IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Civil Appeal Case No. 56/2020

HELD AT MBABANE

In the matter between:

GOOD SHEPHERD MISSION HOSPITAL **Applicant**

and

SIBONGILE BHEMBE **Respondent**

In re:

GOOD SHEPHERD MISSION HOSPITAL **Appellant**

and

SIBONGILE BHEMBE **Respondent**

Neutral citation: *Good Shepherd Mission Hospital vs Sibongile Bhembe* (56/2020) [2020] *SZSC* 32 (22/10/2020)

Coram: **S.B. MAPHALALA JA, J.M. MAVUSO AJA AND M.J. MANZINI AJA.**

Heard: 24 September, 2020.

Delivered: 22 October, 2020.

SUMMARY: *Application for stay of High Court proceedings pending determination of appeal – High Court, in ex tempore judgment, dismissing application for rescission of its own judgment and for leave to defend main action – Applicant instantly noting appeal against ex tempore judgment – High Court proceeding with trial notwithstanding notice of appeal – Whether High Court judgment final or interlocutory – Principles governing finality of judgment considered – Legal principle to the effect that noting of appeal against final judgment stays execution of that judgment considered – High Court judgment held to be final in effect and proceedings should have been stayed – Successful party deprived of favourable costs order owing to dilatory conduct – Order for stay of proceedings granted.*

JUDGMENT

M. J. MANZINI AJA

[1] The Applicant/Appellant, Good Shepherd Mission Hospital, is a medical institution based at Siteki in the Lubombo Region.

[2] The Respondent, Sibongile Bhembe, is a former patient who was operated upon by medical staff in the employ of the Applicant.

[3] Serving before this Court is an unusual application, brought on a certificate of urgency, to stay High Court civil trial proceedings before His Lordship Magagula J., pending an appeal noted against an *ex tempore* Judgment or Order made by the learned Judge on the 9th September, 2020. The application was launched on the same date of the Judgment or Order sought to be impugned in the appeal. The brief facts leading up to the application are as follows:

3.1 The Respondent, as Plaintiff, issued summons against the Applicant/Appellant claiming damages against the latter;

3.2 The action was defended by the Applicant/Appellant, who filed a Plea;

3.3 All subsequent pleadings were exchanged between the parties, and, the pleadings having been closed, the matter was eventually set down for trial on the 10th, 11th and 12th March, 2020;

3.4 However, the Applicant/Appellant's erstwhile attorneys, Henwood and Company, for reasons not relevant to the determination of this matter, then filed a Notice of Withdrawal as Attorneys of Record on or about the 5th March, 2020. The said notice was sent by registered mail;

3.5 The Applicant/Appellant did not appoint new attorneys or furnish an address at which to receive notices in connection with the proceedings, as is required by the High Court Rules. As a result of this failure, the Respondent set the matter down on the 17th April, 2020 for an Order dismissing the Applicant/Appellant's Plea, and for leave to lead evidence in proof of damages. The Notice of Set Down was not served on the Applicant/Appellant;

3.6 On the 17th April, 2020 the Court *a quo* granted an Order dismissing the Applicant/Appellant's Plea, and also granted the Respondent leave to lead evidence in proof of damages. The Applicant/Appellant was not served with this Order;

3.7 The matter was allocated the 9th and 10th September, 2020 for the purpose of leading evidence in proof of damages. The Applicant/Appellant was not served with the Notice of Set Down for the resumption of the trial on the 9th and 10th September, 2020;

3.8 On or about the 4th September, 2020 the Applicant/Appellant appointed its current attorneys, who established on the 8th September, 2020 from the Court file that the matter was due to be heard on the 9th and 10th September, 2020;

3.9 The attorneys for the Applicant/Appellant engaged the Respondent's attorneys and attempted to arrange for a postponement of the trial, coupled with a tender to pay wasted costs, but this was declined;

3.10 In light of the refusal, the Applicant/Appellant prepared an application seeking a stay of the trial proceedings, rescission of the Order granted on the 17th April, 2020, and for leave to defend the main action. It is alleged that the Respondent's attorneys refused to accept service of the application;

3.11 On the 9th September, 2020 the Applicant/Appellant's attorneys appeared in Court and moved the application referred to in paragraph 3.10 hereof, after handing it in from the bar;

3.12 The learned Judge heard submissions made by the respective attorneys and thereafter made an *ex tempore* Judgment or Order dismissing the application. The reasons for the dismissal have not been provided;

3.13 On the same date of the Judgment or Order the Applicant/Appellant filed a Notice of Appeal; and

3.14 Notwithstanding the Notice of Appeal the matter proceeded on the 10th September, 2020, and evidence was led. Submissions have since been made and the matter is now awaiting judgment on the quantum of damages.

