IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO. 87/2016**

In the matter between:

Musa Makepeace Dludlu **Appellant**

AND

Coal Power Africa (Pty) Ltd	**1st Respondent**
Piet Van Rensburg	**2nd Respondent**
Good Shepherd Hospital	**3rd Respondent**
La Hulley (Pty) Ltd	**4th Respondent**
National Chicks Swaziland	**5th Respondent**
Raleigh Fitkin Memorial Hospital	**6th Respondent**
Swaziland Fruit Canners	**7th Respondent**
Sheng Young Swaziland	**8th Respondent**
Emerald Farm	**9th Respondent**
Rodrigues & Associates	**10thRespondent**

In re:

Musa Makepeace Dludlu **Applicant**

And

Coal Power Africa (Pty) Ltd **1st Respondent**

Piet van Rensburg **2nd Respondent**

Neutral Citation: *Musa Makepeace Dludlu v Coal Power Africa (Pty) Ltd and Others (87/2016) [2018] SZSC 63 (30th November, 2018).*

Coram: **MCB MAPHALALA CJ, SJK MATSEBULA AJA AND MJ MANZINI AJA**

Heard: **3rd October, 2018**

Delivered: **30th November, 2018**

Summary

Civil procedure – application for attachment to confirm jurisdiction by incola against peregrinus company – court a quo granting interim order – on return day peregrinus arguing that applicant should have applied for order to found jurisdiction and that cause of action arose outside of court a quo's jurisdiction – application dismissed on the basis of lack of jurisdiction – appeal against dismissal of application – appeal dismissed

Appeal – respondent filing notice in terms of Rule 35 to vary Order appealed against – court a quo consolidating applications but failing to determine or issue order in respect of other application – whether competent for appellate court to determine merits of application for the first time on appeal – application remitted to court a quo for determination on the merits.

JUDGMENT

MANZININ AJA

[1] The Appellant instituted proceedings by way of notice of motion in the court *a quo* seeking the following relief:

1. **Dispensing with the usual forms and procedures relating to service of proceedings.**

2. **Condoning Applicant's non-compliance with the Rules of Court as they relate to the ordinary time limits and form of service and enrolling this matter in terms of Rule 6 (4) that this matter to be heard as an urgent one.**

3. **The Deputy Sheriffs for the district of Manzini, Lubombo and Shiselweni respectively, be and are hereby authorised and directed to attach *ad confirmandum jurisdictionem* varying amounts of money totally the sum of E676, 646.55 (Six Hundred and Seventy Six Thousand Six Hundred and Forty Six Emalangeni Fifty Five cents) due, owing and payable by the Third to Nineth Respondents to the 1st Respondent, as set out in the schedule marked annexure "CPA1" to the Founding Affidavit.**

4. **Directing that the sum of E126,393.00 (One Hundred and Twenty Six Thousand Three Hundred and Ninety Three Emalangeni) received by the 10th Respondent which is due owing and payable to the 1st Respondent, be and is hereby attached, attached *ad confirmandum jurisdictionem.***

5. **The Deputy Sheriffs be and are hereby directed to remit the money attached in terms of Order 3 and 4 above, to**

the Registrar of the High Court within seven (7) days from date of attachment thereof.

6. **The Registrar of the High Court be and is hereby directed to open an interest bearing bank account, where she shall hold the money attached pursuant to Order 3 and 4 for the relief set out in paragraph 8.1.**

7. **In the event any of the 3rd to 10th Respondents opposing this application, that return date to be determined by this Honourable Court and anticipate the Orders in terms of Prayer 3 and 4 above of the Notice of Motion.**

8. **That a *rule nisi*, do hereby issue calling upon any interested persons to show cause on a date and time as may be determined by this Honourable Court, why an Order in the following terms should not be made..**

    8.1 Equal division and distribution between the Applicant and the 2nd Respondent of the residue of the funds attached in terms of prayers 3 and 4 after deduction of expenses accrued by their joint venture undertaken through the 1st Respondent.

