IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 95/2020

HELD AT MBABANE
In the matter between:

Appellant

PHUZAMOYA LIMITED

And

BEBESHA INVESTMENT (Pty) Ltd 1st Respondent

NHLANHLA E. GININDZA N.O 2nd Respondent

Neutral Citation: Phuzamoya Limited vs Bebesha Investment (Pty) Ltd and Nhlanhla E. Ginindza N.O. (95/2020) [2021] SZSC 26 (29/09/2021)

Coram: S.J.K. MATSEBULA JA.

Heard: 23rd August, 2021.

Delivered: 29th September, 2021.

SUMMARY:Civil Law Applicationfor condonation not opposed and in compliance with the Rules of Court matter before a single Judge After condonation application parties argued merits of appeal Sections 145 (2) and 149 (1)

and (3) of the Constitution as well as Section 3 of the Court ofAppeal Act discussed Section 145 (2) of the Constitution isfor determination ofappeals Section 149

(1) isfor certain interlocutory applications Court refers matter to a Supreme Court bench constituted by three

(3) Justices as envisaged by section 145 (2) of the

Constitution No order to costs.

JUDGMENT

S.J.K. MATSEBULA - JA

HISTORIC BACKGROUND

[1] The Appellant owns sugar fields and the I st Respondent is a carrier who would cut and transport the sugar cane to the mills for further processing into sugar. The parties entered into a memorandum of agreement. A dispute later arose between the parties as to whether the agreement had been renewed or not and was subsequently referred to an arbitrator who found in favour of the I st

Respondent herein. The Appellant herein sought to review the decision of the arbitrator at the High Court which confirmed the arbitrator's award, hence the appeal to this Court.

[2] The Appellant appeals the whole judgement of the High Court and the Appellant says the Court a quo erred in law and in fact as follows:

1. "Byfinding that the 1 M Respondent 's tender was not declined and the tone of the ofthe letter ofthe 05 December 2019, gave hope to the I SI Respondent that its tender had passed with flying colours.

2. Byfinding that it was common cause that I the pre-arbitration it was agreed between the parties that the Respondent will file comprehensive statement of claim and the Applicant a detailed reply thereto and the Arbitrator was to consider the documents and making the award.

3. By finding that there was not merit in the argument that the Arbitrator ought to have called oral evidence to address the dispute offact.

4. By finding that the Appellant was not being candid or honest in alleging that the 1 st Respondent did not give notice of intention to renew the contract. The Honourable Court a quo erred in finding that the Respondent didfile such notice which was an indication that the 1st Respondent was interested in providing the services for a further three (3) years. The Honourable Court a

quo further erred, in this respect, in finding that the Appellant has a duty to find out from the I SI Respondent if it intended to renew the contract before callingfor tenders.

5. By finding that the Appellant was being overly technical in alleging that the Respondent ought to have issued a notice of renewal instead of tendering and participating in the tendering process.

6. The Honourable Court a quo further erred in finding that the 1st Respondent did notify the Appellant of its intention to renew the contract.

7. By finding that the clause that; ...on the same terms and conditions to be agreed upon between the parties " was ambiguous and meant that the parties could agree that the contract is renewed and thereafter, negotiate the terms and conditions. The Honourable Court a quo ought to have found that the contract in question to be renewed, the parties ought to have agreed upon the terms and conditions, which did not happen.

8. By finding that the Arbitrator's finding that the Appellant breached an implied obligation of honesty, fairness, and good faith, was obiter andfurther finding that the Appellant acted in badfaith by not enquiringfrom the I[SI] Respondent if it intended to renew the contract, not responding to the I [S]! Respondent's

letter ofthe 20th November 2019 and in purporting to remind the I [SI] Respondent of the expiry of th.e contract on the 30th of December 2019.

9. By failing to find that the Arbitration Award was improperly procured in light ofsame being issued without the hearing oforal evidence or without a proper determination of the glaring disputes offacts.

10. By dismissing the Appellant 's application with costs.„

[3] Accompanying the Appeal is an application for condonation in terms of Rule 17 of the Rules of this Court for the failure by the I st Respondent to file timeously the Heads of Argument and the Bundle of Authorities.

THE CASE FOR DETERMINATION BY THIS COURT

[4] The matter came before me as a single judge. As is a normal practise, first to be heard was the application for condonation. The application for condonation was not opposed and I found it to be in compliance with the requirements expected in condonation applications and granted the application.

[5] The Court then proceeded to hear the appeal and both Counsel for the parties did not raise any objection to the Court's constitution by a single Justice. At the end of submissions, the Court reserved judgement.

