IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 61/2019

HELD AT MBABANE
In the matter between:

TEACHING SERVICE COMMISSION **1st Appellant**

THE ATTORNEY GENERAL **2nd Appellant**

And

TIMOTHY TSABEDZE **Respondent**

Neutral Citation: *Teaching Service Commission and Another vs Timothy Tsabedze* (61/2019) [2021] *SZSC* 48 (25/02/2022)

Coram: **M.C.B. MAPHALALA CJ, N.J. HLOPHE JA AND M.J. MANZINI AJA.**

Date Heard: 22nd November, 2021.

Date Delivered: 25th February, 2022.

SUMMARY: *Civil procedure – Application for leave to appeal against High Court Order upholding Rule 30 notice – Factors determining whether High Court Order final or interlocutory discussed – Requirements for granting leave to appeal against interlocutory orders considered and applied – Held that leave to appeal be granted.*

JUDGMENT

M.J. MANZINI – AJA

[1] Before us is an application for leave to appeal against an Order issued by the High Court (per Maphanga J) on the 21st April, 2021 in terms of which he upheld a Rule 30 application filed by the Respondent (the Applicant *a quo*) objecting to the filing of an Answering Affidavit by the Applicants (Respondents *a quo*). No reasons were given by the Learned Judge for his decision. My comments for his failure to do so appear below. In the alternative, the Applicants prayed for an interpretation of the Judgment referred to above.

[2] The background facts to the application are as follows:

2.1 The Respondent, a former teacher, was dismissed and discharged from his teaching position by the 1st Applicant (Teaching Service Commission) following a disciplinary process;

2.2 The Respondent declared a dispute, followed all the statutory procedures set out in the governing labour law legislation, and the matter was finally enrolled at the Industrial Court, before B.W. Magagula AJ;

2.3 In the Industrial Court the Respondent claimed the following relief:

(a) reinstatement; or alternatively

(b) payment of

(i) terminal benefits in the sum of E663,7050.60;

(ii) maximum compensation for unfair dismissal in the sum of

E182,519.04;

(iii) Costs of suit;

(c) further and/or alternative relief.

2.4 The matter went for trial, and at the conclusion Magagula AJ dismissed the Respondent's claim in a judgment dated 18th April, 2018;

2.5 On the 21st June, 2018 the Respondent brought an application before the High Court in terms of Rule 53 (hereinafter referred to as the review application) seeking the following relief:

(a) An Order reviewing, correcting and setting aside the judgment of the Industrial Court of 18th April, 2018 in terms of which it dismissed all claims of the applicant as against the 2nd Respondent under case No.37/2016; and

(b) Substituting the decision of the Court *a quo* dismissing Applicant's claims with an Order granting Applicant's prayers in terms of the application to Court with costs;

(c) Directing the 7th Respondent to dispatch within fourteen (14) days of receipt of this Notice of Motion to the Registrar of the

High Court, the transcribed record of proceedings sought to be reviewed and to notify the Applicant that he has done so;

(d) Costs of this application if unsuccessfully opposed;

(e) Further and/or alternative relief as the Court may deem fit.

2.6 The grounds upon which the Respondent sought to review the Industrial Court Judgment are not immediately relevant for purposes of this Judgment;

2.7 The Applicants filed a Notice to Oppose the review application on the 13th July, 2018. However, no Answering Affidavit was filed;

2.8 The record of proceedings was eventually filed on the 16th October, 2018. Subsequent to that the Applicants filed a Rule 30 notice objecting to certification of the Record. Still, no Answering Affidavit was filed. The Rule 30 Notice was eventually withdrawn on the 11th December, 2018;

2.9 The review application was eventually set down by the Respondent on the unopposed motion court roll on the 1st February 2019 where an Order was granted by the High Court (per Maphanga J) in terms of the first two prayers sought by the Respondent. For ease of reference I shall refer to this Order as the review default judgment.

2.10 Soon thereafter the Applicants launched an application before the High Court seeking a rescission of the review default judgment;

2.11 Maphanga J. heard the rescission application on the 14th March, 2019. In his Judgment delivered on the 7th October, 2019, almost six months after the hearing, he issued an Order to the following effect:

"In the result the order granted in default stands, save in so far as the substitution order is hereby varied to this effect – that the matter is remitted to the Industrial Court for re-consideration of the respondents claim"

2.12 The Applicants were dissatisfied with the above Order and filed an appeal to the Supreme Court, on the grounds more fully set out later on in this judgment;

2.13 The Appeal was enrolled and heard by Supreme Court, which later delivered the Judgment which is at centre of the current dispute between the parties. It is common cause that the Supreme Court referred the matter back to the High Court. What is in contention are the issues which the High Court was directed to determine;

2.14 Almost one week after the Supreme Court Judgment was delivered the Applicants prepared and filed an Answering Affidavit contesting the merits of the review application. In the Answering Affidavit the Applicants specifically stated that if they were wrong in their interpretation of the Supreme Court Judgment and the High Court was of the view that they ought to have applied for leave, they prayed *"that it must not set aside the Answering Affidavit but must give us an opportunity to act upon the advice of the Court and apply for leave"*.

2.15 The Respondent's immediate response was to file a Rule 30 notice objecting to the filing of the Answering Affidavit. In the Rule 30 notice the Respondent challenged the filing of the Answering Affidavit contending, inter alia, that it purported to deal with the review application which had been put to bed both by the High Court and the Supreme Court. In the Rule 30 notice the Respondent prayed that the Answering Affidavit be set aside as an irregular step, and that the matter be set down for hearing on the quantum of the claim;

2.16 Maphanga J heard arguments on the 21st April, 2021, and on the same date issued an Order granting the prayers sought by the Respondent, save the issue of costs which were reserved for determination in the final cause; and

2.17 The Applicants intend to appeal against the above Order, hence the application for leave to appeal now serving before this Court.

[3] Before I deal with the issues which I consider to be pertinent for purposes of my Judgment I wish to start by commenting on the failure by Maphanga J.

to give reasons for his decision. During the course of the hearing of this matter it emerged that there were full blown arguments by the respective parties on the Rule 30 application. In the normal course, where there has been a full blown hearing on a cause or legal point which may determine the rights of litigants to do or not to do a particular act, or on their entitlement to proceed or not to proceed in a particular way, and a judicial officer rules one way or the other, written reasons for his or her judgment or order are indispensable. Even where an *ex tempore* judgment or order is made, it must be followed up with written reasons. It is highly undesirable, if not a downright breach of litigant's rights, that a judicial officer should fail to supply reasons for a judicial decision. Written reasons enable a litigant to properly assess whether a judgment or order is correct, and if dissatisfied, be able to articulate grounds of appeal, if he or she so wishes. Thus, Maphanga J. ought to have furnished reasons for upholding the Rule 30 application.

[5] All that he did was to record on the Court file that –

> *"Having heard Counsel and upon consideration of the Supreme Court Judgment and specifically the Orders issued for (ineligible) and*

conduct of the matter before this Court, I am satisfied and accordingly direct that:-

(a) The Answering Affidavit sought to be filed by Applicants in the main Application is set aside as an irregular step in terms of Rule 30;

(b) The Applicant is directed to set the matter down for hearing on the quantum of the claim. The parties are directed to file their submission in respect thereof in due course.

(c) Costs shall be reserved for determination in the final cause."

[Own underlining for emphasis]

[6] His Order begs the question – what is it that satisfied him that the interpretation contended for by the Respondent was correct, as opposed to that proffered by the Applicants? If what appears on the Court file was intended to be his reasons for the Order, it is totally inadequate and unacceptable.

[7] Before I set out a summary of the arguments by the respective parties, it is imperative to highlight that at this stage of the proceedings we are only dealing with an application for leave to appeal, not the appeal itself. Therefore, all that is required is for the Applicants to satisfy the well settled requirements for granting leave to appeal, which will be dealt with in some detail below.

The Applicant's case and arguments.

[8] In their Affidavit filed in support of the application for leave to appeal, the Applicants set out a brief history of the litigation between the parties (which need not be dealt with here). In the Affidavit the Applicants explained what motivated them to file an Answering Affidavit pursuant to the Supreme Court Judgment. The thrust of the Applicants' argument was that based on their interpretation of the Supreme Court Judgment, they were entitled or, at the very least, there was a window of opportunity opened for them, to file an Answering Affidavit dealing with the merits of the review application which resulted in the default judgment, which, in turn, had triggered the rescission application. In other words, the Supreme Court afforded them an opportunity to contest the review application on the merits.

