



IN THE SUPREME COURT OF ESW A

TINI JUDGMENT

Civil Appeal Case No: 07/2019

In the appeal between:

TSWELOKGOTSO HEALTH (PTY) LTD Applicant

and

RIVI (PTY) LTD	1 st Respondent
DAVID MAGAGULA N.O.	2 nd Respondent
VIRGINIA DU TOIT	3 rd Respondent
KHANYISA NGCAMPHALALA	4 th Respondent
NEW TENANTS OF HOUSE ATMANTENGA	5 th Respondent

In Re:

TSWELOKGOTSO HEALTH (PTY) LTD Applicant

and

RIVI (PTY) LTD Respondent

Neutral citation: *Tswelokgotso Health (Pty) Ltd vs Rivi (Pty) Ltd and 4 Others* (07/2019) [2019] SZSC 36 (17/09/2019).

Coram: J.M. CURRIE AJA

Heard: 21st August, 2019.

Delivered: 17th September, 2019.

SUMMARY: *Civil Law*

Urgent application seeking restoration of the status quo and the return of applicant's items to leased premises - Respondent raised various points in limine including that the Appeal Court does not have jurisdiction; powers of Supreme Court considered - Held that Appeal Court is not a court of first instance and does not have the power to entertain this application - Application dismissed.

JUDGMENT

J.M. CURRIE AJA

INTRODUCTION

[1] There are two applications before this court being:

- (1) An urgent application dated 12th March 2019 seeking restoration of the *status quo* pending the hearing of the appeal noted on the 27th February 2019 and an order directing the 2nd Respondent to return the applicant's items into the leased premises.

(2) An application dated 9th May 2019 seeking extension of the time limit within which to file the Record of Proceedings in that the learned Judge in the court *a quo* had not delivered a written judgment. This application was not argued before me.

BACKGROUND

[2] On or about the 5th February 2015 the Applicant and the 1st Respondent entered into a lease agreement in terms of which the Applicant would rent and occupy a house, being No. 45 Mantenga Estate, Ezulwini. The Applicant was represented by its own duly authorized representative and the 1st Respondent was represented by the 3rd Respondent, a director of the 1st Respondent, acting on behalf of the 1st Respondent.

[3] The lease agreement terminated on the 31st March 2016 and thereafter the Applicant remained on a monthly tenancy.

[4] The Applicant did not always pay the rentals in time and this was communicated to the 1st Respondent by email and the 1st Respondent did not take issue with this initially as the Applicant would, at times, pay large sums that would cover at least three to four months rental and the 1st Respondent appears to have acquiesced in this arrangement.

[5] However, in August 2018 the 1st Respondent approached the court *a quo* on an urgent *ex parte* basis seeking an order ejecting the Applicant and an order for payment of arrear rentals in the sum of E 68 040.00. The applicant was granted an *ex parte* order ejecting the Applicant from the leased premises. The Applicant made payment of the sum of E 52 920.00 leaving a balance of E 15 120.00. The issue of the payment of arrear rentals remains pending before the court *a quo*.

[6] The matter has therefore not been finalized in the court *a quo* and there appear to have been various negotiations and court appearances, the papers of which are not before this Court. On the 30th January 2019 the Court *a quo* granted an order to the effect that the Applicant

would be permitted to utilize the premises for the month of February 2019 on condition that it paid the monthly rental of E 22 080.00 on or before the 1st February 2019 failing which the 1st Respondent would lease the premises to a new tenant. Furthermore that the Applicant would vacate the premises by the 28th February 2019.

[7] The 1st Respondent contends that the order was a consent order but the Applicant denies that the order was a consent order and on perusing the order it does not appear to me that the order was a consent order.

[8] On the 25th February 2019 the pt Respondent, by letter, informed the Applicant to vacate the premises as per the Court Order.

[9] On the 1st March 2019 the 1st Respondent placed a new tenant in the premises.

[10] On the 27th February 2019 the Appellant filed a Notice of Appeal against the order of the 30th January 2019 which is pending before this Court.

[11] The 1st and 2nd Respondents have raised certain points *in limine* in the first application which are required to be dealt with at the outset being:

(1) JURISDICTION

1st and 2nd Respondents allege that this Court does not have jurisdiction to hear this application to restore the *status quo* pending the hearing of the appeal as it is not a court of first instance. They claim that the matter is still pending before the High Court and that the High Court should have been approached to grant such an order.

(2) AD PEREMPTION

1st and 2nd Respondents submit that the appeal filed in this Court challenges an order granted by consent and that it is not permissible in law to appeal an order granted by consent.

(3) STRIKING OUT

1st and 2nd Respondents apply for the striking out of paragraphs 7.4 to 13 of Applicant's Founding Affidavit in that these

allegations are irrelevant to the matter before this Court. They relate to Phela-Live Wellness Centre and the 3rd Respondent and not the parties before this Court.

THE LAW

[12] It is apparent from sections 14,15 and 16 of the Court of Appeal Act No. 74 of 1954 as well as sections 146, 147 and 148 of the Constitution that the jurisdiction of the Supreme Court is wholly statutory and appellate in nature.

[13] Section 14 of the Court of Appeal Act provides as follows:

"14. (1) 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".

