IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO. 80/2017**

In the matter between:

THE CHAIRMAN, LIQUOR LICENSING BOARD	**First Applicant**
THE ATTORNEY GENERAL N.O.	**Second Applicant**
And	
THULANI RUDOLF MASEKO	**Respondent**
In re:	
THE CHAIRMAN, LIQUOR LICENSING BOARD	**Appellant**
And	
THULANI RUDOLF MASEKO	**Respondent**

Neutral Citation: The Chairman, Liquor Licensing Board vs Thulani Rudolf Maseko (80/2017) [2020] SZSC12 (14 May 2020).

Coram : MJ Dlamini JA

Heard : 22 April, 2020

Delivered : 14 May, 2020

Civil procedure – Appeal struck off the roll and not to be reinstated without leave of court – Application for leave to reinstate the appeal – Court composed by single Judge – Challenge to the composition of the Court.

Respondent challenged the composition of the Court by a single Judge of the Supreme Court, arguing that since the decision of the single Judge would have a substantive effect and impose upon the Order of the Supreme Court of three Justices, it was likely to affect and cause prejudice to the rights of the respondent. A single Judge was therefore not competent to deal with the matter.

Held, *that the Court was duly constituted by a single Judge since the decision of the Judge would not dispose of any part of the main matter before the Supreme Court.*

JUDGMENT

MJ Dlamini JA

Introduction

[1] This is an application for leave of court to reinstate an appeal noted on 3rd October 2017 but struck off the court roll on 10 October 2018, and not to be reinstated without leave of court. The appellant applied for reinstatement on 5 November 2018. The application was duly opposed by answering affidavit dated 9 November 2018. The application for reinstatement, however, had to be deferred as a result of two challenges to the composition of the Court raised by the respondent.

Background

[2] To the extent relevant here, the appeal in question arose from a judgment of Mlangeni J handed down on 6 October 2017 following an *ex tempore* judgment delivered on 22 September 2017 in which the learned Judge set aside the decision of the Liquor Licensing Board denying the respondent the grant of a liquor license to operate a wine and malt outlet on Swati nation land. The Attorney-General

representing the first applicant noted the appeal but failed to follow up with the record and heads of argument as required by the Rules. As a result, on 26 February 2018 the respondent applied for an order declaring the appeal to be deemed abandoned and dismissed in terms of Rule 30(4). No opposing papers were filed by the appellants by 27 March 2018 as required in respondent's notice of motion. The respondent also did nothing to expedite his application. On 10 October 2018 that application was still pending when the Order striking off the appeal was made.

[3] As already stated, the application under Rule 30 (4) was filed on 26 February 2018, prior to the order striking the appeal from the roll. The order striking the appeal off the roll says nothing about the Rule 30 (4) application. Nor is it in anyway apparent from the Order why the appeal was struck off the roll and why the Rule 30 (4) application is not adverted to. The Order simply records that *"Having heard Counsel for the Appellants and Respondent . . ."* it is ordered that the appeal be struck off the roll and *"may not be reinstated without leave of court"*, and appellant to pay the wasted costs. It was only a year later on 12 November 2019 that the Rule 30 (4) application was mentioned by way of it being postponed *sine die* and *"the matter ( ) referred to the Chief Justice for direction and allocation relating to the date upon which the matter is to be heard and the panel of Judges to hear the matter"*. Again, it is not clear from the Order what the "matter" referred to was: Was it the Rule 30 (4) application or the appeal? I was later informed during the hearing that the 'matter' referred to in the Order of 12 November 2019 was a recusal application. Since the Rule 30 (4) application was postponed *sine die* it must be duly enrolled for hearing and likewise the counter-application. As a result, both applications cannot be before me in this leave for reinstatement proceedings, notwithstanding the strenuous argument by the attorney for the respondent.