[9] The Applicants relied on several paragraphs in the Judgment and argued that the Supreme Court referred the matter back to the High Court, and in doing so, enumerated the issues which the latter court was directed to determine. The Applicant submitted that the Supreme Court *"compelled the trial Judge to deal with the following issues"* -

1) *The parties were not heard pursuant to the refusal of the application for rescission (which I believe to be the default judgment stage),*
2) *That the court did not render reasons for reviewing and setting aside the industrial Court judgment*
3) *That the Court referred the matter to the industrial Court*
4) *Then the matter was referred back to the High Court for final adjudication on these issues".*

[10] The Applicants contended that since the Supreme Court had afforded them an opportunity to be heard, and set out the issues for determination by the High Court, this could only be done through the filing of an affidavit (the Answering Affidavit which was rejected by Maphanga J).

[11] The Applicants further contended that the High Court default judgment on the review application was not final. The Applicants referred to paragraph [50] of the judgment where the Supreme Court said *"there is no final and definitive judgment of the High Court in that…"*. The Applicants argued that this implied that the default judgment was rescinded by the Supreme Court.

[12] The Applicants further argued that the Supreme Court directed that the matter be referred back *"to be dealt with in terms of the Rules of the High Court"*, and these Rules did not clothe the High Court with power *"to quantify labour terminal benefits as that role lies with the Industrial Court per the enabling statute"*. The Applicants submitted that the Supreme Court judgment did not repeal the labour statute (Industrial Relations Act) that clothes the Industrial Court with exclusive jurisdiction on matters of quantum of damages to be awarded for unfair dismissal. The Applicants further contended that the Supreme Court Order did not clothe the High Court with powers that are reserved for the Industrial Court by section 8 of the Industrial Relations Act, and therefore, it was wrong for Maphanga J to call for written submissions on quantum of damages.

[13] The Applicants submitted that they had good prospects of success in the appeal based on what is set out above. They also submitted that enforcement of the Rule 30 judgment would *"continue to fortify the incompetent default judgment"*.

[14] Lastly, the Applicants contended that if damages were to be determined by an incompetent Court, as meaning the High Court, and there being no judgment dealing with how the Industrial Court was wrong, the resultant damage and confusion would be dire. They contended that this would cause a delay in the finalization of the matter as there would be further appeals and reviews of the matter, resulting in it taking long to finalize.

The Respondent's case and arguments.

[15] The application for leave to appeal, alternatively, interpretation of the Supreme Court Judgment, was strongly opposed by the Respondent who raised a host of grounds of opposition. Firstly, that the relief sought by the Applicant was incompetent as this Court had already disposed of the main issue contended by the Applicant, namely, *(a) the erroneous nature of the*

default judgment (granting of terminal benefits by the High Court; and (b) the jurisdiction of the High Court to determine terminal benefits of an unfairly dismissed employee. The Respondent contended that the effect of the application would be to effectively re-open the appeal which was finalized, alternatively, create a high-breed (*sic*) manner of review, which would be outside the prescripts of section 148(2) of the Constitution of Eswatini.

[16] Secondly, the Respondent contended that the Order contained in the Supreme Court Judgment was unambiguous, that is, the High Court was directed to determine the appropriate Order in respect of the quantification of the terminal benefits itself. The Respondent contended that in upholding the Rule 30 application the High Court was simply giving effect to the Supreme Court Judgment.

[17] Thirdly, the Respondent contended that the application for leave to appeal was premised on *obiter dictum* findings of the Supreme Court, read against its eventual Order. The Respondent submitted that *obiter dictum* analysis by a Court is neither its finding nor its Order. The Respondent further

submitted that at no point did the Supreme Court compel the High Court to deal with any other issue other than what appears on the Supreme Court's Order. The Respondent further contended that the Supreme Court Order did not in any respect grant leave to the Applicant to file an Answering Affidavit in the review application being handled by the High Court. The Respondent submitted that the Supreme Court could not have determined aspects of the review application when same was not serving before it, and in fact did not do so. The Respondent concluded that on the basis set out above the High Court correctly upheld the Rule 30 application.

[18] Fourthly, the Respondent contended that the Applicants were in fact "*not seeking an interpretation of the Supreme Court Order*", but instead they were seeking "*effectively the review of the Judgment already issued by the Supreme Court.*" The Respondent supported this contention by arguing that the Applicants' application was premised "*on the obiter dictum findings of the Supreme Court, read against its final Order.*" The Respondent argued that the *obiter dictum* was not binding, and as such, the High Court did not err in its interpretation of the Supreme Court Judgment.

[19] Lastly, the Respondent contended that the relief of interpretation of the Supreme Court Judgment was not available to the Applicants on the basis that:-

(a) the Order was clear and unambiguous; and

(b) the Applicants had acquiesced in the Supreme Court Judgment and had waived their rights in terms of section 148(2) to have it reviewed. The Respondent submitted that pursuant to the Supreme Court Judgment the Applicants proceeded to pursue the matter at the High Court and further made submissions on the Rule 30 application. This, it was argued, clearly demonstrated that the Applicants had no intention to challenge the Judgment of the Supreme Court.

Analysis and findings of this Court.

[20] The issues for consideration by this Court are –

(a) Whether the Order made by Maphanga J in granting the Rule 30 application is final or interlocutory. If it is final, the Applicants are entitled to appeal as of right. If it is not final, the Applicants must be granted leave to appeal.

(b) Whether the Applicants made out a case for the granting of leave to appeal, if it is determined that the Order is not final.

[21] Section 14 of the Court of Appeal Act provides that –

"14(1) An appeal shall lie to the Court of Appeal –

(a) from the 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."

[22] Thus, an appeal from a final judgment or order of the High Court lies as of right, as opposed to an appeal against an interlocutory order, where leave of this Court must first be obtained. Determining whether the Order upholding the Rule 30 notice was final or interlocutory, as a preliminary issue, is paramount in that it may well be dispositive of this matter. That is to say, if it is a final Order, there is no legal requirement for the Applicants to seek leave to appeal. They are entitled to appeal as of right. I say this well aware that the Applicants approached this Court on the basis that the Order is interlocutory. However, this does not deter the Court from engaging this issue as the nature of the Order was addressed by the respective parties in oral arguments.

[23] The test for determining whether a Judgment or Order is final or interlocutory in nature has been considered by this Court in a number of its Judgments and is now considered to be well settled. All these Judgments have followed the guidelines set out in **Zweni v. Minister of Law and Order 1993 (1) SA 523 (A.D)** where Harms AJA summarized the legal position as follows:

> *"1. For different reasons it was felt down the ages that decisions of a 'preparatory or procedural character' ought not to be appealable (per Schreiner JA in the Pretoria Garrison Institutes case supra at 868). One is that, as a general rule, piecemeal consideration of cases is discouraged. The importance of this factor has somewhat diminished in recent times (SA Eagle Versekeringsmaatskappy Bpk v Harford 1992 (2) SA 786 (A) at 791 B – D). The emphasis is now rather on whether an appeal will necessarily lead to a more expeditious and cost-effective final determination of the main dispute between the parties and, as such, will decisively contribute to its final solution (Priday t/a Pride Paving v Rubin 1992 (3) SA 542 (C) at 548H – I).*

7. *In determining the nature and effect of a judicial pronouncement, 'not merely the form of the order must be considered but also, and predominantly, its effect' (South African Bank of Athens Ltd 1980 (3) SA 91 (A) at 96H).*

8. *A 'judgment or order' is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings (Van Streepen & Germs (Pty) Ltd case supra at 586I – 587B; Marsay v Dilley 1992 (3) SA 944 (A) at 962 C – F). The second is the same as the oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief (Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another 1992 (4) SA 202 (A) at 214D – G).*

[24] See the decisions of this Court in **Mfanuzile Vusi Hlophe vs The Ministry of Health and Two Others (20/2016) [2016] SZSC 38 (30 June, 2016); Skhumbuzo Dlamini vs The Quadro Trust and Others (01/2018) [2018] SZSC 51 (29 November 2018); Tricor International Ltd v. The New Mall (59/2012) [2013] SZSC 41 (31 May 2013); and Good Shepherd Mission Hospital vs Sibongile Bhembe (36/2020) [2020] SZSC 32 (22/10/2020).**

[25] In **Dumisani Maxwell Kunene vs Director of Public Prosecutions (03/2019) [2019] SZSC 43 (09 October 2019)** this Court acknowledged that the three attributes enumerated above were not cast in stone, and that at times flexibility and pragmatism was required. This Court quoted with approval a statement made by Lewis JA in **Health Professionals Council v. Emergency Medical Supplies and Training CC t/a EMS 2010 (6) SA 469 (SCA) 473** at paragraph 15, here he said:

> *"But the Court also stated that even if an order does not have all three attributes, it may be appealable if it disposes of any issue or part of an issue. Conversely, however, even if an order does have all three*

attributes it may not be appealable, because the determination of an issue in isolation from others in dispute may be undesirable and lead to a costly and inefficient proliferation of hearings."

