



**IN THE SUPREME COURT OF ESWATINI**

**JUDGMENT**

**HELD AT MBABANE**

**CASE NO. 79/2022**

In the matter between

**TRENCOR INVESTMENTS (PTY) LTD**

**APPELLANT**

AND

**AFRICA CHICKS (SWZ) (PTY) LTD**

**RESPONDENT**

**Neutral Citation:** *TRENCOR INVESTMENTS (PTY) LTD v AFRICA CHICKS (SWZ) (PTY) LTD (79/2022) [2023] SZSC 16 (09 JUNE, 2023)*

**Coram** : N. J. HLOPHE, M. D. MAMBA et J. M. CURRIE JJA.

**Heard** : 03 MAY, 2023

**Delivered** : 09 JUNE, 2023

**MAMBA JA:**

- [1] *Civil law and Procedure- Appeal- Application to adduce new and further evidence on appeal. Rule 18 of Appeal Court Rules- Three requirements for admissibility of new evidence, namely (i) Explanation why evidence not led at trial; (ii) Likelihood of evidence being truthful and (iii) Evidence being material to outcome of trial.*
- [2] *Civil law and Procedure- Withdrawal of Counsel from case. Once case commenced, Leave of Court required. On several occasions Counsel not appearing in Court and sending person with no right of audience to seek postponement. Third application for postponement refused and followed by withdrawal by Counsel. Trial proceeding in absence of Counsel and his client.*
- [3] *Civil law- Withdrawal by Counsel refused- trial proceeding in absence of defendant and its Counsel because Court of the view that application for postponement is a ruse or stratagem to avoid trial. New evidence to rebut this view material and therefore admissible. Appeal upheld. Behaviour of Counsel deprecated.*
- [1] In November 2016, the Respondent, who was then the Plaintiff, issued summons against the Appellant for payment of a sum of E1,290,690.97. This amount was made up of two claims. The first claim was for E642,212.14 and the second one was for a sum of E648,478.80. However, after receipt of the summons, the Appellant made three payments totalling E188,322.81 in respect of the second claim and thus reducing it to a sum of E460,156.02. This is in respect of the sale and delivery of broiler chicks and chicken feed respectively by the Respondent to the Appellant in 2015 and 2016. All this is stated in the Respondent's declaration.

- [2] In its plea, the Appellant denied that it was owing [Respondent] the amount claimed as all outstanding amounts were settled by the [Appellant]’
- [3] Once the matter was ripe or ready for hearing, it was set down for hearing on 26 and 27 July, 2021. However, the case could not proceed on any of these two dates due to the unavailability of the trial Judge. By Notice of set down dated 24 March 2022, the matter was set down by the Respondent’s attorneys for hearing on 20 and 21 April, 2022. On the 20<sup>th</sup> April 2022, the matter was removed from the roll due to non-appearance by either of the parties. It would appear that on 16 May 2022, a new trial date was agreed to and that was 20 and 23<sup>rd</sup> June, 2022 but these dates were later on changed to the 28<sup>th</sup> July and 01 August, 2022.
- [4] It is common case that at all material times hitherto, the Appellant was duly represented by attorney H. Mdladla of S.V. Mdladla & Associates. It is common cause further that the said Mr. Mdladla left the said law firm to start his own legal practice. This was on or about

22 July, 2022. He also stopped representing the Appellant on that date. The Appellant's file was then taken over by Mr. Tengbeh, another lawyer practising with S.V. Mdladla & Associates.

- [5] When trial was due to start on 28 July 2022, Mr. Tengbeh did not appear in Court but sent a colleague from the same law firm to advise the Court that he no longer appeared for the Appellant. He indicated to Court that he would be filing his formal Notice of withdrawal immediately. This notice was indeed filed on that date. On 01 August 2022, the Court was forced to reschedule the case and it was set down for the 17<sup>th</sup> and 18<sup>th</sup> day of October, 2022.
- [6] On 11 August 2022, the Appellant's attorney (Mr. Tengbeh) filed and served a Notice of appointment as attorney of record for the Appellant.
- [7] On 17 August 2022, Ms. Charamba, an attorney practising with S.V. Mdladla & Associates, appeared on behalf of the Appellant and informed the Court that his colleague Mr. Tengbeh was handling the matter but was not available that day due to other Court

engagements. She sought or applied for a resetting of the matter. This application was opposed by the Respondent. The Court also pointed out to Counsel that the matter had a long and bad history of being continuously postponed without the trial commencing. Counsel, Ms. Charamba, then applied that she be allowed to take down the evidence of the Respondent and that she be allowed to cross examine the Respondent's witnesses and present the Appellant's case on the next date of hearing; being 18<sup>th</sup> October, 2022. This application was granted by the Court. However, on that date, the Appellant's attorneys, filed their Notice of withdrawal as attorneys of record. The Court rejected this notice and said that it was for an alteria motive, mainly to disrupt the Court proceedings and be granted a postponement that was completely underserved and prejudicial to the Respondent and the administration of justice in general. Appellant's attorneys removed themselves from the proceedings.