[4] The respondent opposed the application for leave to reinstate. In his answering affidavit dated as hereinbefore stated, the respondent included a "counter-

application", challenging the Order of the Supreme Court dated 10 October 2018 and seeking for its setting aside in terms of section 148 (2) of the Constitution. How the counter-application could be set down separately for hearing as it was appended to the respondent's opposition to the reinstatement is not clear to me. In general, only when the reinstatement is set down could the review of the Order of 10 October, 2018 be attended to. But there is still a hurdle. A Full Bench of the Supreme Court would be required for the review under section 148 (2), while a single Judge has been assigned for the reinstatement application. Evidently, the counter-application could not be pursued. This in my view is the predicament – self-made predicament – in which the respondent has placed himself: a dual combat that cannot be fought effectively on the same battleground.

[5] It is again not clear on the papers before me how this happened, but on 29 May 2019 the Supreme Court issued an Order, "by consent" of the parties, that the *"appeal be enrolled in the next session of the Supreme Court"*. I would have thought that before the Supreme Court on 29 May, 2019 would have been the application for leave to reinstate. The appeal had been struck off since 10 October, 2018. Was the Order of 29 May 2019 in effect a grant of the reinstatement permitting the enrolment of the appeal? Hard to say. The papers before me do not explain. If the appeal was ordered to be enrolled as stated why this application for leave to reinstate.[1]

[6] When, during the second session of the Supreme Court in 2019, the appeal would have been set down or enrolled and heard, we have instead an Order of the Supreme Court dated 12th November 2019. As already noted, by that Order the Supreme Court postponed *sine die* the Rule 30 (4) application. Nothing is said of the appeal as such. Was the appeal in fact enrolled as earlier ordered? Still no clear answer. What has

[1] The Order of 29 May 2018 seems to have been a follow up to the Order of 7 May 2018 which ordered the filing of papers in the application for the recusal. That Order in para 5 stated: "The main matter and the application already filed of record be allocated a date in course of current session of the Court". The reference to 'main matter' in this Order would seem to refer to the application for leave to reinstate the appeal. This application, however, was not enrolled even during the second session of 2019.

been enrolled, not in the second session of 2019 but in this first session of 2020, is the application for leave to reinstate the appeal.

Re-instatement hearing and Objection thereto.

[7] At the start of the hearing of the leave to reinstate Mr. Howe, for the respondent, stood up first, stating that the hearing before Court was for the Rule 30 (4) application and not the reinstatement. In that case the Court was not properly constituted by a single Judge. Mr. Howe may have been correct in his assertion but then the single Judge had not been empaneled for the Rule 30 (4) application. A couple of verbal exchanges between the bench and Mr. Howe ensued culminating in a request by Mr. Howe for a short-break to allow the parties to consider an alternative way forward. That was granted but, not unexpectedly, the parties did not agree.

[8] The hearing had to proceed on the leave for reinstatement as had been the roll. To this, Mr. Howe again objected arguing that a single Judge was not competent to hear and decide the matter which as far as he was concerned raised substantive and definitive issues bearing on the rights of the parties. According to Mr. Howe, as he applied from the bar, the issues raised in the reinstatement application had a final and definitive effect likely to be prejudicial and cause inconvenience to the respondent. Mr. Howe further argued that since the order striking the appeal from the roll and permitting reinstatement of the appeal by leave of court was made by a three-Judge court a single Judge could not properly deal with the reinstatement application which entails a definitive order. By reinstatement, the cause is advanced to the prejudice of the respondent or so Mr. Howe further argued, as he went on to seek to distinguish the **Big Tree Filling Station** case *(infra)* from the present in that **Big Tree Filling Station** concerned a stay of execution while the present case concerns leave to reinstate an appeal which had been struck off.

[9] Instead of the leave to reinstate the court had to deal with the objection to the single Judge *coram* raised by Mr. Howe and opposed by Mr. Simelane, for the applicant. From one end the issue raised may be said to be constitutional, but, with respect, that would be a false alarm. An application for recusal of a sitting Judge is from one end constitutional but that is not the way it is ordinarily treated at the hearing. That is how we have viewed the application challenging the single Judge. And judicial notice might as well also be taken in that several of these interlocutory applications concerning leave to appeal, leave to reinstate, or extension of time have been routinely dealt with by single Judge of the Supreme Court.