[26] In the **Mfanuzile Vusi Hlophe** case (*supra*) this Court emphasized that –

"The test must be directed to the order namely as to whether it is final or interlocutory and not to enquire as to whether a party has other legal process or remedies available in a matter such as an appeal or plea pursuant to the judgment or order."

[27] In applying the above principles to the facts at hand, my conclusion is that Maphanga J.'s decision to uphold the Rule 30 notice has all the attributes of a final judgment or order, and therefore appealable as of right. In the first place the decision was not susceptible of alteration by him. Having heard arguments by the respective parties on the Rule 30 notice, and having made the decision to uphold it, there was no legal basis on which he could have reversed or altered his decision.

[28] Secondly, bearing in mind the interpretation which the Applicants contend for, that is to say, the Supreme Court afforded them an opportunity to be heard or place their version before the High Court in relation to the issues set out in the Judgment, and which are core to the question of liability of the Applicants for the alleged unfair dismissal, the decision to uphold the Rule 30 application effectively fastened the Applicants with liability. One might say this was attained by the review default judgment rather than the act of upholding the Rule 30 notice, but if the Applicants be right that the Supreme Court refused to endorse the review default judgment, then the Order denied them the opportunity to contest their liability for the alleged unfair dismissal. Put differently, the effect of the Order was to deny the Applicants their right (if their interpretation of the Judgment be correct) to contest the correctness of the review default judgment, whilst on the other hand granting the Respondent the right to prove his damages for the alleged unfair dismissal. In this sense the decision was definitive of the rights of the parties.

[29] Lastly, the decision disposed of a substantial portion of the relief claimed in the main proceedings. In the High Court the main proceedings are those instituted by the Respondent claiming *inter alia*, the review of the Industrial Court Judgment *"dismissing the Applicants' claims with an Order granting*

the Applicants' prayers in terms of the application to Court with costs." The effect of Maphanga J.'s decision is to confirm the review default judgment and pave the way for quantification of the claims made by the Respondent. Moreover, it is the Respondent who prayed for an Order that the matter be set down for hearing on the quantum of the claim.

[30] In light of the foregoing reasons I am inclined to disagree with the Respondent's argument that the decision to uphold the Rule 30 notice was a purely interlocutory or preparatory order. In my view it is interlocutory in form but is final in effect, and therefore appealable as of right.

[31] Even if I am wrong in the conclusion I have reached on the finality of the Order, I am convinced that the Applicants have made out a case deserving of being granted leave to appeal. The requirements which must be met in order to succeed in an application for leave to appeal, have been confirmed by this Court to be the following:-

(a) There must be reasonable prospects of success;

(b) The amount, if any, in dispute must not be a trifling;

(c) The matter must be of substantial importance to one or both of the parties; and

(d) A practical effect or result can be achieved by the appeal.

See: **Johan Jacob Rudolph and Another v. Kanhym Estates (Pty) Limited and Two Others (62/2019) [2020] SZSC 45 (16/12/2020); Temahlubi Investments (Pty) Ltd v. Standard Bank Swaziland Limited Civil Appeal Case No. 35/2008; Thwala v Titus Mlangeni t/a Mlangeni and Company (48/2001) [2002] SZSC 30 (10 June 2002); Vintage Publishing (Pty) Ltd v. African Echo (Pty) Ltd t/a Times of Swaziland (7/07)[2007] SZSC 24 (08 May 2007); and Mildred Carmichael and 5 Others v. Assemblies of God (47/2012) [2012] SZSC 59 (30 November 2012).**

[32] What is meant by *"reasonable"* prospects of success is that based on a dispassionate assessment of the attendant facts of a matter and relevant applicable legal principles, it must be established that an appellate court could reasonably arrive at a conclusion different to that of the trial court. The prospects, therefore, must not be remote, but have a realistic chance of succeeding. It must not be a mere possibility of success. There must be a

sound and rational basis for concluding that there are prospects of success on appeal. See **Johan Jacob Rudolph and Another (*supra*) at paragraph [13-14].**

[33] Again it bears mention that in dealing with an application for leave to appeal the Court should exercise caution, in that at that stage of the proceedings the Court is not dealing with the appeal itself. That is to say, one must not deal with the factual and legal issues raised as if it is the final determination of the appeal –that is the function of the panel which finally hears and determines the appeal, if leave is granted.

[34] In the application for leave to appeal the Applicants set out three grounds on which they intend to appeal the decision of the High Court, namely:

(*a*) *The learned Judge a quo erred in law and in fact by granting the Rule 30 application.*

(b) *The learned Judge a quo erred in law and in fact by holding that it can quantify the terminal benefits and damages of the Respondents.*

(c) The learned Judge a quo erred in law and in fact by proceeding to deal with the matter without affording the Applicant to be heard and delivering written reasons showing how the Industrial Court wrongly arrived to its decision.

[35] In gauging whether the Applicants have discharged the onus of proving that they deserve to be granted leave to appeal this Court must assess the proposed grounds of appeal in the context of the impugned decision to uphold the Rule 30 notice. However, in the absence of a written Judgment, or any reasons for that matter, as to why Maphanga J. upheld the Rule 30 notice, this becomes a challenging task.

[36] In assessing the Applicants' prospects of success it is inevitable that the Supreme Court Judgment should be analyzed in order to ascertain whether an appellate court could reasonably come to a different conclusion to that reached by Maphanga J., as his interpretation of the said Judgment must have been the reason he upheld the Rule 30 notice.

[37] Before considering the actual contents of the Judgment and the Order, it is perhaps important to reiterate the cardinal rule in the interpretation of Court Judgments. In this regard the principle laid down by Trollip JA in **Firestone South Africa (Pty) Ltd v. Genticuro AG 1977(4) SA 298 (A.D.),** which was approved and applied by this Court in **Beauty Build Construction (Pty) Ltd v. Muzi P. Simelane Attorneys and Others (68/2015) [2019] SZSC 64 (1st March, 2019)** is instructive.

> *"The basic principle applicable to construing documents also apply to construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. Se Garlick v. Smartt and Another, 1928 A.D. 82 at 87; Wet Rand Estates Ltd v. New Zealand Insurance Co. Ltd 1926 A.D 173 at p.188. Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what its subjective intention was in giving*

it (CF Postmasburg Motors (Edms) Bpk v. Peens en Andere, 1970 (2) SA 35 (N.C.) at p.30 F – H). Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise – see infra. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court a quo and its reasons therefore, can be used to elucidate it. If, despite that, the uncertainty persists, other relevant extrinsic facts or evidence are admissible to resolve it."

See too: **Van Rensburg and Another NNO v. Naidoo and Others NNO; Naidoo and Others NNO v. Van Rensburg and others 2011 (4) SA 149 SCA; and Swazi MTN Limited and Others v. Swaziland Post and Telecommunications."**

[38] The Order, which is the executive part of the Supreme Court Judgment, made by this Court reads as follows:

"[54] Accordingly, the Court makes the following Order:

1. *That the appeal partially succeeds in that the order of the High Court referring the matter to the Industrial Court is set aside.*
2. *That the matter is referred back to the High Court for final adjudication.*
3. *That no order as to costs is made."*

[39] On a plain reading, this Order did not specify what the High Court must finally adjudicate. It is clear that the Order directed the High Court *to "finally adjudicate"* some issue(s) – but what is it that it was ordered to finally adjudicate? The lack of specificity in the Order opened room for differing interpretations, and this was a rather unfortunate consequence. This was the root cause of the dispute that subsequently unfolded before Maphanga J. Yet, the Order with which a judgment concludes has a special function – *"it is the executive part of the judgment which defines what the court requires to be done or not done, so that the defendant or respondent, or in some cases the world, may know it."* Per **Nicholas AJA in Administrator, Cape, and Another v. Ntshwaqela and Others 1990 (1) SA 705 (AD) at 716 A – B.**

[40] The lack of specificity as to what was to be finally adjudicated by the High Court enjoins us to engage in an interpretive exercise in order to ascertain the meaning of the Order and the intention of the Court. We are compelled to read the Judgment as a whole in order to ascertain the intention of the Justices who sat on appeal. However, not every reader of the Judgment will arrive at the conclusion contended for by the Respondent. During the course of his oral arguments counsel for the Respondent was specifically asked to identify the portion of the Supreme Court Judgment which he claimed clearly and unambiguously directed the High Court to quantify the damages allegedly due by the Applicants, but he failed to do so. All he could do was to resort to his own interpretation of the Judgment and Order.