[4] On the 10th September, 2020 the current proceedings were instituted by the Applicant/Appellant. The application is opposed by the Respondent.

[5] A fundamental issue which looms large in this matter, which might well be dispositive of the application, is the effect of the filing of the Notice of Appeal on the trial proceedings: did it have the effect of automatically staying the proceedings pending final determination of the appeal, or not? Counsel for the respective parties were invited to address us on this point.

[6] Counsel for the Applicant/Appellant submitted that although the application was interlocutory in nature, the Judgment or Order dismissing the application for rescission and for leave to defend the main action was final in effect. He argued that on this basis the trial proceedings should not have been continued, pending the outcome of the appeal. On the contrary, Counsel for the Respondent argued that the Judgment or Order was interlocutory. Thus, the argument went, the Applicant/Appellant ought to have first applied for leave to appeal. He submitted that the proceedings in the Court *a quo* had not been finalised, as judgment on the quantum of damages had not been handed down. He contended that the Applicant/Appellant ought to have awaited the judgment on the quantum of damages, and thereafter apply for a stay of execution, as the Judgment or Order would then have been be final. In essence, the argument was that there is no proper appeal pending before this Court.

[7] Having considered the affidavits filed by the parties, I am of the view that although the application for rescission and for leave to defend the main action was interlocutory in nature, in the sense that it was made in the course of the proceedings, its dismissal was, in effect, a final Judgment or Order of the High Court. The Judgment or Order had all the significant attributes of finality. Firstly, the dismissal of the application shut the door and fastened the Applicant with liability for payment of damages. The dismissal confirmed the Order of the 17th April, 2020 – which dismissed the Applicant/Appellant's Plea. The Plea is in effect a denial of liability for payment of damages. Thus, by dismissing the application for rescission and for leave to defend the Judgment or Order disposed of a substantial portion of the relief claimed by the Respondent in the main action. Secondly, the dismissal granted the Respondent definite and distinct relief, in that the issue of liability was resolved in the Respondent's favour. Lastly, the Judgment or Order of Court could no longer be reversed by the Court *a quo*. These are important attributes of finality which this Court has approved and applied in several of its judgments. See – ***Tricor International (Pty) Ltd v. The New Mall (59/2012) [2013] SZSC 41 (31 May 2013); Mfanuzile Vusi Hlophe v. The Ministry of Health and Two Others (20/2016 [2016] SZSC 38 (30***

June 2016); Sikhumbuzo Dlamini v. The Quadro Trust and Others (01/2018) [2018] SZSC 5 (2018).

[8] The position in our jurisdiction is that the noting of an appeal against a final Judgment of the High Court automatically stays the execution of that Judgment pending final determination of the appeal. The Judgment or Order cannot be carried out or given effect to unless leave to execute has been first obtained. This age old principle was succinctly stated in ***Reed and Another v. Godart and Another 1938 AD 513*** where **De Villers JA** stated as follow:

> ***"Now, by the Roman Dutch Law the execution of all judgments is suspended upon the noting of an appeal; that is to say, the judgment cannot be carried out and no effect can be given thereto, whether the judgment be on for money (on which a writ can be issued and levy made) or for any other thing or for any form of relief granted by the Court appealed from. That being so, I see no reason why the Rules should be confined to judgments on which a sheriff may levy execution. The foundation of the common-law rule as to the suspension of a judgment on the noting of an appeal, is to prevent***

irreparable damage from being done to the intending appellant, whether such damage be done by a level under a writ, or by the execution of the judgment in any other manner appropriate to the nature of the judgment appealed from".