[10] It was not clear in Mr. Howe's argument what exactly section 149 of the Constitution allows a single Judge to do in the exercise of the power vesting in the Supreme Court but *"not involving the determination of the cause or matter before the Supreme Court"*. It was, however, clear that Mr. Howe's objection revolves around the nature of an order of reinstatement as might be pronounced by a single Judge. Mr. Simelane did not agree with Mr. Howe's submission. Mr. Simelane argued that the court was duly constituted for purposes of the reinstatement. Reinstatement determines nothing substantive. The matter reinstated might still not succeed notwithstanding any professed prospects of success. The application for reinstatement is not the end but a means to an end. It is not granted for its own sake.

Standing of a single Judge – section 149 of the Constitution

[11] The position of a single Judge is provided for by section 149 of which sub-section (3) in part states that *"... any order, direction or decision"* of a single Justice may be *"varied, discharged or reversed"* by the Supreme Court of three Justices. In terms of this subsection the question of leave does not arise. An aggrieved party is given the right to appeal regardless of the nature or character of the order in issue. Accordingly, the competence or power of a single Justice acting in terms of section 149 should not arise. The single Judge is exercising powers of the Supreme Court subject only in that

the single Judge cannot determine or dispose of any portion of the *"cause or matter before the Supreme Court"*. *In casu,* the appeal is not before the single Judge. The matter of the appeal is a matter for the Supreme Court. It awaits the final determination or disposal by that Court, unless, of course, it is allowed by the parties to float or lie in limbo indefinitely to the inconvenience of the registrar. If the appeal is reinstated it will come before the Supreme Court as regularly constituted in terms of section 145 of the Constitution. Whether the appeal is reinstated or not the aggrieved party is free to approach a quorum of three Justices of the Supreme Court and, may be, a Full Bench on review.

[12] Section 149 of the Constitution is somewhat unique: it does not use the term 'interlocutory' but that the single Judge may exercise power *'not involving the determination of the cause or matter'* before the Supreme Court. To the extent that the decision of the single Judge must not involve the determination of the cause or matter before the Supreme Court, the decision is interlocutory. The decision may *"be varied, discharged or reversed"* by the Supreme Court of three Justices *"at the instance of either party to that matter"*. The section does not use the word 'appeal'. How the aggrieved party approaches the Supreme Court of three Justices is not stated. The section is silent as to whether the 'appeal', if appeal at all, is with or is without leave. Presumably the appeal is without leave: that is how it has been treated any way. To the extent that it is appealable the decision of the single Judge must be deemed to be final in effect. But if it is final, then it disposes of some issue or portion of the main action or suit. Question is: Is it really final? If so, what part of the main action or suit does it dispose of?

[13] Simply stated: section 149 provides for an interlocutory decision by a single Judge. The decision of the single Judge has in the past been treated as having a final and definitive effect and accordingly appealable. For our purposes, however, there is no compulsion to thoroughly interrogate the section. The simple course laid before

the parties under the section is that the decision of the single Judge does not or ought not to dispose of or even pass upon any part of the main matter before the Supreme Court. In this case, that is the matter of the appeal. The decision of the single Judge is 'appealable' regardless of its character as an interlocutory decision. But as already pointed out, the word 'appeal' does not appear anywhere in section 149. Subsection (2) of the section reads: *"In criminal matters, where a single Justice refuses or grants an application in the exercise of power vesting in the Supreme Court, a person affected by such an exercise is entitled to have* ***the application determined*** *by the Supreme Court constituted by three Justices"*. [My emphasis] Subsection (3), although worded slightly differently would seem to support review rather than appeal as it provides that the decision of the single Justice (granting or refusing the application) *"may be* ***varied, discharged or reversed*** *by the Supreme Court of three Justices at the instance of either party ..."* [My emphasis]. Is "appeal" in anyway implied in these words? That is assignment for another Court.

[14] If section 149 produces an appeal, then the decision emanating from the section would ultimately culminate in a review under section 148(2). The implications of such a process are truly dire – a recipe for justice delayed. However, if we are to stop the Full Bench review of a decision arising from section 149, then the so-called appeal to the full court in terms of subsection (3) must be reconfigured as a review and not an appeal as has been thought. Afterall the decision of a single Judge does not dispose of any part of the main action or suit; so why go the whole hog. On principle, it would not make good sense to review the same decision twice by a superior court. The sooner rules of court are promulgated the better for all concerned.