9. **That Applicant be granted leave of Court to serve 1st and 2nd Respondents by edictal citation.**

[2] On the 21st July, 2016 the application was heard by Justice M. Dlamini, who granted prayers 1 to 7 of the Notice of Motion, and issued a *rule nisi* calling upon First and Second Respondents or any interested person to show cause why an Order in terms of Prayer 8.1 should not be made (or granted). The Learned Judge also granted leave to serve First and Second Respondents by edictal citation, and gave directives on the manner of

service. 1st and 2nd Respondents were afforded a period of fifteen (15) days after service of the edictal citation to file an appearance to defend.

[3] The First and Tenth Respondents entered a Notice of Intension to oppose the application, and subsequently filed an Opposing Affidavit which raised several points *in limine*, and dealt with merits as well. The Respondents raised the following points *in limine*:

3.1 Lack of jurisdiction;

3.2 The doctrine of clean hands;

3.3 No legal right to proceeds or division of income belonging to the First Respondent; and

3.4 Failure to satisfy requirements of interdict.

[4] The First Respondent thereafter launched a separate application(hereafter called the second application) under Civil Case No. 1519/2016 against the Appellant hereinafter, as First Respondent; a company called Coal Power For Africa (Pty) Ltd, as Second Respondent; and the First National Bank of Swaziland Limited, as Third Respondent. In the application the following relief was prayed for:

1. Dispensing with the normal rules of court relating to the manner of service, time limits and procedure, and hearing the matter as on to urgency.

2. That the First and/or Second Respondent be and is hereby interdicted from withdrawing and transferring all or any monies from their respective bank accounts held with and operated with Third Respondent including

but not limited to Account No. 57720171033 held at Nhlangano Branch, pending finalization of this matter.

3. **That all the bank accounts of First and Second Respondents held and operated with Third Respondent, whenever they may be held, be and are hereby frozen and suspended with immediate effect pending finalization of these proceedings including but not limited to Account No.57720171033 operated by First Respondent at Nhlangano Brach.**

4. **That all or any funds held in the name of the First and Second Respondents as aforestated with the Third Respondent be and are hereby frozen and suspended pending finalization of action proceedings to be instituted against the said Respondent in the sum of E910, 867.80 (Nine Hundred and Ten Thousand Eight Hundred and Sixty Seven Emalangeni Eighty cents) by applicant herein.**

5. **That a *rule nisi* in terms of Prayer 1 to 4 therein be and is hereby operable with immediate effect, Returnable on or before the 9th September, 2016 whereupon the Respondents to show cause why Prayers 1 to 4 herein should be made final.**

6. **That the First and Second Respondents be and are hereby directed to account fully to Applicant for all proceeds transacted through their respective bank accounts held with the Third Respondent.**

7. **That First and Second Respondents immediately account and disclose to Applicant all sale transactions made to its**

customers in Swaziland including all the records and supporting documents thereto.

8. Granting costs against the First and Second Respondents at attorney and own client scale and against third only in the event of opposition.

[5] The second application was enrolled and heard by Justice T. Dlamini who granted Prayers 1, 2 and 3 of the Notice of Motion, and issued a *rule nisi* to operate with immediate effect calling upon the Respondents to show cause why it should not be made final.

[6] The First Respondent in the second application filed an Answering Affidavit, to which there was a replying affidavit.

[7] The applications were consolidated and heard by Justice Maphalala PJ, as he then was, who handed down the judgment which is the subject - matter of this appeal. After considering the affidavits filed by the parties and the submissions made in support thereof, the Learned Judge concluded that the Court *a quo* had no jurisdiction to hear the matter, that is, the first application, and was not able to find any exceptional circumstances upon which it could exercise jurisdiction. Having concluded that the Court *a quo* lacked jurisdiction the Learned Judge did not deal with the other points *in limine*. The application was dismissed, and the *rule nisi* discharged with costs on the ordinary scale.

[8] The factors which the Learned Judge considered in arriving at his conclusion were as follows:

8.1 The Appellant had failed to allege facts to sustain his "fear of not being able to obtain adequate legal redress in the Republic of South Africa;

8.2 The application was defective on the basis that there was no order to found jurisdiction. That the Appellant had obtained an order to confirm jurisdiction, which is premised upon the court having jurisdiction on some other ground.

