IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No. 81/2015

In the matter between:

LEBOMBO TRADING (PTY) LTD **Appellant**

vs

FHS ACCOUNTANCY & MANAGEMENT SERVICES (PTY) LTD **Respondent**

Neutral citation: *Lebombo Trading (Pty) Ltd vs FHS Accountancy and Management (Pty) Ltd (81/2015) [2016] [SZSC] 57 (30 June 2016)*

Coram: **J. S. MAGAGULA AJA**
C. MAPHANGA AJA
Z. MAGAGULA AJA

Heard: 9th May, 2016

Delivered: 30th June, 2016

Summary: *Civil Procedure – Application for leave to appeal against – summary judgment; right to appeal out of time beyond the*

prescribed time limits under the rules and Appeal – application in any event untenable in view of final nature of summary judgment - Application dismissed with costs.

JUDGMENT

MAPHANGA AJA

[1] This is an Application brought under a Notice of Motion and founded on an affidavit deposed to by the Appellant for leave to appeal against summary judgment entered by **Mdladla AJ** on the 5th of October 2015.

[2] In that judgment the court *a quo*, in its discretion, granted summary judgment to a portion of a claim in an action for the recovering of a debt allegedly owed by the Applicant to the Respondent in respect of professional fees for accountancy services rendered.

[3] The action had been initiated by the Respondent (an accounting and auditing firm) by way of simple summons. It was subsequently amplified by a declaration setting out detailed particulars of claim after the Appellant had entered an appearance to defend the action.

[4] The Respondent speedily followed up the pleading with an application for summary judgment for sums claimed.

[5] That application for summary judgment was opposed vigorously by the Appellant (the defendant *a quo)* which filed an affidavit resisting summary judgment.

[6] Had the content of the defence conveyed in the affidavit resisting summary judgment been in the form of pleading it would have taken the angle of an exception, for in it the Applicant averred that it had been a material term of the agreement between the parties that the fees to be charged would not exceed E20,000.00 and that the Plaintiff had undertaken to render an invoice in regard to the fees due and payable.

[7] It was alleged that in the absence of an invoice itemising the basis for the fees charged, the Defendant (Applicant) was not liable for the claim and therefore the claim was premature.

[8] The court *a quo* in considering all the evidence as contained in the affidavits filed by the parties made the following orders:

8.1 granting summary judgment in favour of the respondent in the sum of E20,000.00; and

8.2 referred the balance of the claim to trial with directives as to conduct of further pleadings.

[9] Although the Applicant claims to have attached the written judgment of the court *a quo* to the founding affidavit, the copy attached is incomplete in that it is missing pages 10 – 12 thereof. I am therefore unable to have proper regard to the full contents thereof and the fuller reasons for the orders made.

[10] Be that as it may, this defect in the application is, in my view of no serious consequence to the immediate issues arising herein in relation to the adjectival aspect of the application. I shall return to this aspect shortly.

[11] The application is opposed by the Respondent who has filed an affidavit in that regard. It has raised the point (*in limine*) that the application for leave is out of time; regard being had to the time lines set out in Rule 9 (1) of the Court of Appeal Rules of 1971.

[12] Respondent's contention is that given the stated date of the judgment from which the leave to appeal is sought (the 5th October 2015), this application in having been filed on the 10th of December 2015 falls well beyond the prescribed period of 4 weeks after the date of the judgment.

[13] The Applicant's application, in my view, suffers from the lack of preparedness and diligence on the part of his attorneys. As a result the Applicant was far from being ready to proceed with the matter. This is regrettable. When the Applicant's attorney (Mr. Dlamini) rose to address the court he did so only to make an application for postponement of the application to the next session. This application was made from the bar and the reasons advanced are woeful. Chief amongst these reasons was that Mr. Dlamini was only standing in for Mr Gumedze who was 'unavailable' as he had to travel to South Africa on a personal emergency. As it turns out the court learned from Mr. Dlamini that in any case Mr Gumedze himself had taken over the matter on behalf of the Applicant from its erstwhile attorney (Mr Mzizi) who according to Mr Dlamini is said to have left practice.

[14] As if this was the least of the Applicants problems, the second reason for the postponement was that the book of pleadings was not complete as the Respondents answering affidavit had not been compiled included.