[15] Mr. Howe's argument, in my view, takes the proceedings a step back. It questions the character of the leave to reinstate – whether it is interlocutory or purely interlocutory. In my view, this question does not arise; if it arises then it has been answered by the provisions of section 149. An aggrieved party has the right to

escalate and present his grievance before a three Judge bench of the Supreme Court without having to first determine whether the decision of the single Judge is interlocutory and appealable or purely interlocutory and not appealable except with leave. It is to be noted however that the decision reached by the full court is in effect a decision of the single Judge: it is the decision which the single Judge ought to have reached. This must be so since the single Judge was acting in terms of section 149(1), that is to the extent "not involving the determination of the cause or matter before the Supreme Court". In other words, though the matter has been escalated "at the instance" of one of the parties, it is still a matter within the jurisdictional limit of the single Judge under section 149(1). The full court is not exercising the full powers of the Supreme Court: it is only exercising the modified powers of the single Judge. The advantage of the Supreme Court is one of numbers in that it has a quorum of three Justices empowered to vary, discharge or reverse (or confirm) the decision of the single Judge. The jurisdiction exercised by the full court although authorized by section 149 is in effect akin to the jurisdiction exercised under section 146(2) (b).

[16] Some seventy years or so ago in **Pretoria Garrison Institutes**[2] Watermeyer CJ eloquently stated:

> *"The characteristic quality of a final judgment is its conclusiveness or definitiveness so far as the court pronouncing it is concerned. By that I mean that the court pronounces its ultimate decision upon the point decided by the judgment and that the same point will not in the course of the case again be open for consideration. Its effect is to determine the rights of the parties as regards the point dealt with and in the absence of an appeal the decision becomes* res judicata *between the parties and they are then entitled to adopt whatever procedure the law lays down for the purpose of enforcing those rights."*

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[2] **Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd** 1948 (1) SA 839 (AD), pp 846 - 8

[17] In **South Cape Corporation** case[3], Corbett JA in summary stated the situation as follows:

> *"(a) In a wide and general sense the term 'interlocutory' refers to all orders pronounced by the Court upon matters incidental to the main dispute, preparatory to, or during the progress of, the ligation. But orders of this kind are divided into two classes: (i) those which have a final and definitive effect on the main action; and (ii) those, known as 'simple (or purely) interlocutory orders' or 'interlocutory orders proper' which do not. ... (c) The general list as to whether an order is a simple interlocutory one or not was stated by Schreiner JA in the* ***Pretoria Garrison Institutes*** *case, supra, as follows (at p. 870): '... a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to 'dispose of any issue or any portion 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'. ... (e) At common law a purely interlocutory order may be corrected, altered or set aside by the Judge who granted it at any time before final judgment; whereas an order which has final and definitive effect, even though it may be interlocutory in the wide sense, is* res judicata..."

[18] As already intimated, the objection to the jurisdiction of the single Judge in the matter of leave to reinstate seems to be based on the outdated understanding of interlocutory orders. The interlocutory order or decision under section 149 does not preserve anything or significantly alter anything affecting the rights of the parties. It may be said to cause the respondent some degree of prejudice or inconvenience by returning him to the battlefield. Still, nothing much is lost by the respondent or gained by the applicant. It is on the determination of the appeal that something significant is

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[3] **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd** 1977 (3) SA 534 (AD), pp 549 – 50.

lost or gained by the litigants. As Herbstein and Van Winsen say: *"...Though it may cause great, indeed irreparable, prejudice to the respondent, it clearly does not dispose of any issue or any portion of an issue in the main action or suit".*[4] That is critical.

