IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO. 45/2022**

In the matter between

MASTER OF THE HIGH COURT N.O.	**1ST APPLICANT**
THE ATTORNEY GENERAL N.O.	**2ND APPLICANT**

AND

SUN INTERNATIONL MANAGEMENT LIMITED	**1ST RESPONDENT**
NEDBANK SWAZILAND LIMITED	**2ND RESPONDENT**
ESWATINI NATIONAL PROVIDENT FUND	**3RD RESPONDENT**
CHICK-FIL-A SWAZILAND (PTY) LTD	**4TH RESPONDENT**
FORMER EMPLOYEES OF SWAZISPA	**5TH RESPONDENT**

Neutral Citation: *MASTER OF THE HIGH COURT N.O. & ANOTHER v SUN INTERNATIONAL MANAGEMENT LIMITED & 4 OTHERS (45/2022) [2022] SZSC 63 (06 DECEMBER 2022)*

Coram : MAMBA JA

Heard : 14 NOVEMBER, 2022

Delivered : 06 DECEMBER, 2022

[1] *Civil law and Procedure – Application for Leave to Appeal against an interlocutory order of the High Court per Section 14 (1) (b) of the Court of Appeal Act 74 of 1954. Applicant must show reasonable prospects of success in the intended appeal. Essential requirements of reasonable prospects of success restated.*

[2] *Civil law – Applicant raising point of law by way of affidavit – No corresponding affidavit by respondent in response thereto. Points of law founded on pleadings alredy filed. Points of law opposed by Counsel in argument. Held points of law need not be opposed or raised by way of an affidavit.*

MAMBA JA:

[1] The first applicant is the Master of the High Court of Eswatini. The depositions made in these proceedings on her behalf have been made by her Deputy. The other parties herein have been described by the 1st applicant in her founding affidavit as follows:

> '2. The 2nd applicant is the 1st applicant legal representative duly appointed in terms of the Constitution and other related Acts of Parliament.
>
> - - -
>
> 4. The 1st respondent is SUN INTERNATIONAL MANAGEMENT LIMITED a South African company duly registered with the laws of the Republic of South Africa. It has no physical address in the country but has furnished provision of a security for costs.

5. The 2nd respondent is NEDBANK SWAZILAND LIMITED a financial institution duly incorporated in terms of the laws of the country having its principal place of business at Swazi Plaza, Mbabane.

6. The 3rd respondent is ESWATINI NATIONAL PROVIDENT FUND a statutory body duly established in terms of Laws of the country having its principal place of business at Nkoseluhlaza Street, Manzini.

7. The 4th respondent is CHICK-FIL-A SWAZILAND (PTY) LTD a private company duly incorporated in terms of the laws of the country based at Royal Spa, Ezulwini, Hhohho District.

8. The 5th respondent is THE FORMER EMPLOYEES OF SWAZISPA who nominated DUMISANI DLAMINI to depose to their affidavits on their behalf and currently using law firm of Robinson Bertram to receive all notices and processes on his behalf.'

[2] In or about June 2021, the 1st respondent successfully applied before the High Court to have Swazispa Holding Limited and its subsidiary companies under liquidation. This was under case number 1109/2021. The reason for placing the said companies under liquidation was that they were unable to honour or pay their debts. Marissa Boxshall Smith, an attorney, was appointed as liquidator of the said companies. A *concursus creditorium* was established primarily to look after the interests of the creditors. It is common cause that the liquidator was, with the cooperation of the *concursus creditorium*, where necessary, able to execute some of her duties. In or about March 2022, the 1st applicant appointed one Paul Mulindwa, an accountant as co-liquidator. This decision was duly conveyed to the shareholders and creditors of the relevant companies. This was on 18 March 2022.