- [8] After hearing the respondent's evidence, the trial Court granted judgment in favour of the Respondent as prayed together with costs

at attorney-own-client scale. The costs were awarded at the said punitive scale to mark the Court's displeasure at the way the Appellant's attorney (Mr. Tengbeh had conducted himself in the course of the proceedings. Judgment was handed down on 03 November, 2022.

[9] Dissatisfied with the above judgment, the Appellant filed this appeal. The Notice of Appeal was filed and served on the date of judgment.

[10] In the Notice of Appeal, there are 5 grounds of appeal namely; that the Court erred and misdirected itself in:

‘1. . . . law by proceeding with the trial on the 18<sup>th</sup> October, 2022 notwithstanding the fact that a Notice of Withdrawal had been genuinely filed by the Appellant's attorneys . . . , thus violating the Appellant's constitutional right to be heard and to be afforded a fair trial.

2. . . . fact by holding and concluding that the Notice of withdrawal as filed on 18 October 2022 . . . was not genuine notwithstanding the fact that the Court was . . . was given due

notice of eleven days before the trial date that the legal representative for the Appellant was unavailable due to an ongoing trial which had been set for continuation on the dates that Court *a quo* had similarly allocated for the trial to be heard, thus violating the Appellant's constitutional right to be heard and to be afforded a fair trial.

3. . . . setting trial dates contrary to the notice period as agreed to between the parties in the Pre-Trial Minutes and/or in the absence of the Appellant and/or Appellant's duly appointed representative, thus violating the Appellant's constitutional rights to be heard and to be afforded a fair trial.

4. . . . ordering that the trial should proceed and deviating from a consensual agreement between the parties that the trial would only proceed on the first day being the 17<sup>th</sup> October, 2022 to allow the Appellant to open its case and thereafter new dates would be allocated in view of the Appellant's legal representatives being engaged in another trial, thus depriving the Appellant's constitutional rights to be heard and to be afforded a fair trial.

5. . . . law and infact in holding that the conduct of Appellant's attorney was appalling and conspicuous to warrant a punitive costs order as against Appellant.'

[11] The appeal was enrolled by the Registrar for hearing on 12 April, 2023 and the Appellant's Heads of Argument was filed and served on 01 March, 2023. On 06 March 2023, the Appellant filed an application for leave to lead further evidence at the hearing of the appeal. This application is opposed by the Respondent.

[12] The application for leave to lead further evidence is supported by the affidavit of Mr. Tengbeh and Mr. H. Mdladla, the erstwhile legal representative of the Appellant. In his affidavit, Mr. Tengbeh states that the evidence sought to be admitted or led is to prove or establish that the filing of the two Notices of withdrawal as attorneys of record for the Appellant was genuine or was for a genuine reason or ground.



This, he asserts, is contrary to the finding by the Court *a quo* that such notices were a ruse or stratagem ‘either to delay or simply to prevent the trial from taking off,’ as held by the trial Court. He continues that:

‘3.3 personally, the conclusion of the Court *a quo* has a serious implication on my standing as a junior attorney of this Court and simply to let such an inaccurate and factually baseless conclusion continue to linger on in a judgment of Court would be folly of me. Sadly, the perusal of the file notations which form part of the record of appeal fail to take note of pertinent issues relating to the actual attorney seized with the matter from inception and who actually attended to Court for setting of trial dates. These fundamental primary factual issue having sadly been mis-portrayed in the impugned judgment of the Court *a quo* and to a larger extent being littered with inaccuracies that unfortunately led to a false narrative which forms the basis for the rejection of the notice of withdrawal as attorneys of record filed in the Court *a quo*.’

[13] The gravamen of Mr. Tengbeh's fresh evidence is that:

13.1 He inherited the matter from Mr. H. Mdladla in July, 2022.

13.2 The trial dates of 28 July and 01 August, 2022 were agreed upon between Mr. H. Mdladla and Mr. S. Simelane, for the Respondent.

13.3 When Mr. Tengbeh inherited the file from the said Mr. Mdladla, he already had other cases set down for hearing on the said dates.