[19] In the **African Wanderers Football Club** [5] case it was argued that the order granted by Howard J *"clearly prejudiced the appellant in that, inter alia, the respondent was authorized to manage and control all the affairs of the Wanderers Football Club including the said professional team; the order granted by Howard J, was clearly not an interdict* ad servandam causam. *It had the force of a definitive sentence and was accordingly a final judgment... Although it had been held in certain cases that an interdict granted pending the determination of an action is an interlocutory matter from which no appeal lies, this applies only to those interdicts in which the relief sought is* ad servandam causam, *that is to preserve the* status quo, *and cannot apply in cases where the grant of an interdict* pendente lite *may cause irreparable harm to the respondent as is the position in the present case. The order made in the present case had the effect of a definitive judgment..."* (p 40.) To the foregoing argument Muller JA responded: [6] *"The fact that the order made by Howard J. could well prove to be prejudicial to the company does not therefore justify a contention that the order was a final and definitive order and not merely an order* ad servandam causam"

[20] The outdated approach simply looked at the artificial impact of the order on the respondent. In this regard Wessels JA in the **Globe and Phoenix**[7] case states as follows: *"We have not to look to any inconvenience or even expense which an interim order may cause to the person against whom such order operates. We must look to its effect upon the issue or issues in the suit".* Schreiner JA in **Pretoria Garrison Institutes** case, *supra,* after referring to the **Globe and Phoenix,** case stated: *"The earlier*

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[4] **The Civil Practice of the High Courts of South Africa**, 5th ed. p 1209.
[5] **African Wanderers Football Club (Pty) Ltd v Wanderers Football Club,** 1977 (2) SA 38 (AD)
[6] **Ibid** at p 48G
[7] **Globe and Phoenix Gold Mining Co. Ltd v Rhodesian Corporation Ltd** 1932 AD 146 at 155

judgments were interpreted in that case and a clear indication was given that regard should be heard not to whether the one party or the other has by the order suffered an inconvenience or disadvantage in the litigation which nothing but an appeal could put right, but to whether the order bears directly upon and in that way affects the decision in the main suit".

[21] The case of a Justice of the Supreme Court sitting alone occurred in the consolidated matters of the **Minister of Housing and Urban Development v Sikhatsi Dlamini and 10 others,** Case No 31/2008; **The Chairman of the Commission of Enquiry into the Operations of the Municipal Council of Mbabane v Sikhatsi Dlamini,** Case No.32/2008, and **Sikhatsi Dlamini and 10 others v Walter Bennett and others,** Case No. 38/2008. The judgment of the Supreme Court, on appeal, was delivered on 20 November 2008 (per Zietsman JA, Ramodibedi JA and Magid AJA). In the several applications and counter applications that were involved in these matters, relevant to this case was the decision, dated the 9th September 2008, of the then learned Chief Justice (RA Banda) who set aside the order of SB Maphalala J., as he then was, dated 19 June 2008 which had been granted *"pending the finalization of the main application"*. The Chief Justice, sitting as a single Justice in terms of section 149 (1) of the Constitution, in para [10], stated as follows:

> *"There can be no doubt in my judgment, on the basis of these authorities, that the judgment of Maphalala J. in the court below was a decision which is definitive of the rights of parties and has the effect of disposing of the major portion of the relief that was sought".*

[22] Reacting to the above statement, on appeal in terms of section 149 (3), the Supreme Court (per Ramodibedi JA for the full court) stated at para [26]: *"With due respect, I regret that I am unable to agree with this statement on the facts of this case. It will be recalled ...that Maphalala J's order was made specifically* 'pending the finalization of the main application'. *Quite plainly, therefore, it was not meant to be*

final in effect. Indeed, the latter could hardly be the case because Maphalala J did not dispose of the merits of the main application which remain outstanding to date... It follows that the order was purely preparatory or incidental to the main application. See for example **Jerry Nhlapho and 24 Others v Lucky Howe NO** *(in his capacity as liquidator of VIP Limited in Liquidation)* Civ App No. 37/07". In the event, the order of Maphalala J. was restored by the Supreme Court. That Order as set out in the notice of motion read as follows: *"2 Setting aside or interdicting implementation of the Ministerial Order dissolving the Council of Mbabane pending the finalization of the main application, . . ."*[8]

[23] The learned Chief Justice in the **Sikhatsi Dlamini** case (supra) observed that the issue he had to resolve was whether the judgment of Maphalala J was *"appealable or not and whether this was a proper case in which I could grant leave to appeal".* In para [14] of his judgment the Chief Justice noted the following:

> *"The issue before me is not whether the decision of Maphalala J was right or wrong and therefore the issue of jurisdiction does not arise. I am unable to accept Mr. Hlophe's submission that the issue of an application for leave is a substantive matter which only a full court can deal with. Mr. Hlophe was not able to cite any authority to support his proposition. In my view, if there is any one matter which can be brought before a single judge of the court is the application for leave to appeal."*

[24] In the **Big Tree Filling Station** [9] case there was a counter-application by the respondent against an order of stay by a single Judge of the Supreme Court. The

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[8] The statement of the Chief Justice had other challenges. If Maphalala Js order was final and definitive could a single Justice set it aside? Would it rather not have been appealable directly to the Supreme Court in terms of section 14 (1) (a) of the Court of Appeal Act? Leave to appeal is only necessary under section 14 (1) (b) which deals with appeals from (purely) interlocutory decisions. See also para [15] of the full court judgment.

[9] **Nur and Sam (Pty) Ltd t/a Big Tree Filling Station, Nuisa Investments (Pty) Ltd t/a Sakhula Filling Station v Galp Swaziland (Pty) Ltd** [2015] SZSC 04 (9 December 2015).

application was opposed by the applicants (in review) who submitted that *"a single Judge had power to hear and determine the application for stay of execution because it did not involve determining the matter in controversy".*[10] The respondent argued that the Judge (Maphalala ACJ) *"sitting as a single Judge did not have the power to vary or stay the Supreme Court's order under section 149(1) of the Constitution because a single Judge changed the decision of the Supreme Court which required three Judges"*. In our case, the decision of the Supreme Court referred to in the foregoing statement is the order striking off the appeal from the roll. It is then argued that this order should not be altered by a single Judge. In the **Big Tree Filling Station** case, it was respondent's submission that the stay should have been reserved for the normal Supreme Court bench of three Justices in terms of section 145 (2). The point however had become moot but it was insisted to be in the public interest to have it decided.

[25] In the foregoing case, the Court referred to section 149 (1) and (3) regarding the power of a single Supreme Court judge. The Court emphasized the words *"not involving the determination of the cause or matter"* before the Court found in section 149 (1) as meaning that the single Judge can properly deal with 'interlocutory matters' which *"do not involve the determination of the matter before the court, for instance an appeal or review"*, pointing out that *"a stay of execution does not vary a decision of any court but merely postpones its execution"*. Substantively an order of reinstatement changes nothing. In the **Big Tree Filling Station** case both the minority and majority dismissed the counter-application challenging the power of a single judge of the Supreme Court from entertaining and varying a decision of the Supreme Court in terms of section 149.

[26] Herbstein and Van Winsen [11] also define an 'interlocutory order' as *"an order granted by a court at an intermediate stage in the course of litigation, settling or giving*

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[10] Ibid, para [27]. See also paras [41], [42], [82] – [84] of the Minority Judgment.
[11] **The Civil Practice of the Superior Courts in South Africa**, 3rd ed p 709

directions in regard to some preliminary or procedural question which has arisen in the dispute between the parties. Such an order may be either purely interlocutory or it may be an interlocutory order having final or definitive effect. The distinction between a purely interlocutory order and an interlocutory order having final effect is of great importance in relation to appeals".

[27] In the matter of the appeal which was struck off the roll by the Supreme Court, the appellant (or prospective appellant) has no right of appeal, that is, the right which an appellant ordinarily has from a judgment of the High Court to have the appeal enrolled for hearing. The appellant has forfeited that right by having the appeal struck off the roll. The appellant must then seek the indulgence of the court to have its appeal returned on the roll. The need or necessity for the appellant to seek and obtain leave of court to return or reinstate on the roll an appeal formerly removed or struck off is easy to understand. The order of the Supreme Court striking the appeal off the roll is not final and requires leave to be obtained for the reinstatement. The Order leaves the appeal uncertain, hovering in the corridors of the Registry like a troubled ghost. If the appellant has no more means of reactivating the appeal by placing it on the roll, then the respondent can apply to have it dismissed. The appellant may of course formally withdraw or abandon the appeal which has been struck off the roll. Only a notice to that effect would be required. The application for leave to reinstate is thus preparatory and intermediate. It is a process or step in the process to the appeal. It is itself not the appeal.