[41] On the above basis I am not persuaded that the Order of this Court was clear and unambiguous. The Order was unclear and not specific as to what was to be finally adjudicated by the High Court. The Respondent's contention that "*the High Court was directed to determine the appropriate Order in respect of the quantification of the terminal benefits itself*" is based on its own

interpretation of the Order (and Judgment). It is plausible that it may be incorrect, and this may only be finally determined on appeal.

[42] In my analysis, the various paragraphs in the Supreme Court Judgment relied upon by the Applicants, without deciding the issue, can reasonably support the interpretation contended for by them. More pertinently, in my opinion, these paragraphs do not constitute *obiter dicta*, as claimed by the Respondent.

[43] In a lucid Judgment, this Court in **Attorney General and Another v. Masotsha Peter Dlamini (27/13) [2013] SZSC 44 (30 July 2013)**, dealt with what constitutes the *ratio decidendi* and *obiter dictum* in a judgment. The Court referred to **Black's Law Dictionary**, where *ratio decidendi* and *"obiter dictum"* are defined as follows:

> "*ratio decidendi-[Latin- the reason for deciding]*
>
> 1. *The principle or rule of law on which a court's decision is founded.*

2. *The rule of law on which a later court thinks that a previous court founded its decision; a general rule without which a case must have been decided.*

   'The Phrase' the ratio decidendi of a case is slightly ambiguous. It may mean (1) the rule that the judge who decided the case intended to lay down and apply to the facts or (2) the rule that a later court concedes him to have had the power to lay down.

   There are two steps involved in the ascertainment of the ratio decidendi- First, it is necessary to determine all the facts of the case as seen by the judge, secondly it is necessary to discover which of those facts were treated as material by the judge…

"Obiter dictum [Latin something said in passing]. A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).

Strictly speaking an 'obiter dictum' is a remark made or opinion expressed by a Judge, in his decision upon a cause by the way – that is incidentally or collaterally and not directly upon the question before the Court or it is in any statement of law enunciated by the

Judge or Court merely by way of illustration, argument, analogy or suggestion – in the common speech of lawyers, all such extra judicial expressions of legal..."

[44] At paragraph [37] and [38] the Court went on to say that:

"[37] It follows from the above that the ratio of a Judgment is <u>the reason for the decision which is determined by the issue in dispute</u>….

[38] It follows that the ratio would be the decision determining the issue. So any part of the decision <u>not determining or dealing with the issue in dispute</u> or which is not necessary to be determined in deciding the point operates in the form of an embellishment, a mere addendum. Such observation constitutes obiter dictum."

(Own underlining for emphasis)

[45] Thus, one of the key means of identifying *ratio decidendi* and *obiter dictum* is to consider the issue(s) in dispute which a court is called upon to decide. Generally, if a court decides an issue in dispute one way or the other, the

reasons for that decision constitute the *ratio decidendi*, and any part not determining the issue in dispute, *obiter dictum*.

[46] It is trite that in an appeal *"the issues in dispute"* are circumscribed by the Notice of Appeal which must be prepared in accordance with the prescripts of Rule 6(4) of the Rules of this Court, in terms of which it must set forth concisely and under distinct heads the grounds of appeal. The grounds of appeal are the issues in dispute between the parties and which an appeal court is being called upon to determine. As is often said, the grounds of appeal are to the appeal what pleadings are at the trial whose outcome is appealed against. The grounds of appeal serve an additional important function, as correctly pointed out by OTA JA in **Silence Gamedze and 2 Others v. Thabiso Fakudze (14/2012) [2012] SZSC 52 (30 November 2012)** at paragraph [20] that:

> *"[20] The role of the grounds of appeal also has another dimension, a jurisdictional one. I say this because the grounds of appeal also define the jurisdiction of the appellate court to entertain and determine the appeal. It curtails and restricts the issues on appeal only to the complaints properly raised in the grounds of appeal,*

except where the appellate Court permits an issue not raised in the grounds of appeal or decided in the trial nisi prius, to be raised and argued in the appeal with the leave of the Court.

[21] From the above it is crystal clear that the grounds of appeal are akin to the pleadings at the trial nisi prius. That is why the law dictates that the parties are bound by their grounds of appeal just as they are bound by their pleadings."

(Own underling for emphasis)

[47] Admittedly, a significant portion of the Supreme Court Judgment deals with the factual background to the appeal. However, the judgment does dedicate some critical attention to the grounds on which the appeal was premised. At paragraph [27] the Judgment reproduced the four grounds of appeal listed in the Notice of Appeal. Thus, the four grounds of appeal constitute the *"issues in dispute"*, or put differently, the pleadings in the appeal. In my assessment the paragraphs upon which the Applicants rely for their interpretation of the Order have a direct bearing on the first two grounds of appeal, which are that:

"1. The Court a quo erred in fact and in law by refusing to rescind the default review judgment granted on the 1st February 2019; and

2. The Court a quo erred in law and in fact by amending the default review judgment and ordering the parties to submit themselves to the Industrial Court for reconsideration of the Respondent's claim when it was functus officio as it had determined the quantum on the 1st February 2019."

(Own underlining for emphasis)

[48] The first ground of appeal clearly put in issue the correctness of Maphanga J.'s refusal to rescind the review default judgment he granted on the 1st February, 2019. Put differently, the Supreme Court was being asked to determine if the decision of Maphanga J. to refuse the rescission application was correct. As such, the correctness of Maphanga J.'s decision was an issue in dispute calling for determination by the Supreme Court.

[49] Likewise, the second ground of appeal put in issue the correctness of Maphanga J.'s decision to amend the review default judgment and direct the

parties to submit themselves to the Industrial Court for quantification of the Respondent's terminal benefits. As indicated above, this became an issue in dispute calling for determination by the Supreme Court.

[50] Paragraphs [46] and [47] of the Judgment are the Supreme Court's response to the first ground of appeal. The Learned Judge said:

"[46] Notwithstanding the default on the part of the Appellants, it believed the High Court to firstly satisfy itself that the jurisdictional requirements for bringing the matter within its review authority were met and secondly that a case had been made justifying the reviewing and setting aside of the judgment of the Industrial Court. None of this took place. Therefore, there is no legal basis in the circumstances to refer this matter to the Industrial Court to determine damages <u>in the absence of legal authority demonstrating that the Industrial Court Judgment is wrong and calling to be reviewed and set aside</u>.

[47] The Supreme Court <u>may not pronounce itself on any of these matters without the High Court having first dealt with them</u>…."

(Own underlining for emphasis)

[51] In my analysis, in these paragraphs the Court was expressing its reluctance to determine the correctness or otherwise of the review default judgment in the absence of reasons that the Industrial Court Judgment was wrong. Hence, its refusal to pronounce itself without the High Court first having dealt with them. Put differently, the Court declined to deal with the issue in dispute and gave its reasons for doing so. On this basis I do not agree that the Supreme Court disposed of the main issue regarding the review default judgment or the jurisdiction of the High Court to determine the damages allegedly due to the Respondent. For the same reason the Respondent's argument that the *"appeal was finalized"* cannot be sustained. How can it be regarded as having been finalized when the Supreme Court stated in no uncertain terms that it would not pronounce itself on the issues raised in the appeal?

[52] Paragraph [49] of the Judgment also expressed the Court's reluctance to pronounce itself on the correctness or otherwise of the default review Judgment and the referral of the matter to the Industrial Court for quantification of damages *"in the absence of the parties being heard."*

[53] In paragraph [50] the Court concluded that there was *"no final and definitive judgment of the High Court in that no reasons were advanced and/or requested for the judgment other than that it was granted in default."* The above statement clearly shows that the Court did not endorse the default review judgment. Instead, the Court reasoned that *"The only open legal avenue is to refer the matter back to the High Court to be dealt with in terms of the Rules of the High Court."*

[54] In my view, the paragraphs which the Applicants rely upon do not constitute *obiter dicta*. They are part of, if not the main, reasons why the Court could *"not pronounce itself"* on the issues raised in the Notice of Appeal, and why the matter was referred *"back to the High Court to be dealt with in terms of the Rules of the High Court."* These paragraphs set the tone for the decision to refer the matter back to the High Court. As earlier indicated the Respondent labelled these paragraphs as *obiter dicta*. However, I could not find any cogent reason how the Respondent arrived at this conclusion. This can hardly be a correct conclusion considering that the issues in dispute were set out in the Notice of Appeal serving before the Court. Furthermore, the Court captured the arguments made by the parties at the hearing in relation to the issues in dispute.