13.4 On 25 July, 2022, a mere two days after taking charge of the Appellant's file, he wrote a letter to the Respondent's attorneys alerting them that he already had some cases set down for the dates in question. He requested the said attorneys that both sides should meet with the trial Judge to agree on a fresh date for trial. This correspondence is dated 25<sup>th</sup> July, 2022 and was received by the attorneys for the Respondents on the following day. (Vide FMT1). For some reason not explained on the papers herein, the proposed meeting with the Judge did not take place.

13.5 Ms. Phindile Masango, who had no audience before the Court *a quo*, and not Ms. Charamba, appeared in Court on 28 July, 2022 as recorded by the trial judge. The trial judge insisted on the matter commencing on 01 August, 2022. As this was clearly unsuitable for Mr. Tengbeh, the Notice of withdrawal as attorneys of record was accordingly filed. Annexure FMT2 is a Notice of set down for trial on 01 and 02 August, 2022 in respect of another matter in which Mr. Tengbeh was involved in in the High Court.

13.6 The Court was clearly in error in observing as it did in paragraph 9 of its judgment that the trial dates of 17 and 18 October, 2022 were settled and agreed upon by both sides. The Appellant's attorneys had withdrawn as attorneys of record on 01 August, 2022, as per the notice dated 29 July, 2022.

13.7 Again, on receipt of the new Notice of set down for trial for 17 and 18 October, 2022, Mr. Tengbeh wrote a letter to the Respondent's attorneys indicating to them that the set trial dates were unsuitable to him. He requested that the trial judge be approached by both Counsel to reschedule the matter. (See

FMT6 dated 06 October, 2022). There is no clarity in the papers herein what became of this suggestion by Counsel. What is clear though is that Counsel appeared in Court before the trial judge on 14 October, 2022 to settle the issue. Only Ms. Charamba appeared. The trial judge made it clear to Counsel that

‘. . . I have allocated at least 2 or 3 trial dates and it is not taking off. If Mr. Simelane [Respondent’s Counsel] does not want to proceed, I am not going to deal with this matter because each time I allocate dates, I block other cases and then you come and tell me that you are not proceeding.

...

No, I am not going to entertain this.

...

I will stand that matter down to the 17<sup>th</sup> and Mr. Simelane must decide what he wants to do with the matter . . . If he does not want to proceed, he must file a notice of withdrawal.’

It is common cause that on 17 both Mr. Simelane and Ms. Charamba appeared in Court as already narrated above. In summary, these are the facts or new evidence that the Appellant seeks leave to adduce on appeal. It has been clarified or explained that the correspondence between Counsel was unknown or not before the Court when it considered judgment. Additionally, that the Appellant was initially represented by Mr. H. Mdladla was also unknown by the Court at the relevant time. Mr. Tengbeh only took charge of the matter on behalf of the Appellant on or about 22 July, 2022 when Mr. H. Mdladla left the employ of S.V. Mdladla & Associates. Further, the other evidence sought to be led shows that Mr. Tengbeh was indeed engaged in other Court matters on the relevant dates.

[14] The application to lead further and new evidence by the Appellant is opposed by the Respondent, who submits that “. . . it appears as if the [Appellant’s] attorneys want to clear their name and nothing in the evidence sought to be adduced goes to the merits of the appeal.’ (See paragraph 3.6 of the opposing affidavit). The Respondent states further that the Court acted properly in regulating and controlling the

process towards the hearing of the matter and thus avoid any unwarranted and undue delay in the finalisation of the matter.

[15] In terms of Section 33 (1) of the Court of Appeal Act 74 of 1954, this Court may, where justice so demands or require, permit or allow a party to adduce new evidence on appeal. This would be done in exceptional cases only. The test for the admissibility of such further evidence was stated by the Court in *Maketha v Limbaba 1998 (4) SA 143 (W) at 146* as follows:

‘(a) There should be some reasonably sufficient explanation based on allegations which may be true, why the evidence which is sought to be led was not led at the trial.

(b) There should be prima facie likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial.’

In *St Clair Moor and another v Tongaat Hulett Pension Fund and Others 2009 (3) SA 465 (SCA)* at para 36 :

*“[36] The test for the admissibility of further evidence on appeal is well-established (S v de Jager 1965 (2) SA 612 (A) at 613C – D). An applicant must meet the following requirements:*

*(a) there must be a reasonably sufficient explanation, based on allegations which may be true, why the new evidence was not led in the court a quo;*

*(b) there should be a prima facie likelihood of the truth of the new evidence; and*

*(c) the evidence should be materially relevant to the outcome of the case.*

*Leave will only be granted to adduce further evidence on appeal in exceptional cases only - see De Aguiar v Real People Housing (Pty) Ltd [\[2010\] ZASCA 672011 \(1\) SA 16](#) (SCA) para 11.”*

