”

From the above it seems to me abundantly clear that unless an order has a bearing on the main action or suit or on the results of such action or suit, then it is interlocutory. The stage at which the order is issued is irrelevant. It could be issued before or as in *casu*, after judgment on the main action has been issued. The order appealed against in *casu* is one refusing a stay of execution. It has no

bearing on the main issue in the action which is payment of a certain sum of money. The order has no bearing for instance on the amount payable in the main action or the liability or otherwise of the Appellants to pay such money.

In my opinion the order sought to be appealed against is a pure interlocutory order and the Appellants ought to seek leave of this court before they could appeal against it. It is common cause that such leave was never applied for or granted by this court. For this reason the appeal falls to be dismissed on this point also.

[13] It appears that the matter was enrolled in the last session of this court. It was postponed to the current session to enable the Appellants the written judgment or reasons of the decision of the court *a quo*. To date hereof the written judgment has not been filed and it is not clear what steps the Appellant took to secure it.

[14] The Appellants have filed instead, what purports to be a transcript of the proceedings in the court *a quo* containing what purports to be reasons for judgment. This purported record is however not certified as correct by Registrar of the High Court. When questioned about this the first Appellant stated that the transcriber's certificate was enough and that there was no need for the Registrar's certificate. He however did not refer the court to any authority for this contention. The Rules of court require a certification by the Registrar and not a transcriber.

[15] After consideration of the whole case and the fact that it commenced in 2008 and judgment was issued in 2012 but to date hereof the judgment debt has not been settled when liability to pay the Appellants is not disputed, I have come to the conclusion that there was serious abuse of court process in this matter.

[16] For the foregoing reasons the following order is made:

1. The appeal is dismissed.
2. The Appellants are ordered to pay costs of the appeal on the scale as between attorney and own client

J.S. MAGAGULA

ACTING JUSTICE OF APPEAL

I agree

R.J. CLOETE

ACTING JUSTICE OF APPEAL

I agree

K.M. NXUMALO

ACTING JUSTICE OF APPEAL