[3] On 04 April 2022, the 1st respondent, Nedbank Swaziland Limited, the 2nd respondent and the 3rd respondent filed an application before the High Court seeking an order reviewing and setting aside the appointment of Mr. Mulindwa as a co-liquidator. The applicants submitted that the said appointment was unlawful and or irrational and invalid. That was part B of the application. Part A was a prayer for an

interim interdict that pending the review application, Mr. Mulindwa be interdicted from executing his duties as co-liquidator. After all the set of papers in the application had been filed, the applicants gave notice that they would no longer be pursuing part A of their application.

[4] It is observed and recorded here that whilst pursuing their application, challenging the appointment of Mr. Mulindwa, the applicants did cooperate with him in the execution of his duties as a liquidator.

[5] By Notice dated 06 May 2022, the 1st and 4th respondents (the applicants in this application) filed and served a Notice to raise two points of law (*in limine*). These points were couched in the following terms:

> '1. The applicants - - - are estopped from moving this application because they have embraced [Mr. Mulindwa] and are working with him. The matter is now academic.
>
> 2. The doctrine of peremption is applicable in the matter.'

This Notice was accompanied by an affidavit by the Deputy Master of the High Court where she pointed out, *inter alia*, that the applicants were working hand in hand with Mr. Mulindwa and that the effect of abandoning Part A of the application was tantamount to an act of acquiescence or peremption on their part.

[6] The applicants did not file any papers in response to the points of law raised but only made submissions to Court when the matter was argued by Counsel on 13 May 2022. The Court handed down its ruling on 20 June 2022. The Court ordered that

> '1. The points of law are hereby dismissed. The application will proceed to be heard on the merits.
>
> 2. Costs to follow the event.'

[7] Not being satisfied with the above ruling, the applicants (in this case) have filed this application wherein they pray for an order:

> '1. That the applicants be granted lease to appeal the judgment delivered - - - on 20 June 2022.
>
> 2. Costs, jointly and severally against the respondents.'

[8] This application has been made in terms of Section 14 (1) (b) of the Court of Appeal Act 74 of 1954 which provides that an appeal shall lie to this Court by leave of this Court from an interlocutory order of the High Court. The Court *a quo* found that the defence of estoppel was inapplicable in the case and that this had been conceded by Counsel for the applicants. (See paragraph 19.1 of the judgment). On the issue of peremption the Court ruled that the respondents had not been shown to have unequivocally signalled or signified that they accepted the appointment of Mr. Mulindwa. The fact that they were cooperating with him in his role as a liquidator could not be said to be unequivocal in view of their clear intention to have his appointment declared unlawful and that he be removed as co-liquidator. It concluded that where there is more than one inference that may be fairly drawn from the actions of the respondents herein, then that act cannot be said to be unequivocal. (See paragraph 19.8 of the judgment).

[9] The applicants argue that there was no opposition to their points of law inasmuch as the respondents did not file an answering affidavit. Applicants submit that "an affidavit is opposed by another affidavit."

(Paragraph 51 of Founding Affidavit). I do not think that this assertion should burden this judgment. Suffice it to say that a point of law need not be raised by way of an affidavit. That is trite law. Indeed such a point may even be raised *mero motu* by the Court. If all the material needed for a determination of the legal point raised was already before the Court-in the pleadings-then there was absolutely no need to repeat it in an affidavit. To do so would be surplusage and would unduly burden the pleadings. The legal points raised were based on the facts contained in the pleadings. The 1st applicant has herself characterised these points of law as "arguments". (See paragraph 52 of Founding Affidavit). There is no merit on this challenge or complaint.

[10] The applicants have stated that there are reasonable prospects of success in the intended appeal. If granted leave to appeal, the applicants submit that they will basically repeat the two points raised *in limine* and also argue that

> '(d) the Learned Judge *a quo* erred in law and fact by holding that the respondents constitutional right in terms of Section 33 [of the Constitution] was violated and that they could not waive their right even if they so desired.'

