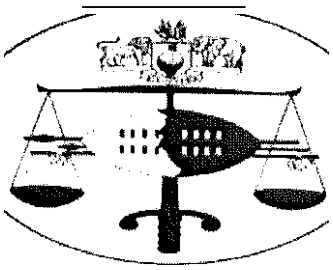

IN THE SUI>REME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE
In the matter between:

Case No.: 97/2016

,JACOB C. YENDE

Appellant

And

NGONINI ESTATE (A DIVISION OF UNITED PLANTATIONS) SWAZILAND LIMITED

Respondent

In Re

.JACOB C. YEN DE

Appellant

And

NGONINI ESTATE (A DIVISION OF UNITED PLANTATIONS) SWAZILAND LIMITED

Respondent

Neutral Citation: *Jacob C. Yende vs Ngonini Estate (A Division of United Plantatiom) Swaziland limited (97/2016) [2024] SZSC 76 (11/04/2024)*

Coram: Justice S.J,K Matsebula JA;
.Justice N.J. Hlophe JA;
AND Justice L.M. Simelane
AJA.

Date Heard: 7th November, 2023.

Date Delivered: I I th April, 2024.

SUMMARY : *Civil Law - Civil Procedure - Defamation - Exception - Compromise - Deed of Settlement;*

Applicant was employed by Respondent who terminated the employment Contract 011 a/legations of theft-Appellant sued/or unlawful dismissal and related benefits whilst on the other hand Respondent sued/or recovery of the alleged stolen monies

< /'from the Appellant - The parties thereafter signed a deed of settlement in full and final settlement of all claims relating to or arising ji·om the employment relationship;

After the deed of settlement Appellant thereafter sued Respondent and claimed

damages for defamation because of the theft a/legations and suit thereon -

Respondent excepted to the Appellant's combined summons as disclosing no cause of action because of the deed of settlement.

Court a quo upheld the exception and dismissed the Appellant's action as disclosing no cause of action.

On appeal: Rule 23 and 30 visited- examination of the nature and objectives of exceptions and conclusions thereon.

Held: Appellant failed to prove fraud on the Deed of Settlement - Exception therefore stands.

Held: Appeal dismissed with no order to costs.

.JUDGMENT

S..J.K MATSEBU LA, JA:

Background

[I] The Appellant issued combined summons against the Respondent alleging that the Respondent defamed him by alleging that he had misappropriated a sum of E15 014.15 (Fifteen thousand and fourteen Emalangeni fifteen cents) as its bookkeeper. He alleged that such statement defamed him as it portrayed him as a dishonest individual and a thief and therefore he claimed to have

suffered damages m the sum of E800 000.00 (Eight hundred thousand Emalangeni).

[2] The Defendant 111 its plea raised an exception *(in limine-settlement)* and alleged that-

> *"The Plaintiff's particulars of claim as read together ,vith the fi1rther particulars of claim provided do not disclose a cause of action against the Defendant in that on or about 20 June 2007 and at Pigg* 's *Peak, the parties entered into a Deed of Settlement in terms of which the Defendant paid to the Plaintiff an ex-gratia amount for the settlement of any benefit or claim which the Plaintiff may have against the Defendant.* "

131 Defendant added that-

> *"The agreement constituted*
>
> *A. fii!I and final settlement of any and all claims which the Plaintiff has or may have regarding any issue arising out of Plaintiff's employment, claim to any benefit or his separation fi·om employment with Defendant.* "

And prayed that the Defendant's claim be dismissed with costs.

f 41 On the same papers and just below the exception, the Defendant pleaded to the merits of the action instituted by the Plaintiff (pleaded-over) and denied

that the Plaintiff was defamed as alleged or in any manner or that the statement was defamatory.

[51 The Appellant/Plaintiff did not respond to the Defendant's Plea (the exception or the pleadings as the Defendant had pleaded over the exception) but amended his Particulars of Claim to elaborate as to how the defamation occurred (the Defendant by instituting a claim in court for the recovery of the misappropriated funds thus portraying him as a thief and an untrustworthy person) and increasing the amount claimed from E800 000.00 (Eight hundred thousand Emalangeni) to E830 000.00 (Eight hundred and thirty thousand Emalangeni).

[6] On the 1s[t] September, 2015 the Defendant, in response to the amended Particulars of Claim, filed a separate Notice of Exception in terms of Rule 23 (1) of the Rules of the High Court wherein it submitted that

(a) The Plaintiffs claim was compromised in terms of the Deed of Settlement;

(b) Plaintiffs Particulars do not disclose a cause of action, it was not stated who made the statement as the Defendant is a body corporate;

(c) The alleged defamatory words are not spelt out in the particulars of claim; and

4. That the Plaintiff has amended the Particulars of Claim by introducing a new cause of action after the close of pleadings and without tendering wasted costs.