*“11. It is incumbent upon an applicant for leave to adduce further evidence to satisfy the court that it was not due to any*

*remissness or negligence on his or her part that the evidence in question was not adduced at the trial. Furthermore, inadequate presentation of the litigant's case at the trial will only in the rarest instances be remediable by the adduction of further evidence at the appeal stage. It is thus clear that the test is a stringent one."*

The test for the admission of new evidence is thus a stringent one. The test was confirmed in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* (CCT 56/03) [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) (26 November 2004)

*"The SCA has similarly held that new evidence should be admitted on appeal under this section only in exceptional circumstances. This is because on appeal, a court is ordinarily determining the correctness or otherwise of an order made by another court, and the record from the lower court should determine the answer to that question. It is accepted however that exceptional circumstances may warrant the variation of the rule. Important criteria relevant to determining whether evidence on appeal should be admitted*



were identified in *Colman v Dunbar*. Relevant criteria include the need for finality, the undesirability of permitting a litigant who has been remiss in bringing forth evidence to produce it late in the day, and the need to avoid prejudice. One of the most important criteria was the following:

*‘The evidence tendered must be weighty and material and presumably to be believed, and must be such that if adduced it would be practically conclusive, for if not, it would still leave the issue in doubt and the matter would still lack finality.’*

[16] In allowing a party to lead further and new evidence on appeal, the appeal Court may either remit the matter to the Court *a quo* or hear the evidence itself. “Which of these courses is followed if the Court of appeal decides that further evidence should be heard is simply a matter of convenience not involving any question of principle. . . . In general, courts of appeal exercise the power of hearing evidence themselves only in cases in which the proof required is readily

available at the seat of the Court of Appeal.’ (*Herbstein & Van Winsen, 3<sup>rd</sup> ed (Juta & Co) 1979 at 733*).

[17] In the present appeal, the Appellant’s complaint is that it was denied the right to be heard or be represented by Counsel of its choice simply because the Court was not of the view that Counsel was not withdrawing its services because of a legitimate or genuine reason or ground. The trial proceeded in the absence of the Appellant or its legal representative because the Court was of the view that Counsel for the Appellant “chose to play hide and seek” games, thereby effectively depriving itself of this opportunity.” (Per paragraph 28 of the judgment at page 94 of the Book). That is the crux of the finding by the Court *a quo*, that the Appellant’s Counsel was not busy or engaged in other Court trials but rather bent on delaying the trial of the matter at hand. The correspondence between Counsel and the Court file entries show that Counsel was engaged in other Courts on the relevant days. This information was not before the Court *a quo* when it made its judgment. Again, this information or further evidence was not before the Court then simply because it did not form part or constitute the pleadings before that Court. In addition, if

the Court knew that Mr. Tengbeh only inherited the file from Mr. H. Mdladla late in July of 2022, the Court may have found that Mr. Tengbeh's non appearances were excusable or justified. As already narrated above, as early as the 25<sup>th</sup> day of July, 2022, Mr. Tengbeh informed his colleague, Counsel for the Respondent, of his predicament or sought that the trial judge be approached to reschedule the trial. These issues are undoubtedly relevant and material to the grounds of appeal, namely; that the Court inadvertently based its decision on incorrect information.

[18] The relevance, efficacy or materiality of the evidence sought to be adduced or led resides in the decision of the Court *a quo* rather than on the Appellant's defence on the merits. But logically, if the Appellant was wrongly denied or not afforded the chance to present its case to the Court, the entire proceedings are vitiated or rendered a nullity. Clearly therefore this evidence is material to the outcome of the trial. It thus meets the third requirement mentioned in paragraph 15 above.

[19] The requirement that every litigant must be accorded or afforded the opportunity to present his case before court is a basic tenet of the law. It is an integral part of the rules of fair play or natural justice. The constitutional provisions in our own supreme law merely echoes this rule of natural justice or procedural fairness. It is applicable in administrative law, criminal proceedings or civil proceedings. (See *John Roland Rudd v Rex (26.12) [2011] SZSC 44 (30 November 2012)*, which case was submitted to Court by Counsel for the Appellant on 08 May, 2023, after submissions had been made by both sides).