8.3 The whole cause of action arose between the parties outside the Court *a quo's* jurisdiction.

8.4 That it was not clear whether the Appellant's cause of action was founded upon partnership (joint venture) or whether it was a shareholders' dispute.

[9] Although the Learned Judge stated in his judgment that he would decide on the second application as well, this escaped him, and, consequently, no Order was made in respect thereof. In fact, there is no indication that the issues raised in the second application were considered at all by the Court *a quo*.

[10] Dissatisfied with the judgment the Appellant filed a notice of appeal on a number of grounds, some of which are totally misconceived as the Court *a quo* did not make any of the "findings" which it is alleged to have made. The grounds of appeal are as follows:

1. The Learned Judge erred in dismissing the application with costs.

2. The Learned Judge erred in law in fact by upholding the point *in limine* on jurisdiction; that court *a quo* lacked jurisdiction.

2.1 An attachment to found or confirm jurisdiction is an attachment of the person or property of one who is domiciled and resident in a foreign country in order to make him amenable to the jurisdiction of the Court. An attachment can found or confirm jurisdiction only in claims sounding in money or relating to property.

3. The Learned Judge misdirected himself in law when he found that the Court was to resolve a shareholder's dispute.

4. The Learned Judge erred in law and in fact when he found that the cause of action arose in South Africa.

4.1 The attached property was within the Court's jurisdiction and the cause of action arose with the Court's jurisdiction.

5. The Learned Judge misdirected himself when he found that the Appellant should not be afforded a hearing in these proceedings.

6. The Learned Judge misdirected himself when he found the following:

6.1 That the Appellant failed to disclose the existence of the company and acted in dishonesty.

6.2 That the Appellant was desirous of defrauding the Respondents.

7. The Learned Judge ignored the fact that the Appellant is a Director of the First Respondent and not an agent.

8. The Learned Judge erred and misdirected itself when he found that Petros Jan Vans Rensburg invested or

contributed money in the sum of E500.000.00 towards the capital investments.

9. **The Learned Judge misdirected himself in finding that the Appellant received and diverted proceeds the proceeds from the 1st Respondent clients into his personal bank account.**

10. **The Learned Judge misdirected himself on the facts when he found that the application lacks sufficient details as to the amount and nature of claim.**

11. **The Learned Judge erred by accepting the Respondents version of events and allowing the Court to be persuaded by same despite that he held not to deal with merits of the matter on reason of upholding point *in limine* on jurisdiction.**

[12] In light of my comments above, I do not intend to deal with all the grounds of appeal, save for those which are relevant to the Order of the Court *a quo* dismissing the application on the basis of lack of jurisdiction. Legal practitioners should be minded to carefully scrutinise judgments and appeal against findings of fact and/or rulings of law which appear in the judgment itself.

[13] On the other hand, the failure of the Learned Judge to deal with and decide the second application prompted the First and Second Respondents in this appeal to issue a "Notice of Intention to Contend that the Judgment of the High Court should be varied in terms of Rules 35 and 36". In terms of the Notice the Respondents

indicated that they intended to apply to this Court to vary the judgment of the Court *a quo* in the following respect:

1. **That the Court *a quo* having found in its judgment that the *rule nisi* in the *ex parte* application under Case No. 1268/2016 be discharged with costs on the ordinary scale, ought to have also found with costs as both matters were heard simultaneously after consolidation.**

2. **That the Court *a quo* erred in law and in fact in not making a determination on the application under Case No. 1519/2016.**

Submissions by the Parties.

[12] Both parties filed lengthy Heads of Arguments in support of their respective causes. The Appellant argued that the Court *a quo* misdirected itself when it failed to consider that the jurisdictional connecting factor or *rationes jurisdictionis* included the conclusion or performance of a contract within its jurisdiction. The Appellant submitted that although the First Respondent was registered as a South African company, it was solely designed to do business in Eswatini. The Appellant further submitted that the Court *a quo* misdirected itself in not finding that the situation of the subject-matter of the cause of action, the debts due to the First Respondent by the Third –Tenth Respondents, was within the Court's jurisdiction, and that the cause of action included the performance of the joint venture contract in Eswatini. The Appellant submitted that the money which was the subject matter of the attachment belonged to the joint venture and not the First Respondent.