[7] On the 25th August, 2016 the Defendant filed its Plea on the amended Particulars of Claim dated the 11 th February 2015 (in my paragraph 5 above) which in content is the same as the earlier Plea, containing the exception and pleading over.

[8] The case was then set down but it could not proceed as the Appellant appeared in person and sought postponement to enable him to find new attorneys to represent him. The matter was postponed and on resumption, the court *a quo* enquired if the new attorneys were acquainted with the facts of the case and if they were ready to proceed on that day. They answered to the affirmative notwithstanding the fact that the court thought otherwise as the court file had all along been kept under lock and key by the Judge. The case proceeded.

[9) The exception was upheld and the claim or action dismissed on the basis that it lacked a *cause of action.* The *ex tempore* order dismissing the action read as follows-

> *"Whereupon having heard Counsel for the Plaintiff and the Defendant and having read papers fifed qf'record an Order in the following terms is hereby granted;*

It is ordered that:

1) *The Plaintiff's cause of action is hereby dismissed on the basis of the exception with costs*. (My underlining).

[IO] The Judge in the court *a quo* did not give a written judgment with reasons which would inform the Appellant and this Court of the reasons or basis for the order, which may, probably as standard practice cite or quote any legislative or statutory provisions or case law relied upon. The absence of reasons gave bilih, before this Court, to several postponements nursing this unfo1iunate situation to enable the parties to get the written judgment from the court *a quo* but all in vain. The Registrar of that court failed to persuade the Honourable Judge to write such judgment but a portion of the transcript of the trial was made available. I say a portion because I do not believe it's a full transcript from A to Z of the hearing but only the relevant pa1i that contains the reasoning of the cowi in coming to the order that it came up with it. My opinion is that transcripts of proceedings could not be a fair replacement of a written judgment with reasons.

[11] The Appellant's grounds of appeal are three fold -

(a) The learned Judge erred in law and fact in dismissing the Appellant's cause of action based on a non-existent deed of settlement which was filed by the Respondent;

(b) The learned Judge misled herself in holding that the deed of settlement was valid and the Appellant did not raise the issue of

forgery in any of the papers. The court overlooked that the summons was withdrawn and new summons were filed. After the new summons was served the Respondent filed its plea and raised a point in limine, *which addressed the issue of the Deed of settlement. The matter was set down for hearing in order to clarify the issue of the point in* limine *for arguing and no subsequent papers were filed by the Appellant. The court erred in law and in fact in admitting the fact that the issue of forgery of the said deed of settlement cannot be found in the Appellant's papers. The Appellant maintains that no subsequent papers were ever filed by the Appellant ever since the amendment of the summons, so this issue couldn't have been raised since the Appellant* is *still to Ole its Replication and the matter was only set do,vn to address only the point in limine, and that was the only platform that the issue of forgery could have been raised under the circumstances.* "; and

(c) *The learned Judge erred in law and in fact by admitting the Respondents evidence without hearing the Appellant's defence. The Appellant's representative was not even afforded the chance to address the court on the issue and such is a gross violation of the Applicant's right to a fair hearing and the principle of the* Audi Alteram Partem. *This resulted into a serious miscarriage o_fjustice.*

The Appellant's Case

[12] It would appear the three grounds of appeal slightly went through metamorphosis which manifested in the Heads of Argument as follows-

(a) On page I of the Heads, the Appellant insists that it was defamed and suffered damages to the amount of E830 000.00 (Eight hundred and thirty thousand Emalangeni);

(b) On page 3 of the Heads -Appellant states-

"It is *unconventional for a Defendant to raise an exception to Particulars of Claim and thereafter proceed to file a comprehensive plea 011 the merits. This was the approach by the Respondent, it raised an exception preliminary and thereafter pleaded to the merits of the matter"*

Appellant does not state or allege any prejudice suffered as a result thereof as **it** did not take the remedial steps provided for under Rule 30 of the High Court Rules.

(c) On page 5 of the Heads - Appellant relying on **Rule** 23 (4) of the High Court Rules, submits that-

"Where any exception is taken to any pleading or an application to strike out is made, no plea, replication or other pleadings over shall be necessary".

The Appellant therefore, argues that the court a quo should not have dismissed his case or put differently should not have accepted the exception as there was an irregular step in the form of pleading over.

The issue of Rule 30 is discussed in my paragraph [16] below but one cannot, al this juncture, fail to observe that the Appellant should have raised this as an irregular step at the High Comi level and applied for it's setting aside. He must have acquiesced to what he now complains to be an irregular step. That being the case its not a valid ground of appeal and stands to fail.