[28] At the back of the application for leave to reinstate an appeal is the express or implied assertion that the applicant intends to restore the appeal on the roll for hearing but may not do so unless leave be granted. The leave application is therefore not an end in itself but a step in a journey. To that extent the leave application is not quite unlike an interdict *pendente lite*. It is in the same vein that the applicant for leave may also seek to convince the court that the balance of convenience favours the

granting of the leave should there be any lingering doubt as to the propriety therefor. Further, leave to reinstate an appeal is not the same as noting an appeal. The latter usually depends on a right enjoyed by the appellant while the former usually depends on an indulgence the court might exercise or extend in favour of the applicant.

Conclusion

[29] It will be noted that section 149 does not draw a distinction between the two types of interlocutory orders. The section would seem to treat all decisions of the single Judge as final and definitive and as such appealable without leave. This may be the way in which Mr. Howe viewed and understood section 149. To that extent Mr. Howe may have been correct. But no authority in support was cited. The case **Sikhatsi Dlamini**, already referred to, cannot be of much assistance. Accordingly, that line of argument does not take the matter any further. That approach soon proves to be a *cul-de-sac.* It does not follow that because the resultant order or decision of single Judge may be classified as final only a *coram* of three Judges must deal with the matter - such as the reinstatement. What makes the order, *in casu,* to be or appear final is not the character or effect of the order as such. It is section 149 which makes the decision of the single Judge appealable without leave. The decision itself does not dispose of or directly affect any part of the main action or suit. That is why the argument challenging the composition of the bench in this application for reinstatement is, with respect, unproductive. The Constitution allows the single Judge to exercise the powers of the Supreme Court in the limited sense stated in subsection (1) of section 149. That limitation is important to properly understand.

[30] We have already noted, also, that the single Judge is not exercising independent powers but power of the Supreme Court. The decision of the single Judge is in effect a decision of the Supreme Court. In the case of reinstatement, the applicant seeks to restore on the roll the matter which the Supreme Court has removed for whatever reason short of a dismissal. The removal from the roll is itself an intermediate step,

not final; it does not determine the issue or issues on appeal. Hence the possibility of reinstatement of the appeal. On being removed from the roll as by being struck off the matter is not determined on its merit. The matter is returned to the Registry where it may pend indefinitely if none of the parties does something to affect it otherwise, such as by application for reinstatement or for dismissal. It should also be clear that a *coram* of three Justices of the Supreme Court cannot be constituted in terms of section 149. If the position argued for by Mr. Howe should prevail it would mean that section 149 would be a dead letter since all the decisions generated under that section are final and appealable (without leave). An appeal from the decision of a single Judge under section 149 is escalated to a full court constituted in terms of section 145. We have expressed the opinion that this escalation of the matter is not an appeal likely to give rise to a review before a Full Bench.

[31] The problem facing the respondent is that the Rule 30(4) application has not been enrolled since postponed *sine die,* and as such is not before me and cannot be heard ahead of the reinstatement – unless it is enrolled as such. During the hearing of the leave for reinstatement respondent can raise argument based on Rule 30(4) as may be contained in the answering affidavit. Although the Rule 30 (4) application is interlocutory in form it has a final and definitive effect as its aim is to dispose of the appeal. To that extent, that application cannot be heard by a single Judge. The respondent's regular answering affidavit to the application for leave to reinstate has also set up a counter-application which, as already pointed out, cannot be heard by a single Judge. That in part explains the respondent's initial predicament regarding the single Judge *coram.* The counter-application is a matter for the Supreme Court. This is so because the counter-application, which is in effect a review in terms of section 148 (2), seeks to have set aside the Supreme Court order of 10 October 2018. That is a matter for a Full Bench to be set down separately and not as part of the reinstatement proceedings.

[32] In the result and for the foregoing considerations, the challenge of the jurisdiction of the Court based on its constitution by a single Judge is without merit and stands to be dismissed. It is accordingly so ordered. The hearing of the application for the leave to reinstate the appeal is postponed to be set down on an expedited date possibly this session. No order as to costs.

MJ Dlamini JA

Mr. M. Simelane, for the Applicant

Mr. L. Howe, for the Respondent