[15] The conduct of the Applicant and its attorneys is most disconcerting if not deplorable. Their inability to proceed and deal the application is clearly self-made. It can only be attributed to a totally unconcerned attitude much to the inconvenience of both the court and the other party. It offends against the integrity of this court and its rules.

[16] Needless to say the Applicant's attorneys were unprepared and the court had to prevail on Mr. Dlamini as the Counsel appearing before it to deal with the matter and accordingly dismissed the application for postponement and ordered that the matter should proceed as enrolled.

Condonation

[17] In light of the point *in limine* raised as pertains the apparent late filing of the Notice of Motion for the application for leave, Mr Dlamini sought to contend that the Notice had not been filed out of time as according to the Applicant judgment was only received on the 8th of December 2015 by the Applicant. To this end he argued that the date of the judgment for purposes of application of the rule has to be 8th December 2015 as the date it was delivered and not the 5th October (the date stated on the written judgment).

[18] To buttress this argument Mr Dlamini submitted from the bar, that what had in fact happened is that the learned **Mdladla AJ** had only handed down a *ex tempore* judgment on the 5th October 2015. As it turns out from Mr Dlamini's own further submission this statement was misleading. It emerged from his later submission that in fact the court had indicated that the text of the judgment had to have minor clerical errors to be attended to, but the court had in fact read out the content and orders from the written judgment. It transpired that the Applicants attorneys had been remiss and only attended to pick up their

copy of the judgment from the Registrar of the 8th December 2015. Clearly this smacks of sheer neglect on the part of the Applicant's attorneys.

[19] In this light, the Appellants submissions that judgement had been delivered on the 8th December, have absolutely no merit. The date of the judgment appears *ex facie* the judgment as the 5th October 2015.

[20] In any case even if the Applicant had the alleged difficulties in getting hold of the written judgment of the 5th October 2015 and only received the same on the 8th December 2015, it made no attempt to apply for an extension of time in terms of Rule 16 (1) of the Rules of the court, nor an application for condonation in terms of Rule 17 of the Rules. For this reason this application is not properly before the court.

[21] The other difficulty the Applicant faces has to do with the competence of the application for leave itself. This turns on the nature and status of the judgment in regard to which leave to appeal is sought.

[22] Applicants approach is premised on what is set out in paragraph 5 of its founding affidavit wherein it is motivated as follows:-

> **"This is an application in terms of which the Applicant seeks leave to appeal an <u>interlocutory decision</u> by the learned S.V. Mdladla AJ (as he then was) that was whose judgment was received by the Applicant on the 8th December, 2015."** (sic)

[23 It is so well settled a position that summary judgment is final in its effect that it is trite in our law. In its finality it is executable as it is ostensibly appealable. That is the practical legal impact of summary judgment.

[24] For the sake of restatement of this proposition I may only refer to the words in the works. **Herbstein and Van Winsen (3rd Edition at page 309)** where the learned authors say:

> **"The granting of summary judgment under the present rules is a final and definitive judgment and leave is not required to take such judgment on appeal."**
>
> (see also the case of **Arend and Another vs Astra furnishers (Pty) Ltd 1973 (1) SA 849 (C).**

[25] The **Arend** case clearly emanates from a jurisdiction sharing similar sources to our jurisprudence in the form of common rules and principles and in our view these are of equal force in our law and therefore of persuasive value.

[26] It is only a refusal of an application for summary judgment which is an interlocutory order **(Herbstein and Van Winsen op cit).**

[27] There lies the foremost and major hurdle to the Applicant's application. In this regard if is therefore clearly misconceived.

[28] Now both counsel dedicated a fair amount of argument on the merits as to the correctness of the Court a quo in granting the summary judgment. Much as the subject matter may be interesting we find it unnecessary to venture thus far.

[29] Clearly the Applicant's application presently has a series of in inherent defects let alone shortcomings on the part of the conduct of both Applicant attorneys. This has occasioned this court and the Respondent considerable waste of time. Needless to say it has also mulcted the Respondent in unnecessary litigation and costs.

[30] The application has no merit and therefore is dismissed with costs.

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C. MAPHANGA

ACTING JUSTICE OF APPEAL

I AGREE

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J. S. MAGAGULA

ACTING JUSTICE OF APPEAL

I ALSO AGREE

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Z. MAGAGULA

ACTING JUSTICE OF APPEAL

For the Appellant: Mr M V Dlamini

For the Respondent: Mr T N Nsibande