(d) On page 6 of the Heads - the Appellant refers to The Civil Practice of The Supreme Cami of South Africa 4th Edition Herbsteen and Van Winson at page 489-

"The Rules do not curb the povver of the court on grounds of convenience to order an exception to stand over for decision at the trial when, for instance, it raises a point of law that may not arise al trial and thus prove academic or bound up with the merits of the dispute".

To that end, although it appears as a new ground of appeal, the Appellant argues-

"We submit that, the alleged settlement agreement was in dispute, it was somewhat intertwined ·with the merits, it ought to have been a su ject of the trial".

Again here, there is no evidence on the record on appeal that this argument was ever raised in the court *a quo* and rejected.

The Respondent's case

[13] The Respondent's case, briefly is that-

(a) The Appellant as per its Heads of Argument, has ignored or abandoned the entire grounds of appeal as per the Notice of Appeal;

(b) The Appellant, as he does in the Heads of Argument, is not entitled to raise new issues on appeal except to a limited avenue of a point of law;

(c) The Appellant having received the exception as well as the pleading over chose to close the pleadings without ,a replication by filing a Discovery Affidavit.

(d) When the proceedings reached discovery stage the Appellant was no longer entitled to file the replication which he sought at the trial and which he still seeks even at this stage of appeal.

(e) The case was correctly decided on the exception on the basis of a compromise evidenced by the Deed of Settlement therefore killing the cause of action of the Appellant.

The Law

[14] The court *a quo* decided the case on the basis of the exception, meaning it upheld the exception. The exception is that the Appellant's papers disclose no cause of action because there was a compromise reached by the parties thrnugh the Deed of Settlement which was filed in the court *a quo* which settlement was not included by the Appellant who is responsible for compiling the court record for the Appeal Cami.

fl 5] Rule 23 (4) of the High Court Rules reads-

> *"(4) Where an exception is taken to any pleading or an application to strike out is made, no plea, replication or other pleadings over shall be necessary.* ''

[16] It appears a practice has steadily crept into our procedural practice of pleading over when an exception has been taken. Rule 23 (4) does not prohibit such but states that it "shall not be necessary" leaving the court with a discretion either to allow the proceeding to proceed or to disallow them. But an aggrieved party to a *pleading over* has a remedy found in Rule 30 of the High Court Rules, it states -

> ***"Irregular Proceedings***
>
> *30 (]) A party to a cause in which an irregular step or proceeding has been taken by, any other party may, within fourteen days after becoming aware of the irregularity, apply to court to set aside the step or proceeding;*
>
> *Provided that no party who has taken anv fi1rther steps in the cause with kno,\!ledge of the irregularity shall be entitled to make such application.* (My underlining).
>
> *(2) Application in terms of sub-rule (]) shall be on notice to all parties 1,pecifying particulars of the irregularity alleged.* "

[17] Since Rule 30 is a **High** Court Rule it means it can avail a person at the High Court level. Failure to utilize it then, it means one cannot make such irregular

step as an appeal point. The Appellant did not challenge the irregular step or proceeding but instead took a step further in the proceeding by way of filing an application for discovery and probably excusing or legitimizing the irregular proceedings. This would have meant according to the court *a quo* the exception stood as well as the pleading over (a plea) and would therefore require a replication if any.

f181 As is procedural, both parties filed their Heads of Argument in relation to the exception as it had to be dealt with first, that is, before proceeding to the main case (claim for damages for defamation) if needs be, Here lies some difficulty for the Appellant. The Respondent (as Defendant therein) had filed the Deed of Settlement between the patties stating that the monies' paid therein by the Respondent were in full and final settlement of all claims arising or relating to their employment relationship. The Appellant (Plaintiff therein) made a bare denial of the Settlement document alleging he did not sign the filed settlement in its current form but signed another Deed of Settlement, one which he could not produce before the court. He attributes his failure to his erstwhile attomey who had not given him a copy of that settlement document on the excuse that his attorney's photocopier had broken down on the day of signature, It is not clear why the Appellant could not secure the document on subsequent days in order for the couti to see if indeed there was another document different from the one filed by the Respondent. Allegations of forgery must be proved in order to stand or succeed. This ground can not stand as it was not substantiated by evidence,

I19) Coming back to the nature and efficacy of an exception. An exception implies that the pleading objected to, taken as it stands, is legally invalid for its purpose *(Salzman v Ho/mess 1914 AD 152).* The Appellant was therefore put on notice to rebut this with equally convincing evidence not just bare allegations of fraud. It must be appreciated that the object of an exception to a pleading or part of a pleading is to obtain a substantive order setting the pleading aside either in whole or in part and not to obtain a mere expression of opinion from the comt on the legal point raised by the exception *(Municipal Council of Bulawayo v Bulawayo Waterworks Company Ltd 1915 AD 6 I I 631).* (My underlining)