Lastly, it is submitted by the applicants that

> '71. This matter is of jurisdictional importance to enrich our law on the principles of [peremption] hence granting me leave to appeal the judgment is of great national importance.' Frankly, I do not understand what is meant by this submission. If the suggestion is that leave to appeal must be granted in order for this Court to restate the law regarding the doctrine of peremption, then I think that the applicants are mistaken. The said doctrine, its requirements or principles are well known in this jurisdiction and there is no need for this Court to restate these on appeal just for the benefit of the applicants. Perhaps if there are novel issues or conflicting issues of law on the subject, these may legitimately need the attention of this Court. That is not the case in this application.

[11] As can be seen from the grounds for leave to appeal, the applicants state that the Court a quo was wrong in its decision. However, the test for leave to appeal is whether there are reasonable prospects of success in the appeal, or that the applicant must satisfy the Court that another Court could reasonably have reached a different conclusion or more specifically, that conclusion propounded by the applicants. Logically,

one has to have a reasonable basis to assert that there are reasonable prospects of success in the appeal. Establishing the existence of reasonable prospects of success, is of itself not decisive of the application. Ultimately, the Court would be guided by what would be in the best interests of justice. (See *Land & Agricultural Development Bank of South Africa & Another v Van den Berg & Others [2022] 1 All SA 457 (FB).* In South Africa, this subject is regulated by Section 17 of the Superior Courts Act. The effect of this section is that leave to appeal may now only be granted where the applicant has established that there are reasonable prospects of success in the appeal. We do not have a similar provision in our Court of Appeal Act.

[12] Regarding the test for leave to appeal, this Court in *The Registrar of the High Court, Eswatini N.O., The Hon. Chief Justice of Eswatini N.O. v Mduduzi Bacede Mabuza and Mthandeni Dube (02/2022) [2022] SZSC 08 (06 May, 2022)* had this to say:

> **Appealability of interlocutory orders - the test**
>
> [41] Speaking generally, appealability of an interlocutory order depends on whether it has final and definitive effect. As to when an order is final and definitive, reference is frequently

made to Schreiner JA in **Pretoria Garrison Institutes** case. The Applicants have also approached the leave to appeal application from the point of view of appealability. In this regard, Applicants relied on two South African decisions under the democratic dispensation. The cases are **City of Tshwane**[1] and **National Treasury**[2]. The cases set out the test for granting leave to appeal. In **National Treasury** case Moseneke DCJ had stated:

> *"[25] This Court has granted leave to appeal in relation to interim orders before. It has made clear that the operative standard is the 'interest of justice'. To this end, it must have regard to and weigh carefully all germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows*

from it is serious, immediate, ongoing and irreparable".

[42] In the **City of Tshwane** case, Mogoeng CJ had also made observations on appealability of interim orders. In para [39] the learned Chief Justice stated: *"The appealability of interim orders in terms of the common law depends on whether they are final in effect..."* And went on

> *"[40] The common law test for appealability has since been denuded of its somewhat inflexible nature. Unsurprisingly so because the common law is not on par with but sub-servient to the supreme law that prescribes the interests of justice as the only requirement to be met for the grant of leave to appeal. Unlike before, appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The over-arching role of interests of justice considerations has relativised the final effect of the*

order or the disposition of the substantial portion of what is pending before the review court, in determining appealability..."

[43] My understanding of the South African position expressed by the then Chief Justice and his then Deputy, in separate cases, is that the new position builds on and develops the common law standard test. The issue raised by the Applicants is of constitutional significance and should not be allowed to remain unresolved - independently of the fate of the bail appeal. In my opinion, 'the interests of justice' standard is not necessarily at odds with the common-law based requirements for the grant of leave to appeal. In this regard, the reasonable prospects of success are important but not decisive. In that regard, some of the criteria regulating leave to appeal (to the Constitutional Court) stated by Currie and de Waal[3] are the reasonable prospects of success and the nature of the issue that is the subject of the appeal (including an appeal against an interim order). These grounds are considered in light of the interests of justice and are by themselves not necessarily

decisive. The matter at issue must also be of some public importance. Granting the appeal does not thereby pre-judge the outcome on appeal. It is said: "The Court does not anticipate a decision as to the success of the intended appeal, but considers only the viability of the appeal."