[20] *S v Nqula 1974 (1) SA 801 (E.C.D.)* was a case on review from a Magistrate's Court. The accused had been convicted of culpable homicide arising from a motor vehicle. He was also convicted of driving the said motor vehicle without a licence. Her attorney had been detained by adverse flying conditions and thus failed to appear in Court to represent her. She had also failed to get another attorney to represent her. Her application for a postponement was refused and she was informed by the trial magistrate that the absence of her

attorney was insufficient to allow her the postponement she applied for. Upon arraignment, she pleaded guilty to both counts and was accordingly convicted and sentenced. On review, which I think would also be applicable in an appeal, the Court set aside both her conviction and sentence. The Court reasoned that

‘It is to my mind a matter of considerable importance in the interests of justice and the administration of justice that every accused person should be accorded every opportunity of putting his/her case clearly or succinctly to the Court and this can only be properly done when it is put by a person who is trained in the law. Such a person must obviously be in a much better position to put the case of an accused person much better and much more clearly than that person could fairly do himself.’

That the accused had pleaded guilty in this case was of no moment or irrelevant. The trial was rendered a nullity in its entirety.

[21] Based on the above facts and legal principles, I would, without any hesitation allow the application to lead or adduce further evidence.

The evidence sought to be led is clearly material for a just conclusion of this appeal. I have no doubt that if the Court a quo was aware of this evidence, it would have afforded the Appellant the chance to be represented by its chosen legal representative, Mr. Tengbeh. It is a matter that deserves mention that when Counsel terminated his services, the Court did not find it necessary to at least inform the Appellant that the case would proceed in the absence of Counsel. This opportunity would have allowed the Appellant to either prosecute its own case or solicit the services of another legal representative.

[22] Having said all of the above, this Court notes that it does not condone the actions of Counsel for the Appellant in not appearing in Court at all to apply for the various postponements. Sadly, on one occasion Ms. Masango, whom I believe had no right of audience in Court, and is described as a non-practising attorney, was sent by Counsel to apply for a postponement of the case. This is totally unacceptable and it exhibits disrespect for the Court. If it was really impossible for Counsel to appear in Court, perhaps appearance by a

director of the appellant would have been a better option. Again, whilst it is patently clear that the two notices of withdrawal were filed after an application for a postponement had been refused, I think this does not evince an intention to disrupt the proceedings but shows the unavailability of Counsel to represent the Appellant at the appropriate time. It is too harsh in my view, to say that ‘Counsel re-appointed himself’ on 11 August, 2022. There is simply no evidence to suggest this. The Court has to assume that the re-appointment was made by the client.

[23] I have noted in the preceding paragraph that Counsel for the Appellant did not properly do everything in accordance with the rules of procedure and practice in this case and this is bad for an officer of the Court. But, shall the sins of Counsel be visited on his client? Reliance has been placed on the general rule enunciated in *Salojee v The Minister of Community Development 1965 (2) SA 135*, that there is a limit beyond which a litigant cannot escape the actions of his attorney’s lack of diligence. It is not an – all size – fit all approach though. Each case has to be decided or adjudicated upon its

own particular facts and circumstances. In the present appeal, the sum of money granted against the Appellant is not trifling. For a small or medium scale business entity under the prevailing economic climate, it may have dire consequences to an innocent party. The argument or suggestion that the Appellant may have a claim against its attorney for professional misconduct is, in my view, cold comfort to the Appellant. The prejudice to be suffered by the Appellant cannot be adequately addressed by an order for costs, whereas that could be done in favour of the Respondent through a re-trial. To refuse the appeal under the circumstances would be rather too harsh and not in the best interests of justice. To deny the appeal could be tantamount to punishing the Appellant for the indiscretions of its legal representative. The end result would be to subordinate the Appellant's substantive right to be heard to a mere rule of practice by an attorney. That again, would be unjust in my view.

[24] Mr. Tengbeh's behaviour in the Court *a quo* was totally unprofessional and unacceptable and cannot be condoned. It is unfortunate that costs were not granted against him *de bonis propriis*



and this is because, we believe, he was not in Court at the relevant time and therefore he was not called upon to address the Court on the issue. For the same reason that we did not call upon him to address us on it, we are unable to issue such an order, but otherwise it would have been justified in the circumstances.

[25] For the foregoing reasons, I would make the following order:

- (a) The appeal is upheld and the judgment of the Court *a quo* is set aside.
- (b) The order for the payment of costs issued by the Court *a quo* is hereby upheld.
- (c) The matter is remitted to the High Court for trial *de novo* before another judge.
- (d) The Appellant is ordered to pay the costs of this appeal.

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**MAMBA**  
**JUSTICE OF APPEAL**

**I AGREE**

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**N. J. HLOPHE  
JUSTICE OF APPEAL**

**I ALSO AGREE**

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**J. M. CURRIE  
JUSTICE OF APPEAL**

**FOR THE APPELLANT:**

**MR. F. M. TENGBEH**

**FOR THE RESPONDENT:**

**MR. S. SIMELANE**