[Own underlining]

See too: ***Swazi MTN Limited and Others v. Swaziland Post and Telecommunications Corporation High Court Case No. 1896/2010; Doctor Lukhele v. Swaziland Water Agricultural Development Enterprises Ltd High Court Case No. 1504/2011.***

[9] My conclusion that the dismissal of the application for rescission and for leave to defend the main action was a final Judgment or Order, coupled with the trite principle that an appeal against a final judgment of the High Court automatically stays the execution of that judgment or order, begs the question whether it was correct for His Lordship Magagula J. to proceed with the trial, in light of the Notice of Appeal. Clearly, he ought not to have proceeded. Proceeding with the trial after an appeal had been noted against his final Judgment or Order clearly prejudiced the Applicant/Appellant's

right to appeal the decision fastening it with liability to pay damages to the Respondent. It is in the interests of justice that the Applicant should retain the opportunity of showing that the Judgment or Order appealed against is incorrect, if indeed this is the case. The Applicant/Appellant is not obliged to wait for judgment on the quantum of damages before seeking redress, as was suggested by Counsel for the Respondent. A litigant who properly files an appeal against a final Judgment or Order of the High Court should legitimately expect an automatic stay of the execution of that Judgment or Order pending the appeal. To hold otherwise would be to subvert the age old principle that an appeal automatically stays execution of judgment pending final determination of the appeal, unless leave to execute the judgment has first been obtained.

[10] In my view, the present application for the stay of the High Court proceedings would have been unnecessary if the above stated principle had been given effect to. The prejudice to the Applicant/Appellant if the trial proceeds, as is the case, and its right to appeal frustrated is manifest. On the other hand, the Respondent stands to suffer no prejudice, since it will still have the opportunity to prove its claim in due course. In the circumstances I do not find it necessary to deal with the issue of prospects, or lack thereof, of

success in the appeal, or the existence or non-existence of an alternative remedy. These issues simply have no bearing in the determination of this matter. According to ***Erasmus Superior Court Practice Volume 2 Second Edition 2016*** at D1-603

> *"As a general rule the court will grant a stay of execution where real and substantial justice requires such a stay or, put otherwise, where injustice will otherwise be done."*

See too: ***Soja Ltd v Tuckers Land Development Corporation (PTY) Ltd and Another 1981 (2) SA 407 (WLD); Road Accident Fund v Srtydom 2001 (1) SA 292 (CPD);Gois t/a Shakespear's Pub v Van Zyl and Others 2011 (1) SA 148 (CLC)***

[11] Effectively, unless a stay of the proceedings is granted, the Applicant/Appellant will lose its right to appeal against the Judgment or Order, and, on this basis, it is hereby granted.

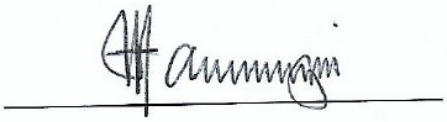
[12] On the issue of costs a fair result dictates a deviation from the general rule that costs follow the event. I am of the view that the Applicant/Appellant was dilatory in bringing the application for rescission and for leave to defend

the main action. The deponent to the affidavit founding the application stated that she became aware in mid June 2020 that there was a matter before Court involving the Applicant/Appellant, which they did not attend. She also stated that she was informed by Respondent's Counsel that the matter had been postponed to the 9th September, 2020. It is not clear what prevented the Applicant/Appellant from engaging their attorneys and establishing the status of the proceedings. This would have enabled Applicant/Appellant to act timeously, and avoid the last minute application for rescission. For this reason I am of the view that Applicant/Appellant should be deprived of a favourable costs order. This is by no means a determination that because of the delay Applicant/Appellant should be non-suited in its appeal against the refusal of the application for rescission.

[13] In the result, the Court makes the following Order:

1. The High Court proceedings in respect of Case No. 79/2020 before His Lordship Magagula J. are hereby stayed pending final determination of the appeal noted by Applicant/Appellant on the 9th September, 2020.

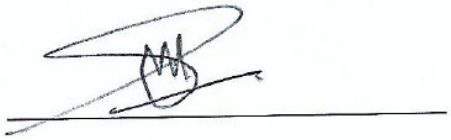
2. Each party is to bear its own costs in this application.



M.J. MANZINI

ACTING JUSTICE OF APPEAL

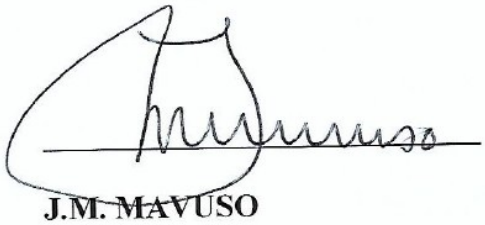
I agree



S.B. MAPHALALA

JUSTICE OF APPEAL

I agree



J.M. MAVUSO

ACTING JUSTICE OF APPEAL

For the Applicant: MR. K. SIMELANE

For the Respondent: MR. S. BHEMBE