[55] However, my conclusion that the paragraphs relied upon by the Applicants do not constitute *obiter dicta* does not answer the critical question whether the Supreme Court specifically granted leave to the Applicants to file an Answering Affidavit, as they did. As can be seen from the text of the Judgment, the Supreme Court did not specify what pleadings, if any, were to be filed by the parties. All that was said was that *"the matter must be referred back to the High Court to be dealt with in terms of the Rules of the High Court"*, and that *"the matter must be referred back to the High Court for final adjudication on these issues."*

[56] These phrases beg the question – if the Supreme Court was reluctant to deal with the issues in dispute *"in the absence of the parties being heard"* how was the Applicants' version going to be placed before the High Court if the Applicants were not permitted to file an affidavit, considering that the litigation had been instituted by way of motion proceedings? My view is that although the Supreme Court did not specify that an Answering Affidavit should be filed, a window of opportunity was opened for the Applicants to take whatever steps that were open to them in terms of the Rules of the High

Court to place their version before the Court, which could plausibly include an application for leave to file the Answering Affidavit out of time.

[57] In fact, on a closer reading of the Answering Affidavit which was rejected by the High Court, the Applicants specifically raised the issue of leave to file the said affidavit as a preliminary point. Since there is no written judgment it is not clear whether the Applicants orally moved the application for leave to file the Answering Affidavit, and the reasons why it was declined, if this was the case. If the interpretation contended for by the Applicants is correct, then it would call for cogent reasons for Maphanga J. to refuse the application for leave to file the Answering Affidavit, given the Judgment of the Supreme Court. This, in my view is an issue which could very well be determined in favour of the Applicants when the intended appeal is finally determined.

[58] In my understanding, the Applicants' case was that they elected to file an Answering Affidavit based on their own interpretation of the Judgment, not that the Court directed or ordered them to file the same. Furthermore, that they had in the alternative, applied for leave to file the said Answering

Affidavit out of time. In the absence of a written Judgment setting out the reasons why the Applicants' interpretation was rejected, or why the application for leave to file the Answering Affidavit was not considered and/or refused, I find no legal basis to conclude that they have no reasonable prospects of success on appeal.

[59] In the circumstances, I am persuaded that on a dispassionate assessment of the facts of this matter and all the relevant applicable legal principles, an appellate Court could reasonably arrive at a conclusion which is different from that of Maphanga J. The Applicants have discharged the onus of establishing *"reasonable"* prospects of success if granted leave to appeal, in that the interpretation they contend for is reasonable, and if accepted could result in their appeal succeeding.

[60] With respect to the second requirement, namely, that the amount, if any, in dispute must not be a trifling, I am satisfied that the damages (terminal benefits) claimed by the Respondent are substantial so as to warrant enrolment of the matter on appeal.

[61] Furthermore, the issues in dispute between the parties are of substantial importance, particularly the question whether the High Court has jurisdiction to determine terminal benefits for an unfairly dismissed employee. This is a very important issue which deserves to be fully addressed by this Court.

[62] Lastly, if leave to appeal is granted, the appeal itself will have a practical effect in that the question whether the default review judgment was endorsed or not will finally be settled. The liability of the Applicants to pay the Respondent damages for the alleged unfair dismissal hinges upon the default review judgment being sustained, and this stage precedes the quantification of the compensation which may ultimately be payable to the Respondent. Thus, the liability of the Applicant must first be adjudicated before quantification of damages takes place. The proposition that the Applicants must wait for the High Court to quantify the damages and thereafter file an appeal if dissatisfied, loses sight of the fact the jurisdiction of the High Court to conduct that very exercise is being challenged. What is the point of engaging in an exercise which may turn out to be a nullity?

[63] In the circumstances, taking into account all of the above, I am of the view that the Applicants have satisfied the requirements for granting leave to appeal, and it is hereby granted.

[64] In my view costs should follow the cause.

ORDER

[65] In the result the Court hereby issues the following Order:

1. Leave to appeal is hereby granted.

2. Costs to follow the cause.

M.J. MANZINI
ACTING JUSTICE OF APPEAL

I agree

M.C.B. MAPHALALA
CHIEF JUSTICE

For the Appellant: THE ATTORNEY GENERAL

For the Respondent: MAGAGULA & HLOPHE ATTORNEYS

SUMMARY

Application for leave to Appeal – Requirements for leave to appeal - Whether judgment appealed interlocutory or final and definitive in effect - If appeal final in effect although interlocutory in form , no leave required as matter appealable as of right – Attributes of a final judgment or order - If Judgment interlocutory in form and effect , leave to appeal required – Requirements for the grant of leave to appeal an interlocutory judgment - Nature of the judgment founding this application - Whether final or interlocutory – Whether a case made for the relief sought.

DISSENTING JUDGMENT

HLOPHE JA

[1] I have read the majority judgment penned by my brother Manzini AJA and respectfully beg to differ from it on the conclusion reached. Herein below are my reasons for arriving at such a conclusion.

INTRODUCTION

[2] This is an application for leave to Appeal a judgment of the High Court in which it upheld a Rule 30 objection (that is, an objection that a certain step taken by the opposing party in proceedings serving before the High Court was irregular), raised by the current Respondent. The order complained of

was couched in the following terms by the Learned Judge *a quo*, Maphanga J:-

> *(a) The answering affidavit sought to be filed by the Respondents in the main matter is hereby set aside as an irregular step in terms of Rule 30 (of the High Court Rules).*
>
> *(b) The Applicant is directed to set the matter down for hearing on the quantum of the claim. The parties are directed to file their submissions in respect thereof in due cause.*
>
> *(c) Costs shall be reserved for determination in the final cause.*

[3] The step complained of as having been irregularly taken by the current Applicants was the belated filing of an answering affidavit in proceedings that had initially run their course in both the High Court and the Supreme Court. At the High Court the proceedings were not opposed but the outcome from them was challenged on an unsuccessful rescission of judgment application whose judgment was taken on appeal by the applicants. The appeal was partially successful in so far as the aspect of the matter referred to the Industrial Court for determination was set aside with the matter being referred back to the High Court for finalization of adjudication. This was pronounced in the unanimous judgment of Justices **B.J. Odoki JA, S.P. Dlamini JA and M.J. Dlamini JA.**

[4] It is only, as shall be seen from the full facts set out below, that instead of having the High Court deal with the matter towards final adjudication as directed, the current Applicants filed an answering affidavit in the long finalized aspect of the matter – the review - contending that the said affidavit had to be considered in the finalization of the matter ordered by the Supreme Court. They claimed that the Judgment of the Supreme Court had somehow allowed them to file the answering affidavit in the long completed review proceedings. This overlooks the fact that they had consciously failed to file the said affidavit leading to the review application being dealt with as an unopposed matter.

[5] It was in response to the filing of the answering affidavit to the long completed proceedings that the current Respondent filed a Rule 30 objection, contending that the filing of the affidavit in question after all that had happened, including a pronouncement on the matter by the Supreme Court, was an irregular step that called for the affidavit in question to be set aside. This Rule 30 objection was upheld by the High Court which set aside the said affidavit and ordered how the matter was to be proceeded with going forward. The Applicants reacted thereto by instituting the current proceedings in which they sought leave to appeal the order in the rule 30 objection referred to.

FACTUAL BACKGROUND AND RELATED COMMENTS.

[6] The background to the matter including its history and circumstances is as set out in the papers filed of record. It is summarized in the manner set out in the following paragraphs.

[6.1] The Industrial Court found against the current Respondent in a matter where he was claiming *inter alia* the payment of terminal benefits and a compensation for unfair dismissal.

[6.2] The effect of the Industrial Court Judgment was to dismiss the matter (the then applicant's claim) in its entirety.

[6.3] The current Respondent, then the Applicant in the proceedings, approached the High Court for review of the Industrial Court Judgment. After no opposing affidavit (also referred to as the answering affidavit) was not filed together with the applicants not attending court on the date for hearing the matter, the High Court per Maphanga J, granted the unopposed review application thus awarding wholesale the reliefs sought by the then applicant, which inter alia included terminal benefits and an amount for compensation for unfair dismissal.

[6.4] As it did so, it relied on the grounds for review as raised by the applicant in those proceedings which have been casually referred to in the proceedings as the Industrial Court having failed to apply

its mind to the facts and circumstances of the matter resulting in it dismissing the current Respondent's Application which served before it.

[6.5] Although the Review Application was launched on the 21st June 2018, the current Applicants who had been served with same are said to have only filed a Rule 30 objection on some technical issues relating to the certification and filing of the Record of proceedings. No answering affidavit was ever filed. After some months without an answering affidavit having been filed, the then Respondents, now Applicants, withdrew the Rule 30 objection. However, as that was done, no answering affidavit was filled. In fact it is common cause that there was instead filed several Notices of set down of the matter, which however did not trigger the filing of the opposing or answering affidavit. This makes a conclusion inescapable that the failure to file an answering affidavit was conscious and by choice on the then Respondents' part; Applicants in this matter.