[13] The Respondents on the other hand, submitted that the Court *a qu*o did not err in upholding the point *in limine* with respect to lack of jurisdiction. They submitted that the Court *a quo* lacked jurisdiction to resolve the alleged shareholder's dispute regarding the business affairs of a company registered in accordance with the laws of South Africa and carrying on business in that jurisdiction. They further argued that the application was defective on the basis that there was no preliminary Order to found jurisdiction, as the Appellant had only obtained an Order to confirm jurisdiction, which is premised upon the Court having jurisdiction on some other ground, with the *peregrinus* status of the defendant necessitating attachment to confirm jurisdiction.

[14] The Respondents further submitted that the whole cause of action, if any, arose outside the jurisdiction of our courts and the Appellant had failed to provide justifiable reasons why the shareholders' dispute or contractual dispute (joint venture) could not be resolved in South Africa.

Analysis of the submissions and the applicable legal principles.

[15] From the evidence in the record and the submissions of both Appellant and the Respondents, it is common cause that the First Respondent is a company registered in accordance with the laws of South Africa. Furthermore, that it conducts its real and principal business in South Africa. It has no business address or premises in this country.

[16] It is also clear from the affidavits filed of record that the alleged joint venture was entered into in South Africa. According to the Appellant's own version the joint venture "would be carried out through the medium of a company" (the First Respondent). The Appellant repeated the allegation that the joint venture would be operated and carried out through the incorporation of the First Respondent more than once. The

Appellant also alleged that the directors and shareholders of the First Respondent would meet and participate fully in the regular monthly meetings, presumably in South Africa. The Appellant further alleged that the Second Respondent would be responsible for the financial management of the affairs of the 1st Respondent, and would also keep proper books of accounts which would be debated in the monthly meetings. Further, the First Respondent would open a bank account with ABSA Bank, Menlyn, South Africa.

[17] Based on the above allegations (by the Appellant himself) I have no doubt that the principal place of business and the central control of the First Respondent was located in South Africa. Apart from a bald allegation by the Appellant, there are no facts alleged to establish that the performance of the contract (joint venture) was intended to take place in our jurisdiction.

[18] Thus, the facts conclusively confirm that the First Respondent company is, in terms of the law, a *"peregrinus"* in our jurisdiction.

[19] According to ***LAWSA Volume 4 Part 1*** at paragraph 37

> *"A company resides where its central control is located, namely the place where its general superintendence of its affairs takes place and where, consequently, it carries on its real or principal business. At least for jurisdictional purposes, a company also resides where its registered office is located"*.

Several authorities are listed in support of the above stated principles.

[20] Now turning to deal with the contention that the cause of action arose within the Court *a quo*'s jurisdiction. The primary relief which the Appellant prayed for in the Notice of Motion is "equal division and distribution between the Applicant and Second Respondent of the residue of the funds attached in terms of prayer 3 and 4 after deduction of the expenses accrued by their joint venture undertaken through the First Respondent".

[21] In the founding affidavit the Appellant alleged the First Respondent was "nothing more than a vehicle or a medium to carry out the activities of the joint venture and treat it as such for purposes of this application and disregard that it is a company". According to the Appellant's reasoning once the corporate veil of the First Respondent is pierced the two joint venture partners, that is, the Appellant and Second Respondent would be entitled to an equal division and distribution of the attached funds. In other words, the Appellant wants the Court to disregard the fact that the funds which were to be attached are proceeds of contracts entered into by the First Respondent, and legally belong to the company.

[22] What the Appellant is attempting to do is pierce the corporate veil from within the company, that is, "reverse veil piecing". It is trite law that a Court will not lightly pierce the corporate veil of a company unless special or exceptional circumstances are shown to exist. Piercing the corporate veil is a matter of substance, because in doing so a court imposes a scheme of rights and obligations on the parties or members very different from that upon which they arranged their affairs.