[13] Again in *Teaching Service Commission and Another v Timothy Tsabedze (61/2019) [2021] SZSC 48 (25 February 2022)* this Court stated the position in the following terms:

> '[31] - - - 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 Kahnym Estates (Pty) Limited and Two Others (62/2019) [2020] SZSC 45 (16/2020): 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).'*

[14] The application is opposed by the respondents, who submit *inter alia,* that when the matter was argued on 13 May 2022, '- - - at that stage and given the fact that Mulindwa had already commenced his role as co-liquidator, the respondents elected not to pursue the interim interdictory relief as it would not have been prudent to pursue an interdict at that stage. Further it was envisaged that the matter could be argued holistically and as such, a final order would be more appropriate.

- - - The respondents have always maintained that the appointment of Mulindwa was irregular, irrational and unlawful. That is the issue that is pending before the Court.'

In essence, the respondents submit that the fact that they have in the meantime allowed Mr. Mulindwa to carry out his duties as co-liquidator unhindered is not an act of acquiescing to his unlawful and irrational appointment.

[15] In the present application, this Court is not being asked to determine whether the Court *a quo* was correct in its assessment and treatment or analysis of the issues raised by and in the points *in limine*. That would be an issue in the actual appeal (if leave is granted).

[16] I have already said above that the law on estoppel and peremption is well settled in this jurisdiction. There are no conflicting judgments or exposition of the principles involved in these doctrines. The central issue in the review application in the Court *a quo* is the lawfulness or otherwise of the appointment of Mr. Mulindwa. That is the lis between the parties. Both sides are no doubt desirous of finalising that matter and proceeding with the liquidation of the relevant companies. This,

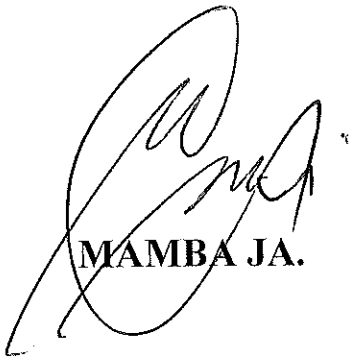
by its very nature and the many creditors involved in the whole exercise, demands that the liquidation be done and concluded expeditiously. The monies involved run into Billions of Emalangeni. It is certainly in the public interest that such issues be concluded expeditiously. An appeal in the circumstances of this case; and based on the relevant grounds of appeal herein, would hardly be consonant with treating the issue expeditiously. Nothing of any practical or useful effect would be gained by an appeal based on the applicants' contention. It would be a waste of time and legal costs on the part of the protagonists. In addition, the applicants have dismally failed to satisfy this Court that there are reasonable prospects of success in the appeal. The points of law raised by the applicants are distinctly misguided.

[17] One further point deserves mention in this application and it is this. The applicants complain that the Court *a quo* was in error in holding that the respondents could not waive their constitutional rights. The Learned Judge did not say so. She held that

'It would, in my view, be folly to deem their action of seeing to it that the bidding process, and the securing of purchasers for the disposal of the assets of the company continued, despite their application to Court, to amount to a waiver of this constitutionally protected right. The applicants herein are seeking to challenge the manner in which the 1st respondent handled the appointment of the 2nd respondent. They are not in my view abandoning their right to fair administrative justice by so doing.' (See paragraph 19.7 of the judgment).

The Learned Judge held that the respondents had not abandoned or waived their rights to fair administrative justice. This is different from saying they cannot waive such a constitutionally protected right. The applicants are, therefore in error on this point or challenge.

[18] For the above reasons, the application for leave to appeal is dismissed with costs.



MAMBA JA.

FOR THE APPLICANTS: **MR. M.E. SIMELANE**

FOR THE RESPONDENT: **MR. Z.D. JELE**