[6.6] The matter was eventually heard by the High Court per Maphanga J. as an unopposed review application. In simple language it was heard as an unopposed application in circumstances more akin to the hearing of a default judgment. This default was in two ways:-

(i) There was no opposition to the Application for review in so far as no papers in that regard had been filed.

(ii) There was no appearance on behalf of the Respondents (now Applicants) in Court on the day of the hearing.

[6.7] After hearing Applicant's Counsel the High Court per Maphanga J, granted the review application and issued an order in the following terms:-

1. *The Judgment of the Industrial Court dated 18th April 2018 in terms of which it dismissed all claims of the Applicant as against the fifth Respondent under Case No. 37/2016 is hereby reviewed, corrected and set aside.*

2. *The decision of the Court a quo dismissing Applicants claim is hereby substituted with an order granting Applicant's prayers in terms of the application for determination of an unresolved dispute with costs. The claims are as follows:-*

   (a) Terminal benefits in the sum of E663 705-00.

   (b) Maximum compensation for unfair dismissal in the sum of E182 519.04.

3. *Costs of suit.*

[6.8] After becoming aware of the Judgment, the Respondents filed an Application for the rescission of same. This Application was allegedly based on Rule 42 (1) (a) of the High Court Rules and the Common Law.

[6.9] With regards Rule 42(1) (a) it was contended that the Judgment had been granted erroneously. The error was said to be that the High Court had substituted its decision for that of the Industrial Court and had in that sense granted compensation in its judgment yet that was an area allegedly preserved for a specialized Court in the form of the Industrial Court per the Industrial Relations Act 2000.

[6.10] With regards the Common Law, the applicants had to satisfy the requirements for that remedy for them to succeed in their application. These requirements were simply:-

(i) A reasonable and acceptable explanation for the default; and

(ii) A *bona fide* defence (in the case of a respondent in labour proceedings) or prospects of success in the case of an Applicant. On these requirements see among other cases that of **Leonard Dlamini v Lucky Dlamini, High Court Civil Case no. 1644/1997.**

[6.11] In its judgment, the High Court per Maphanga J, concluded that on common law grounds, there were no merits in the application because the Appellants were unable to meet the requisites for rescission in so far as they could not give a reasonable and acceptable explanation for their default. Indeed when one looks at their failure to file an answering or opposing affidavit in the review application for months after they had contented themselves with filing a Rule 30 objection (which they had gone on to withdraw) without filing an opposing affidavit in its stead, it would not be inappropriate to conclude that they grossly neglected, or even deliberately decided not to file such an affidavit and therefore that they would be unsuited for a rescission. See also the judgment in **Nyingwa v Moolman 1993(2) SA 508 (TK) on the said requirements.**

[6.12] The position is settled in our law that failure to file an opposing affidavit for an inordinate period without a reasonable and acceptable explanation, in a cases where one had been served with a process that spelt out the time limits to file a required process, there could hardly be reasonable and acceptable explanation and the conclusion by Maphanga J that there was no merit to the rescission application by the Appellants on common law grounds in those circumstances could hardly be faulted. It shall also be borne in mind that their legal representative would not even attend the hearing of the review application despite having been notified of the said date.

[6.13] It looks like there was so much remissness on the part of the Applicant's representatives that the Applicants themselves could not escape the consequences of their representative's action or inaction being attributed to them – see in this regard the celebrated case of **Saloojee And Another NNO V Minister of Community Development 1965 (2) SA 135 (A)** where the following was stated with regards the liability of a party for his attorney's remissness or shortcomings:-

> "*It has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered*".

[6.14] On the question of Rescission under Rule 42 (1) (a), the Court a *quo* concluded that whereas there was no error made in the proceedings, the substitution order was in the circumstances erroneously sought and as such the Court was led into an error in granting same as that relief was in its view outside its area of competence. It so concluded because in its view the award of terminal benefits and compensation for unfair dismissal were matters reserved for the Industrial Court in terms of the Industrial Relations Act. It then went on to refer that aspect of the matter to the Industrial Court because it opined that although such was an

error, it was not one to lead to the grant of a rescission. This point the High Court made in the following words at paragraph 49 of the judgment:-

"*In the circumstance of this case I am persuaded that although there was no error in the proceedings or (sic) the substitution order was in the circumstances erroneously sought and as such the court led into error in granting the same as the relief was outside of the competence of the Court"*.

[6.15] A comment is merited at this point given what is indeed contended by the respondent's counsel to the effect that in concluding that the High Court could not substitute the decision of the Industrial Court in the course of a review, the High Court was not entirely correct as the position may differ where there are in existence certain circumstances referred to as exceptional. This will for instance be the case where the reviewing court had fully investigated all the facts and is convinced that the body being reviewed had failed to exercise its discretion. See **Yipsing v Germiston Rural Licensing Board 1934 WLD 70).**

[6.16] Again upon not being satisfied with this judgment, the Applicants approached the Supreme Court appealing the judgment of the High Court which had directed that the aspect on the award of compensation for unfair dismissal be referred to the Industrial Court as a specialized Court. The stand point of the Applicants

was simply that there was no misdirection by the Industrial Court and that the High Court had been incorrect in the decision it had made. This was hardly a point to make if the order granted at the hearing of the review could not be rescinded on the grounds cognizable at law. Other than noting the appeal contending the High Court should have granted the rescission, the applicants do not seem to have shown where and how the High Court's decision on the rescission was being faulted, particularly bearing in mind the fact that whatever shortcomings there were in the review process, they could only be visited or become issues if the judgment dismissing the rescission could be faulted in law.

[6.17] In its judgment the Supreme Court, after raising and considering a wide range of issues, most of which must have been obiter when considering that the matter before it was in essence an appeal against a decision of the High Court in the course of a rescission application and in which the said Court had correctly concluded, on the basis of the common law, that the relief sought could not be granted because its requirements could not be met, and that for the error relied upon to result in the grant of a rescission, there should be a finding by that Court that the High Court had erred in its conclusion that there had been established no error to justify a rescission; concluded that the application succeeded partially and that the matter was being referred to the High Court for final adjudication.

[6.18] The Supreme Court could, on this point alone, not have meant to grant applicant a judgment interfering with the High Court's review decision if it had not found fault with the latter Court's judgment on the rescission. I could find no reference to such fault in my scrutiny of the Supreme Court Judgment. In other words it could only interfere with the review judgment if it had concluded that there was fault on the High Court's finding on the rescission application. The Supreme Court made the following order at paragraph 54 of its judgment:-

"54. Accordingly the Court makes the following Order;

1. *That the Appeal partially succeeds in that the order of the High Court referring the matter to the Industrial Court is set aside.*

2. *That the matter is referred back to the High Court for final adjudication.*

3. *That no order as to costs is made."*

[6.19] The wide ranging issues considered by the Supreme Court were further obiter when considering the proper context of the matter which is that the review of the judgment of the Industrial Court was done by default after the Applicants had chosen or negligently failed to file opposing papers for their side to be considered and

had also failed to appear in court and advance their side on the day the matter was heard. It was therefore not a case of a failure to grant them a hearing as the applicants appear to have contended at the Supreme Court. The reality is that they had failed to utilize the chance afforded them to be heard and could therefore not be heard claiming not to have been afforded an opportunity for that purpose.

[6.20] In practice it is not strange for a Court to consider the papers filed of record, hear the submissions made by counsel for the party who filed papers and went on to make submissions in Court, to thereafter grant a judgment as prayed for as long as it was satisfied on the propriety of granting the issues raised. It is also normal that in such circumstances, depending on the Court concerned being satisfied on whether a case is made for the relief sought, to hand down a ruling or judgment by default, often there and then. This happens frequently in motion court proceedings under which the review application was heard and granted.

[6.21] A lot is said about the reasons for the review not having been availed by the High Court per Maphanga J. Whilst the reasons could have been more detailed and perhaps rendered more clarity, it would not be entirely correct to say there were no reasons for the order reached in the review proceedings. The application for review had, according to the papers, *inter alia* stated that the Industrial Court had not applied its mind in its hearing the matter.

It should follow that if the contentions by the Applicant in the review application were not disputed by the other side and the Court, after having read the papers filed of record and having heard the submissions by counsel, agreed with the applicant's case, it cannot realistically be said there were no reasons for the review.