[23] The facts of this matter raise a fundamental question – can this Court (or a Court in this jurisdiction) pierce the corporate veil of a company

resident, and carrying on its real and principal business in South Africa, and direct that there should be an equal division and distribution of funds accruing to the company from sales to customers in this jurisdiction, but where it has not been alleged or proved that the sale agreements were concluded in this jurisdiction, on account of a dispute between its members which clearly did not arise in this jurisdiction?

[24] According to ***"Pollak on Jurisdiction"*** (Pistorius, D. 2nd edition, 1993) at page 79:

> *"If a foreign company (which is not an external company as defined) has its principal place of business outside the Republic and does not carry on business within the area over which the Court exercises jurisdiction, it will be amenable to the jurisdiction of that Court only if its property within such area has been attached to found jurisdiction".*

[25] In ***Frank Wright (Pty) Ltd v. Corticas "B.C.M." LTD 1948 (4) SA 456 (C)*** Searle, J stated the legal position as follows:

> *"The respondent is a peregrinus resident and carrying on business in Portugal and accordingly it is essential for the applicant to establish a right to the order of attachment now sought, which can only exist if, after such attachment, the Court will have Jurisdiction to try the action contemplated. This Court has jurisdiction in a suit by an incola against a peregrinus, where the person or goods of the latter have been attached ad fundadam jurisdictionem, by reason of the attachment alone…."*

[26] In *casu*, the Appellant obtained an Order *ad confirmandum jurisdictionem*, and not *ad fundadam jurisdictionem*. On this basis alone the application was fatal. In my view, the Appellant also failed to establish a *rationes jurisdictionis*, which would have warranted a confirmation of the rule nisi. The Appellants' own version indicated that the business affairs of the 1st Respondent were being conducted in South Africa. The Appellant failed to disclose how the facts on which the prayer for the "equal division and distribution" is premised arose in this jurisdiction. In my view, the fact that the Third – Tenth Respondents were local debtors of the First Respondent does not translate into the cause of action arising in this jurisdiction. In the result, I find no basis on which to fault the Learned Judge *a quo*, the appeal is dismissed.

The Notice in terms of Rule 35.

[27] Rule 35(1) of the Rules of this Court proves as follows:

> *(1) It shall not be necessary for a respondent to give formal notice in terms of rule 6 of a cross appeal but every respondent who intends to apply to the Court of Appeal for a variation of the Order appealed against shall within the time specified in rule 36, or such time as the Court of Appeal may Order, give notice of such intention to any parties who may be affected by such variation.*
>
> …..
>
> *(4) The respondent shall state fully in such notice the particulars in respect of which he seeks a variation of the Order and grounds therefore.*

[28] Rule 35 is an alternative to the filing of a cross-appeal by a respondent who is equally dissatisfied with a judgment of the High Court. A cross-

appeal entitles a respondent to apply for a variation of the Order appealed against. A court of appeal may not alter a judgment to the appellant's prejudice, unless the respondent has noted a cross-appeal against such judgment. Rule 35 serves the same purpose as filing a cross-appeal. Thus, where the High Court has failed, in its judgment, to make an Order prayed for by a respondent, the latter would be entitled to either file a cross-appeal or proceed in terms of Rule 35, otherwise this Court would be precluded from considering the issue.

[29] In this appeal, however, the problem lies with the fact that the Learned Judge *a quo* did not consider the second application at all, with the result that if this Court determines the merits, it will be doing so as a court of first instance. And this would be undesirable, if not unprocedural. The relief prayed for under prayers 6 and 7 of the second application is substantive, and is opposed on grounds that require consideration by the Court *a quo*. Any party dissatisfied with the judgment of the court *a quo* should be in a position to exercise the right of appeal. Thus, the second application should be remitted to the Court a quo for determination on the merits.

[30] In the circumstances, the Court makes the following Order:

1. The appeal in respect of the first application is dismissed with costs.

2. The second application is remitted to the Court *a quo* for determination on the merits, before a different Judge.

MJ MANZINI

ACTING JUSTICE OF APPEAL

I agree

_____

MCB MAPHALALA

CHIEF JUSTICE

I agree

_____

SJK MATSEBULA

ACTING JUSTICE OF APPEAL

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