[14] Section 15 of the Court of Appeal Act provides the following:

"15. A person aggrieved by a judgment of the High Court in its civil appellate jurisdiction may appeal to the Court of Appeal with the leave of the Court of Appeal or upon the certificate of the judge who heard the appeal, on any ground of appeal which involves a question of law but not a question of fact".

[15] Section 16 of the Court of Appeal Act provides as follows:

"16. An appeal shall lie to the Court of Appeal where provision is expressly made in an Act for such appeal."

[16] Section 146 of the Constitution of 2005 provides the following:

"146. (1) The Supreme Court is the final court of Appeal. Accordingly, the Supreme Court has appellate jurisdiction and such other jurisdiction as may be conferred on it by the Constitution or any other law.

(2) Without derogation from the generality of the foregoing subsection, the Supreme Court has-

- (a) Such jurisdiction to hear and determine appeals from the High Court of Swaziland and such powers and authority as the Court of Appeal possesses at the date of commencement of the Constitution; and
- (b) Such additional jurisdiction to hear and determine appeals from the High Court of Swaziland and such additional powers and authority, as may be prescribed by or under any law for the time being in force in Swaziland.
- (3) Subject to the provisions of subsection (2), the Supreme Court has for all purposes of and incidental to the hearing and determination of any appeal in its jurisdiction the power, authority and jurisdiction vested in the court from which the appeal is brought.
- (4) A decision of the Supreme Court shall be enforced as far as that may be effective, in the manner as if it were a judgment of the Court from which the appeal was brought.

(5) While it is not bound to follow the decisions of other courts save its own, the Supreme Court may depart from its own previous decision when it appears to it that it was wrong. The decisions of the Supreme Court on questions of law are binding on other courts.

(6) Subject to the provisions of this Constitution or as may be prescribed by any other law, an appeal from the full bench of the High Court (or any other court) shall be heard and determined by a full bench of the Supreme Court."

[17] Section 147 further deals with the Appellate jurisdiction of the Supreme Court, and, it provides the following:

"147. (1) An appeal shall lie to the Supreme Court from a judgment, decree or order of the High Court-

(a) As of right in a civil or criminal cause or matter from a judgment of the High Court in the exercise of its original jurisdiction; or

(b) With the leave of the High Court, in any other cause or matter where the case was commenced in a court lower than the High Court and where the High Court is satisfied that the case involves a substantial question of law or is in the public interest.

(2) Where the High Court has denied leave to appeal, the Supreme Court may entertain an application for special leave to appeal to the Supreme Court in any cause or matter, civil or criminal, and may grant or refuse leave accordingly."

[18] Section 148 deals with the supervisory and review jurisdiction of the Supreme Court, and provides the following:

"148. (1) The Supreme Court has supervisory jurisdiction over all courts of judicature and over any adjudicating authority and may, in the discharge of that jurisdiction, issue orders and directions for the purposes of enforcing or securing the enforcement of its supervisory power.

(2) The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by an Act of Parliament or rules of Court.

[19] The first point *in limine* raised by the 1st Respondent is the issue of jurisdiction of this Court.

[20] With reference to the law set out above it is clear that this Court is a creature of statute and does not have original jurisdiction to hear matters of first instance and neither the Supreme Court rules nor the Constitution nor any other legislation provide for same.

[21] The 1st Respondent is seeking specific performance in seeking an order for the restoration of the *status quo* pending appeal and an order that the Applicant's goods be returned to the premises which were leased pending the appeal. The order sought by the Applicant seeking that the goods be returned to the leased premises is inexplicable in that the Applicant is fully aware that the leased premises have already been let to an innocent third party and the lease has been cancelled.

[22] In any event the orders sought are beyond the powers of this court and stand to be dismissed as this is not a court of first instance. As was eloquently stated by Justice Ota in the matter of Clement Nhleko V MH Mdluli and Company and Another Civil Case No. 1393/09 (unreported) at page 14 -

'I find it expedient to add here, that it is undoubtedly the duty of the Court to guard its jurisdiction jealously. It is however not the duty of the Court to expand its jurisdiction, that is the province of legislation. For a court to assume jurisdiction that it clearly lacks is to tow a dangerous path. This is because jurisdiction is the soul and foundation of every case. Without it all the labourers, the Court, Attorneys as well as litigants labour in vain. This is due to the fact that the decision of the Court at the end of the day will amount to a nullity by reason of that lack of jurisdiction "

[23] It is trite that the noting of any appeal suspends the operation of the judgment appealed against and that the court of first instance would be *functus officio* save as regards the power, on formal application, to order that the order appealed against be put into operation pending appeal. The Supreme Court, in general, is not possessed of any

power to grant interim or injunctive or mandatory relief and in particular, any power to order operation of a judgment pending appeal.

[24] The application therefore must fail on the first point raised *in limine* and it is not necessary to deal in detail with the other points raised in detail.

(25) There is no merit in the point that the appeal which has been filed challenging a consent order and that therefore the Applicant ought to be estopped from challenging the said order. There is no evidence before this Court whatsoever that the order made was a consent order and for this reason this point is dismissed.

(26) The issue of striking out does not require further consideration.

ORDER

[27] Accordingly the Court makes the following order:

1. The Application is dismissed.

2. Costs are awarded to the 1st and 2nd Respondents.

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ACTING JUSTICE OF APPEAL

For the Applicant: MR. B. GAMEDZE

For 1st & 2^od Respondents: MR. W. MASEKO