[6.22] That there were reasons for the High Court to conclude the review application in the manner it did, could be seen from the rescission application subsequently filed by the current Applicants. The Applicants had in there not contended that the judgment be rescinded, because there were no grounds or reasons for its grant, but because, they alleged, the grant of the said judgment was attended by error (was erroneous) within the meaning and effect of Rule 42(1) (a) of the High Court Rules as well as on the basis of the Common Law. I have already stated what the requirements for obtaining a rescission under the common law are including what the high court had found to be the error which in its view could however not result in the grant of a rescission, hence its referral of the matter to the Industrial Court for the grant of the compensation.

CONSIDERATION OF LEGAL ISSUES INVOLVED.

[7] With the Supreme Court having ordered that 'the Appeal partially succeeds in that the order of the High Court referring the matter to the Industrial Court, is being set aside' and that 'the matter is referred to the High Court

for final adjudication', I agree with Respondent's counsel it could, in the circumstances, only mean that with the matter having been dealt with as a review in which the Court had, during the hearing, decided not to substitute its judgment or order for that of the Industrial Court, it had referred that matter to the High Court for it to finalize the adjudication of the matter it had partly determined when it referred an aspect of it to Industrial Court. The finalization of the matter would therefore be in doing what it had initially said it had no competence to do. It is only a trite position of our law that the High Court has the legal competence to substitute its decision for that of a specialized body or body under review. The only adjudication that had already commenced in the proceedings appealed against (the rescission application) which had not been finalized and needed to be so finalized was the determination of the quantum for compensation which the High Court had referred to the Industrial Court. This is the aspect the Supreme Court had specifically set aside as it reverted the matter to the High Court for final adjudication.

[8] In the context of the matter and in the context of a review application, the High Court was erroneous in saying it could not itself determine the quantum of the compensation. It is within this context that the Supreme Court can reasonably be construed to have directed the High Court to itself determine the appropriate compensation and thereby finalise adjudication of the matter.

[9] Our law does allow a court hearing a review matter to, in those limited circumstances, substitute its order for that of the trial court provided certain specific requirements are met. This would for instance occur in a case in which nothing would change as the order the trial court stood to make would be the same as that which the reviewing court would make. This would also happen in a case where the referral of the matter to the trial court would only amount to an unfair delay of its finalization.

[10] Commenting on the substitution of the order of the trial court by a reviewing court, **Herbstein and Van Winsen's, The Civil Practice of The Supreme Court of South Africa, Juta & Company, 4th edition, Pages 958-959** stated the following:-

> *"Although the Court will, in the case of a successful review, generally refer the matter back to the particular body entrusted by the Legislature with certain or special powers rather than make the decision itself, it will not do so when the end result is a foregone conclusion and a reference back will merely be a waste of time, when a reference back would be an exercise in futility, or when there are cogent reasons why the Court should exercise its discretion in favour of the Applicant and substitute its own decision for that of the Respondent"(underlining added).*

[11] It is for this reason that I find it completely lacking in *bona fides*, for the Applicants in this matter to have interpreted the judgment of the Supreme

Court referred to above to mean that they were now being given authority to file the opposing affidavit they had initially chosen not to file even before the review matter was adjudicated upon. It is on record that they had, in circumstances that suggested a conscious decision having been taken by them not to file an answering affidavit, only contented themselves with filing only a Rule 30 objection. This objection they had also gone on to withdraw before the matter determining the then applicant's claim could be heard. I also note that in partially upholding the rescission application (that is before the Supreme Court referred back the same decision to the High Court for finality), the High Court had said that it was referring the determination of the quantum of the compensation to the Industrial Court because in its view, that was the only entity with special power to determine such a question.

[12] Of course that was erroneous on the part of the High Court considering the excerpt from **Herbstein and Van Winsen's** book referred to above. The excerpt emphasizes the point that the High Court has the power in a review to substitute its decision for that of the specialized body provided the requirements referred to therein are met. See also **Traube V Administrator Transvaal and Others 1989 (2) SA369** and **Kenneth B. Ngcamphalala V Swazi Bank and Another (385/11) [2012] 223 (28 September 2012) SZSC** in this regard.

[13] It can hardly be in doubt that nothing would hinder the High Court from itself determining the quantum of the compensation as that is not

complicated at all; it being the grant of a salary equivalent ranging between one (1) and twelve (12) months if any was being granted, and therefore that the reference of the matter back would in that sense be a waste of time. Given the background of the matter, the High Court would have also had cogent reasons to substitute its order for that of the Industrial Court after it would have acquainted itself fully with all the facts.

[14] This is the position of the law that must have been uppermost in the minds of the Supreme Court justices when they set aside the decision or order of the High Court referring the determination of the quantum of the compensation to the Industrial court on the basis that it was not competent for it to grant such an order and that only the specialized court could do so. It would have only been in that spirit for its judgment or order to have been reasonable if it had ordered the High Court to finalize the matter itself as what needed to be decided at that stage was merely the quantum of the compensation for unfair dismissal. The Supreme Court had not said that the High Court had erred in concluding that the then applicant had been unfairly dismissed when it reviewed and set aside the decision of the Industrial Court suggesting the contrary position.

[15] It is in fact true that the Appellants' reaction to the judgment and order of the Supreme Court referred to above was to file what they termed an answering affidavit to the initial review application which had long been concluded. I cannot help concluding this was not *bona fide* on the part of the Appellants. If the Supreme Court had meant that the Appellants contest the review

application they had not opposed at the time, it should have first reversed the High Court judgment which failed to rescind the review judgment. In that case the appeal would not have succeeded partially as the Supreme Court pronounced but would have done so fully.

[16] Further still, it would not be competent in law for the Supreme Court to compel the Appellants as parties in a matter to oppose proceedings they had deliberately chosen not to file in the initial review application (by allowing them now file an answering affidavit) or to oppose proceedings the High Court had found the failure to file had not been accompanied by a reasonable and acceptable explanation so as to result in a rescission of the review judgment or order. For the appellants to have filed an answering affidavit in the circumstances of the matter and in the manner they contend they were authorized to have filed by the Supreme Court, the appellants want to suggest they were advised to do so by the said Court. This misses the point as Courts do not advise parties as the applicants suggest. They adjudicate disputes according to law.

[17] For this the Supreme Court would have had to show how the High Court had been at fault in refusing to rescind the said judgment. It follows that in the current matter or even in the judgment of the said Supreme Court, it is nowhere shown nor even insinuated that there was anything wrong with the High Court's judgment in failing to rescind the review judgment particularly on the grounds relied upon for the same; namely Rule 42(1)(a) and the common law. There is therefore no way in law the Supreme Court would

even enter a debate or otherwise conclude there was anything wrong with the review judgment if it had not firstly found there was a basis in law to rescind the said judgment and gone on to show it was wrong for the High Court not to have rescinded the said review judgment.

[18] It is because of this failure to find a basis for the High Court's failure not to rescind the said judgment, that I would agree with Respondent's counsel that the holes sought to be poked by the Supreme Court on the review judgment were merely obiter. The question for determination before the Supreme Court in the said proceedings at that stage were no longer whether at that time there was anything wrong with the review judgment than it was whether that judgment as it stood could be rescinded in law.

[19] This is the reason why I cannot fault the High Court on its decision to uphold the Rule 30 objection against the filing of the said answering affidavit raised by the Respondent.

[20] In its reasons for upholding the said Rule 30 objection, the High Court per Maphanga J stated the following on the file cover annexed to the answering affidavit in the matter: -

> "*Having heard counsel and upon consideration of the Supreme Court Judgment and specifically the order issued for rescission and conduct of the matter before this Court, I am satisfied and accordingly determine that*: -

(a) The answering affidavit sought to be filed by the Applicants in the Rescission Application is hereby set aside as an irregular step in terms of Rule 30;

(b) The Respondent is directed to set the matter down for hearing on the quantum of the claim. The parties are directed to file their submissions in respect thereof in due course.

(c) Costs shall be reserved for determination in the final cause.

[21] The current matter is an application for leave to appeal the foregoing decision or order of the High Court setting aside the answering affidavit filed by the Appellant to a cause that had long been determined. The matter in which the impugned affidavit was meant to be filed had already had two distinct and independent proceedings entertained in different Courts (including the Supreme Court) subsequent to the impugned review decision. In none of those proceedings was there a contention by the applicants that they had not been allowed an opportunity to file the said affidavit nor had they ever asked to be granted an opportunity to file it. This means that for the Judgment of the Supreme Court to have the meaning the applicants contend attached to it, the said Court would have had to grant an order that had not been prayed for, even one without having asked the parties to address it on the possibility of its issuing. Courts do not operate like that and indeed the law does not allow it. The Supreme Court could not in law issue the order suggested by the Applicants. The judgment of the Supreme Court

in **Cowigan (PTY) Ltd and 2 Others V Sandile Thwala N.O. And 3 Others (51/2011) [2011] SZSC 25 (31 May 2012)** is authority for this proposition.

