



IN THE SUPREME COURT OF ESWATINI
JUDGMENT

Civil Appeal Case No. 49/20

In the matter between:

TAKHAMUTI FARMERS INVESTMENTS (PTY) LTD

Appellant

And

ROBINSON BERTRAM

Respondent

Neutral citation: *Takhamuti Farmers Investments (Pty) Ltd (49/20) [SZSC] 09 [2021] (2nd June, 2021)*

Coram: **S.B MAPHALALA JA**
N.J. HLOPHE JA
S.J.K. MATSEBULA JA

Heard: **25th March, 2021**

Delivered: **2nd June, 2021**

Summary: *Appeal – Civil Procedure – on costs - in arguments before the Supreme Court Appellant conceded that Respondent is entitled to costs – as attorney for Appellant was granted costs in the court a quo – therefore the whole appeal is dismissed with cost to be costs at the attorney and own*

client scale in accordance with the agreement of mandate between the parties.

JUDGMENT

S.B. MAPHALALA JA

Introduction

[1] Serving before this court is an appeal against the judgment delivered by the Learned J.S. Magagula On the 6th August, 2020 wherein the Learned Judge *a quo* granted an order for Summary Judgment for payment of the sum of E235,096.16 (Two Hundred and Thirty five Thousand and Ninety Six Emalangenzi Sixteen Cents) representing legal fees rendered to the Applicant at the latter's instance and request, interest thereon and costs of suit.

[2] The grounds of appeal are as follows:

1. **The court *a quo* erred in law in granting summary judgment against the Defendant (now Appellant) without applying the law on summary judgment applicable to the Kingdom of Eswatini, in terms of rule 32 of the High Court Rules.**
2. **The court of *a quo* erred in law by not applying an open mind when deliberating on and adjudicating the matter by ignoring the defence disclosed by the Defendant (now Appellant) and the existence of triable issues that were exhibited in the affidavit resisting summary judgment.**

3. The court *a quo* erred in law and in fact by granting summary judgment against the Defendant (now Appellant) ignoring the judgment issued by his Lordship Hlophe J. when he dealt with matter which has eventually lead to the Respondent's application for summary judgment. His Lordship Hlophe J. ruled that each party must pay its own costs. The Learned Judge a quo per Magagula J. therefore seemed to have now indirectly reviewed the judgment delivered by Hlophe J; the court a quo does not have jurisdiction (in that regard).
4. The court a quo erred in law and in fact by overriding the Chief Justice standing practice directive by proceeding to hear the matter that was initially heard and determined by the Principal Judge Q.M Mabuza. Alternatively, the matter should have at least been heard and determined by His Lordship Hlophe who issued the first judgment in this matter. By so doing, this eventuated the current state of confusion that the matte has found itself.
5. The court a quo erred in law in finding that the office of Sithole & Magagula Attorneys was instructed by a faction of the company (Appellant) but yet they were instructed by the substantive Appellant's executive committee. This finding by the court *a quo* at paragraph 4 of the ruling *a quo* would have been ventilated through trial hence the court should grant the Defendant leave to file a plea with the matter being referred to trial.
6. The court *a quo* misdirected itself by ruling that by virtue of the fact that the Plaintiff (Respondent) was instructed by shareholders of Appellant, the Appellant was therefore obliged to pay for the Respondent's legal fees. The Appellant cannot in law and logically by

operation of company law, pay for any shareholder that approached the court without its mandate.

7. The court *a quo* further erred in law and in fact and it misdirected itself by wrongly applying the turguand rule where such rule was not applicable more so because the Plaintiff (Robinson Bertram) was instructed by aggrieved individuals not the company (Appellant) and or executive committee of the company.
8. The court *a quo* further erred in law and in fact, whereby it failed to exercise its discretion judiciously by granting costs at attorney and own client's scale. The order to costs at a higher scale was unwarranted (with due respect) because his Lordship Hlophe J. had already issued an order that each party must pay its own costs. There was further nothing warranting granting of an order of costs at attorney and own clients scale. The court also did not issue reasons why such costs of such a higher scale were awarded to the Plaintiff.
9. The court *a quo* erred in law and in fact by making a declaration at paragraph 8 of the judgment *a quo* per his Lordship J.S. Magagula, that is when His Lordship Hlophe J. granted the order that each party must pay its own costs he did consider the source of the funds. Such a declaration should been referred to His Lordship Hlophe J. to clarify what he meant by that each party should bear its own costs per his judgment delivered on the 21st August, 2015.