[6] In preparing the judgment and as I was going through both case law and statutory law, the question of jurisdiction of a single judge emerged. The law seemed to point to one direction and conclusion: a single Justice has no jurisdiction to hear and determine an appeal. Otherwise a judgment written in defiance of this injunction is tainted with illegality and it is unlawful, and worse where the presiding judicial officer becomes aware of the injunction but recklessly continues to defy the injunction. The Supreme Court as the highest Court of the land and the expectation being that it should issue lawful and legally sound judgements and orders, the correct path or thing to do is to avoid miscarriage of law but do fairness to the issues at hand and fairness to the litigants. This I believe the Judge can appropriately do, where the Judge realises the error before handing down the judgment. When the realization of the error occurs at this juncture, I believe the Judge, as the director of the case, has an election whether to recall the matter for the argument of the point of law which had eluded the presiding Judge and both Counsel or as in the present circumstances, do the right thing and refer the matter to an appropriately constituted Court. The issue of the jurisdiction of a single Justice is adequately covered by the Constitution hence regard shall be to the Constitution. I hope this judgement will foster a better understanding of the jurisdiction of a single judge.

EXAMINATION OF THE APPLICABLE LAWS

[7] Section 145 of the Constitution provides:

"145 (1) There shall be a Supreme Court of Judicature for Swaziland consisting ofthe ChiefJustice and no less than four other Justices ofthe Supreme Court

(2) The Supreme Court shall be duly constituted for its ordinary work by not less than three Justices of the Supreme Court.

(3) A full bench of the Supreme Court shall consist offive Justices of the Supreme Court.

(4) The ChiefJustice shall preside at sittings of the Supreme Court, and when not sitting the most senior of the Justices constituting the Court shall preside. (the underlining is mine).

[8] The underlined words (in subsection (2) are significant as there are no idle words in a legislative sentence and to get a clearer understanding of the meaning of the underlined words we should connect them to Section 146 (2) (a) of the Constitution which provides:

"146 (2) Without derogating from the generality of the foregoing subsection, the Supreme Court has—

(a) such jurisdiction to &eæ-gud-detecmiue-gpueg.lé from the High Court of Eswatini and such powers and authority as the Court of Appeal possesses at the date of commencement of this Constitution; ' , (underlining is mine).

[9] The ordinary work of the Supreme Court is to hear and determine appeals from the High Court. That is the ordinary run of the mill of the Supreme Court. Apart from the appeals envisaged here and the reviews under Section 148 (2), there are interlocutory applications which are not appeals but are incidental to the appeals. To cater for these interlocutory applications the Constitution provides a facilitation legal regime which, in effect, suspends the operation of Section 145 (2) of the Constitution (i.e. the coram of 3 Justices) in the form of Section 149 of the Constitution introducing single Justice sittings.

[10] Section 149 provides:

"149 (1) Subject to the provisions ofsubsections (2) and (3) a single Justice of the Supreme Court may exercise power vested in the Supreme Court not involving the determination QT. the cause or matter before the Supreme Court. (my underlining)

(2) In criminal matters, where a single Justice refuses, or grants an application in the exercise ofpower 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.

(3) In civil matters, any order, direction or decision made by a single Justice may be varied, discharged or reversed by the Supreme Court of three Justices at the instance of either party to that matter.,,

[1 1] A single Justice is therefore limited to orders, directions and decisions that do not involve the determination of the cause or matter before the Supreme Court.

(my underlining)

[12] In Section 149 (2) of the Constitution (Supra) it is said a single Justice may grant or refuse an application in criminal matters but the word application is not mentioned in civil matters under subsection (3) of the same section but only refers to outcomes which are orders, directions or decisions.

Section 3 of the Court of Appeal Act, 1954 fills the gap or the missing word "application" and it states as follows:

> "3. An application which may be brought before a single justice of the Court ofAppeal may be dealt with by him in open Court or in chambers, at his discretion .