[22] The reality is that the issue that was set aside by the Supreme Court was that of the Industrial Court having to determine the amount of the compensation because the High Court had contended it had no competence to do. In setting aside that aspect the Supreme Court had said that the amount of the compensation should be determined by the High Court (adjudicate the matter to finality and had not said it should start the matter de novo). In that context it meant that the compensation was to be determined by the High Court as it ordered that "the matter is referred to the High Court for final adjudication". The only conceivable 'final adjudication' in the circumstances of the matter as at that point was the determination of the amount for compensation for unfair dismissal which had initially not been finalized when that part was referred to the Industrial Court for that adjudication. It is logical and would be supported by law that the Supreme Court set aside and referred the matter to the High Court to finalize the question that had been left hanging, namely the quantification of the compensation for unfair dismissal.

[23] Viewed from this context and background it should have come as a surprise when the Appellants filed the current application for leave to appeal contending *inter alia* that the Supreme Court in its earlier judgment had impliedly allowed their filing an answering affidavit when all indicators are

that they had consciously chosen not to file same at the appropriate stage and prior to the review judgment being issued. It should complicate the situation more for them that they had not prayed for the filing of that affidavit as a relief in the rescission application nor did they clarify how the matter of the affidavit became an issue during the hearing for it to have ended up being ordered by the Supreme Court. If the contention is that their filing the affidavit was a result of their having interpreted the Supreme Court judgment then that interpretation would not have been a reasonable one given that the Supreme Court would not, as stated above, have possibly ordered the reopening of the review matter without having dealt with the rescission which was the matter serving before it. It further could not legally or validly order the opposition of a matter the applicant had chosen not to oppose and had subsequently been found to have no legal basis to rescind.

[24] In the alternative they sought an order interpreting the Supreme Court Judgment. This relief is not open to them in the circumstances of the matter. When instituting the current application for leave to appeal the applicants had already accepted the Judgment of the Supreme Court they now seek to have interpreted. They in fact acted on the same judgment they now seek to have interpreted. By acting in the manner they did they had acquiesced to it and thereby precluded themselves from acting against it. It is therefore no longer opened to them to challenge an order they initially accepted and even acted upon.

[25] It cannot be disputed that the order issued by Maphanga J as he upheld the Rule 30 application with the rider that the matter be set down for determining the quantum of the claim and that written submissions towards the determination of the question before Court had to be filed by the parties was interlocutory. Describing an interlocutory order, **Herbstein and Van Winsen's "The Civil Practice of the Supreme Court of South Africa, Juta and Company, Fourth Edition** at page 877 had the following to say:-

> "*An interlocutory order is an order granted by the Court at an intermediate stage in the course of litigation setting or giving directions with regard to some preliminary or procedural question that has arisen in the dispute between the parties*".

[26] It is also settled that some such orders are purely interlocutory whilst others are interlocutory with a final and definitive effect. It is again trite that purely interlocutory orders are not appealable as of right but only with the leave of Court whilst interlocutory orders with a final and definitive effect are appealable as of right. See in this regard **Herbstein and Van Winsen's The Civil Practice of the Supreme Court, 4th Edition, at page 877- 878**.

[27] In order to determine whether a preparatory (interlocutory) order is purely interlocutory or has a final and definitive effect it should be ascertained from the facts whether that particular order disposes of any issue or any portion of the issue in the main action or if it irreparably anticipates or

precludes some portion of the relief which would or might be given at the hearing: See in this regard **Pretoria Garrison Institutes v Danish Variety Products (PTY) LTD 1948 (1) SA 839 (A) at 870**.

[28] Contending for the dismissal of the application serving before this Court, Respondents' counsel argued *inter alia* that it was only confirming the lack of merit in the applicants' case that whilst seeking leave to appeal an interlocutory order, the Applicants had alongside that request, prayed for an interpretation of the Judgment of the Supreme Court. He argued further that this was not a competent relief to seek given that the applicants were not allowed in law to first comply with an order of court and only turn to seek an interpretation of that judgment when the relief they had already chosen failed. For this relief to be competently sought, it was argued, it was incumbent upon the Applicants to have, upon pronouncement of the Supreme Court judgment, sought an interpretation from the same court (not necessarily the same judge) before complying with or acting upon the said order or judgment. Owing to the view I have taken of the matter, it is not necessary for me to decide this question. It suffices for me to say that the Respondent counsel's argument is attractive and logical. It only merits comment that whereas the order must be read as part of the entire judgment and not as a separate document, the court's directions must be found in the order and nowhere else. Again if the meaning of the order (the executive part of the judgment) is clear and unambiguous, it is decisive and cannot be rescinded or extended by anything else stated in the judgment. See **Administrator Cape and another v Ntshwaqela and others 1990 (1) SA 705 (A) at- 716 B-C.**

[29] It was also forcefully argued by Respondent's counsel that the interlocutory order sought to be appealed was not a final and definitive one in so far as it did not dispose of any issue or any portion of an issue in the main action or suit. It was argued further that it could also not be established that the order had irreparably anticipated or precluded some part of the relief which would or might be given at the hearing. I agree with this submission when considering that the matter of the rule 30 was in my view not disposing of an issue or a portion of an issue in the rescission application which was the matter that had already been adjudicated upon before the High Court. It had no bearing on the quantum of the compensation the court was meant to determine at the failure of the rule 30 proceedings.

[30] Further argued Respondent's counsel, what the High Court had done was simply to direct that it was incompetent at that stage for the Applicants to file an answering affidavit they had consciously chosen not to file at the appropriate stage and had never even asked for at any stage of the proceedings. This made it strange how then they could have genuinely believed that the Supreme Court had ordered that they be allowed to file such an answering affidavit way out of time after fully fledged proceedings had been heard and concluded at least before two courts including the Supreme Court on the matter.

[31] I am of the view that there is merit in what Respondent's counsel has argued before this Court. I for instance cannot see how the order of the High Court

upholding the Rule 30 objection becomes appealable. Besides the fact that it is a purely interlocutory order in a matter that has not been finalized, there is no way it can be argued that the interlocutory order in question disposed of any issue or any part of an issue in the main action for it to be appealable. I also cannot see how it irreparably anticipates or precludes some of the reliefs, which would or might be given at the hearing so as to be clothed with finality in order for it to be appealable. See **Pretoria Garrison Institute V Danish Variety Products (Pty) Ltd 1948 (1) SA 839.**

CONCLUSSION.

[32] I can only conclude that in so far as the judgment appealed against was answering the question whether the Applicants could be allowed to file an answering affidavit given the background of the matter, it is difficult to understand how the Applicants could assume that they could appeal such an order. The background is that the matter appealed against was a refusal by the High Court to rescind a review order granted unopposd. No reasons had been placed before court explaining how the court was wrong in refusing the rescission that had been sought. Short of an answer to that question, the Supreme Court could not possibly and lawfully decide the question whether the review order or judgment had been granted correctly.

[33] The question of the correctness or otherwise of the review decision would only be possible if a rescission of the review judgment or order would have been competent to grant in law. If the Supreme Court commented on the

correctness or otherwise of the review decision without firstly having decided on the rescission and found it to be competent, then its decision would, to that extent, have been obiter and therefore could not realistically have allowed the applicants to file the answering affidavit they sought to file and by extension, there would be no finality in the decision on the Rule 30 objection. There would also by extension be no real prospects of success in any leave to appeal that order or decision.

[34] Further still, in so far as a rescission of the review order had been sought, the Supreme Court could not say that a rescission should have been granted in a matter where the legal requirements of it were not met. It worsens the position that in reality the review was not granted as a result of a refusal to hear the applicant as it is now suggested by the applicants, but as a result of the latter failing or choosing not to oppose the review application.

[35] I disagree with Applicant's counsel that the various paragraphs in the judgment of the Supreme Court he referred to as supporting his contention that he was to file the answering affidavit in question at that stage, could actually do so in law. Despite that they do not support the applicants' contention, they actually contain obiter material. For the Court to have meant what the applicants contend, it would have had to rescind the judgment or order on one of the cognizable grounds. It did not do so and could possibly not do so in law.

[36] Consequently, I make the following order:-

1. The Applicants' application for leave to appeal the decision of the High Court setting aside the answering affidavit filed out of time after the matter had already been finalized within the Courts' structures cannot succeed and it is dismissed.

2. The matter is reverted to the High Court for it to continue with it in line with the order it had made and against which the leave to appeal was sought.

3. The Applicants will bear the costs of the proceedings.

N.J. HLOPHE

JUSTICE OF APPEAL

For the Appellant : The Attorney General

For the Respondent : Magagula & Hlophe Attorneys