The background

[3] A brief background of the matter is outlined in Appellant's Heads of Arguments at paragraph 2 thereat to be the following:

- 2.1 The matter before court is as a result of dispute between members of the Appellant (Takhamuti Farmers Investments (Pty) Ltd) who had taken each other to court under case no. 1440/4. For ease of reference, a judgment was delivered by the High Court as fully appears at page 131 up to page 145 of the record of proceedings.
- 2.2 The members who instituted the proceedings were aggrieved by the results of elections of the executive Committee for Takhamuti Farmers (Pty) Ltd. As per the judgment at page 145 of the record of proceedings, the court had ordered that each party shall bear its own costs. It should be brought to light that the aggrieved members of the appellant were the ones who were challenging the newly elected executive.
- 2.3 It should also be brought to light that it was the aggrieved members who had appointed the Respondent to represent them in their matter challenging the newly elected executive committee of the Appellant.
- 2.4 It should be stated that the court further ordered fresh elections for the Executive committee. The judgment was appealed as it fully appears at page 146 of the record. It was unfortunate that the appeal was dismissed for non-compliance with the Rules of the Honourable Court as per the judgment at page 148 of the record.
- 2.5 The Respondent in the present matter then instituted action proceedings against the Appellant for payment of legal fees. Same was defended by the Appellant in the present matter (Defendant at court *a quo*). It was then that the Respondent (Plaintiff at the court *a quo*) under case no. 340/2019 made an application for summary judgment which application was resisted by the Appellant (Defendant at court *a*

quo). Same was argued and judgment was delivered on the 6th August 2020 as it fully appears on page 251 of the record of pleadings.

The arguments of the parties

For the Applicant:

- [4] The main thrust of the Appellant's case is that the court *a quo* erred in law in granting Summary Judgment against the Defendant (now Appellant) without applying the law on Summary Judgment in terms of Rule 32 of the High Court Rules. In support of this argument the Appellant's Counsel cited the Supreme Court case of **Azman Investments (Pty) Ltd vs the Government of Swaziland and Another, Civil Appeal no. 12/2011** where the court held that Summary Judgment is an extraordinary remedy and that the court should be slow to close the door to a defendant if a reasonable possibility exists that a defendant has a good or *bona fide* defence. That the court *a quo* erred in not considering the evidence by the Appellant wherein it denies ever authorising the Respondent to legally represent itself. In this regard Learned Counsel directed the court's attention to paragraphs 4, 5, 6, 7 and 8 of the affidavit resisting Summary Judgment at pages 234 and 235 of the Record of Appeal.
- [5] Further it is contended for the Appellant that in its affidavit resisting Summary Judgment it demonstrated that it has a good and *bona fide* defence to the claim by the Defendant. Moreso in that, it was the members who were aggrieved by the elections results who mandated the Respondent in their personal capacities to be their legal representatives. Thus the Respondent should seek payment of its fees from them.

[6] Various submission are canvassed in paragraphs 7 to 22 of the Heads of Arguments.

[7] Finally, the Appellant prays that the appeal be upheld with costs at attorney and own clients scale.

Respondent's arguments

[8] Counsel for the Respondent Mr Jele also filed Heads of Arguments advancing the case for the Respondent on a number of topics and in paragraph 11 thereof stating the following:

11. The important aspect of the matter is that the above Honourable Court should note that Sithole & Magagula Attorneys rendered their fees also to the Appellant's and / or its shareholders and they were paid by the Appellant. This fact has not been disputed by the Appellant or the other shareholders of the Appellant. Sithole & Magagula Attorneys were instructed by the other shareholders on behalf of the Appellant. In the Respondent's case it was instructed by the Appellant through its shareholders. We will revert to this later on below.

[9] I must mention that this paragraph became crucial in the determination of this case because when Counsel for the Appellant was confronted with this state of affairs by the Court readily conceded that indeed Counsel for the Respondent is also entitled to the fees he was seeking. This therefore put paid to the determination of the whole appeal.

[10] Furthermore on the argument of the Respondent at paragraph [8] above stated in his Replying Affidavit at paragraph 6 thereat the following:

The Deponent does not further deny that both attorneys for the Board and the Shareholders submitted fee notes but only one fee note was paid. That is for the Board. Sithole & Magagula Attorneys were paid despite that they lost the matter in all our Courts. This was clearly unfair. Sithole & Magagula Attorneys represented the Board and not the company.

[11] As a result of this it became pointless for the Respondent's Counsel to make any submissions in his defence on the merits of the appeal. Therefore, the appeal is dismissed with costs at attorney and own client scale as provided in the agreement of mandate between the parties.

S.B. MAPHALALA JA

I AGREE

N.J. HLOPHE JA

I ALSO AGREE

S.J.K. MATSEBULA JA

For the Appellant:

Mr. M Sithole
(from Sithole & Magagula Attorneys)

For the Respondent:

Mr. D.N. Jele
(from Robinson Bertram)