[13] The foregoing suffices to show that the powers or jurisdiction of a single Justice is limited to applications which in my view refers to interlocutory applications or certain directions necessary to or incidental to finalising the appeal but certainly not to the merits of an appeal. A list of such applications can be very helpful to guide the Court as well as legal practitioners but such proposal is fraught with dangers for anything erroneously not caught in the net may be interpreted as excluded from the jurisdiction of a single Justice. As the Court has been doing in the past, it shall continue to weigh the nature, likely outcome of each and every application, and taking special precautions against miscarriage of justice, whether such application is proper for a single Justice or not. The safe-

guard for this approach is found in Section 149 (3) of the Constitution where it provides that:

> "
>
> in civil matters, any order, direction or decision made by a single Justice may be varied, discharged or reversed by the Supreme Court of three Justices at the instance ofeither party to the matter,,

In the case of the Minister of Housing and Urban Development vs Sikhatsi Dlamini and Others, Civil Case No.31/2008 at paragraph 14, Chief Justice Banda stated as follows

> "I am unable to accept Mr. Hlophe's submission that the issue of an application for leave is a substantive matter which only afull court can deal with. Mr. Hlophe was not able to cite any authority to support his proposition. I my view, if there is any one matter which can be brought bgfore a single.iudge ofthe court is the application.for leave to appeal ' '.(my underlining for emphasis).

Again in the case of Nur and Sam (Pty)Ltd T/a Big Tree Filling Station and Others vs Galp Swaziland (Pty) Ltd,(13/2015) [2015] SZSC 04 (09December,2015) at paragraph 83 it was held as follows

> "[83] It was submitted by the Respondent that a single justice of the Supreme Court has not power to vary a decision of the Supreme Court. In the first place, the operating words in Section 149 (1) are "not involving the determination of the cause or matter" before the court. This in effect means that a single justice has power to deal mainly with "interlocutory matters". Such matters do not involve the determination of the matter before the court, for instance an appeal or review. A stay of execution does not vary a decision of any court but merely postpones its execution. " (my underlining for emphasis).

CONCLUSION

[14] Section 149 (1) of the Constitution gives limited jurisdiction to a single Justice and prohibits the presiding Judicial Officer from exercising the Supreme Court's powers that involve the determination of the cause or matter that is pending or is before the Supreme Court. As pointed out above, the question of jurisdiction did not arise during the hearing, hence it was not deliberated upon, the first option upon me was to recall the matter either in open court or in chambers and point out the error to the legal representatives or go for the second option. The second option being to refer the matter to a constitutionally constituted bench of three Justices and cut down on legal fees to the litigants. The second option seems to me to be just and reasonable in the circumstances.

[15] Regarding the issue of jurisdiction, in general, it has been held by this Court that the Court may mero moto raise it at any time of the proceedings even on appeal notwithstanding that none of the litigants have raised it.

In the case of Sikhumbuzo Dlamini vs Samkelisiwe Dlamini (06/2019) [20211 SZSC 50 (04/06/2021), at paragraph 13, adopting a Lesotho case of Motibele Tseliso v Matekase Mampho, LC/APN/152/2014, this Court stated as follows

> "A Court has power to raise mero motu the specialpleas ofjurisdiction, non-joinder and mis-joinder, and if proven valid, must decline jurisdiction, whether or not the plea of lack ofjurisdiction has

been raised by the Respondent/defendant or proprio motu stay the proceedings until an interested party has been joined or intervened or has waived the right to be joined or intervene, or has consented to be bound by the outcome of the case. "

And at paragraph 14 of the Sikhumbuzo Dlamini (supra), it adopted the following -

"[14] And at paragraph [11] (supra) the Court further stated as follows_

"[11] Since the special plea ofjurisdiction is not confined to the initio lites stage of the proceedings but remain alive up to the stage ofappeal proceedings, there is no merit in the contention that it cannot be raised after the first appearance. In Attornep General v Kao LAC 2000-2004 656 at ara ra h 13 - 18 the Court of Appeal held that the defence of lack ofjurisdiction may be raised at any time, even on appeal. Failure by a litigant to raise this defence does not have the effect of conferring jurisdiction where none exists".

This Court is therefore precluded from deciding on an appeal where it lacks jurisdiction apart from giving appropriate orders or directions therein.

ORDER

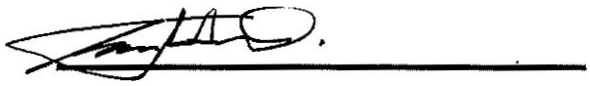
[1 6] In the circumstance I issue the following orders:

(a) The unopposed application for condonation and by consent of the parties, is granted;

(b) The Supreme Court constituted by a single Justice has no jurisdiction or powers to determine this appeal;

(c) The matter is referred to the Registrar for the constitution of a bench of three Justices to determine the appeal herein.

(d) No order to costs.



S.J.K MATSEBULA
JUSTICE OF APPEAL

For the Appellant: K. SINIELANE For

the Respondent: 1. DU PONT