[20] Herbsteen and Van Winsen, Civil Practice of the High Courts of South Africa, Fifth Edition Volume 1 at page 630 states that-

> *"The aim of the exception procedure is thus to avoid leading of unnecessary evidence and to dispose of a case in whole or part in an expeditions and cost-effective manner.* "

An exception can be taken for the purpose of raising a substantive question of law which may have the effect of settling the dispute between the parties. To that end an excipient should make out a clear case before he is allowed to succeed (*Colonial Industries Ltd v Provincial Insurance Company Ltd 1920 CPD 627).*

[21 \ In casu, the exception is born from a Deed of Settlement that was signed by the parties in terms of which all claims arising from the Appellant's

employment, claim of any benefit and or separation from the Respondent were settled in full and final. The claim for damages arises from the said employment relationship as the Respondent had sued for the recovery of misappropriated funds where the Appellant was an employee of the Respondent. The matter was set down and after hearing arguments from both pa1iies, the Court *a quo* upheld the exception and dismissed the action. The effect of upholding the exception, even without stating that the main action was dismissed, was that there is no case for the Defendant to answer, not as a result of not filing a replication but because of the pleadings failing to disclose a cause of action. That alone ended the action and the *ex tempore* order issued by the court reads in paii-

> *"The Plaintiff's cause of action is hereby dismissed on the basis of the exception with costs. "* (My underlining).

[22] The question of whether a replication was necessary or not depends on the practice or mode which was taken by the parties as well as the couii. An exception such as the present, does not require a replication from the Plaintiff in terms of Rule 23. But the Defendant pleaded over, which is a practice I do not know its origins but not unheard in our comis, and if such pleading over was viewed as an irregular step by the Plaintiff, he should have applied for its setting aside under Rule 30 of the High Court Rules. He did not, which means he acquiesced to this seemingly irregular step and took a fmiher step in the proceedings in the form of discovery documents.

[23] The Appellant further complains that his attorney was denied the right to be heard at the cou1t a quo. This complaint has no merit and stands to fail as it does. After the Respondent had made his full arguments in respect of the exception, the Appellant then applied to be allowed to now or subsequent to the arguments by the Defendant to be allowed to file his replication. The cou1t *a quo* refused as that was going to be prejudicial to the Respondent who had by then delivered all his evidence. A ruling was made on the exception, upholding it, and effectively disposing the wh.ole matter with no need to go to the merits of the defamation claim. Upholding the exception took out the life of the claim, it died there and there.

[24] This matter should have ended here but it does not. The issue of judgments and the giving of reasons by a coutt demands a lengthy discussion. There is in this case an unfortunate, probably, a procedural situation, where the Appellant sought, apart from the order issued by the comt, a judgment with written reasons on the matter from the Registrar but none was forth coming. Instead, and probably on desperation, the Appellant had to use and rely on an extract of the transcript of the proceedings for his appeal.

Instead of reso1ting to the use of a transcript, the Appellant might as well have explored section 148 (1) of the Constitution which stipulates-

> " *148 (I) The Supreme Court has supervisory jurisdiction over all courts of.judicature and over all odjudicating authority and may, in the discharge of that jurisdiction, issue orders and directions for the pmposes of enforcing or securing the enforcement of its supervisory power.* "

[25] The Respondent has raised a point *in limine* alleging that the Appellant has brought before this cou1i the appeal prematurely as there is no judgment or written judgment before this Comi issued by the court *a quo.* Is this argument sustainable or not. The Appellant is inconvenienced by the none deliverance of a written judgment with reasons and the Defendant seeks an advantage on the none availability of the judgment with reasons on the record of pleadings and urges this Comi to dismiss the appeal. None of the paiiies should profit or lose because of the lapse of a judicial system. But what should this Comi do in extracting itself from this quagmire. Since this is a topical issue, it has to be explored and a conclusion reached on the subject.

[26] The then Rule 8 (1) provided-

> *"8 (}) The notice of appeal sha!I befiled,vithinfour (4) weeks of the date of the judgment appealed against-*
>
> *Provided that if there is a written judgment such period shall run fi"om the date of delivering of such written judgment.*

The conclusion I draw from this sub-rule is that there is a written and non written judgment. A non-written judgment would include a judgment given *extempore.*

[27] In *casu,* the court *a quo,* at the end of the hearing, issued a document styled "Court Order" where it dismissed the action proceedings or the Appellant's suit in the following terms-

> "It is ordered that-
>
> *(I) The Plaint/ff's cause of action is hereby dismissed on the basis of thet,xception with costs.* "

(a) Does this "order" qualifies to be accepted or to be referred to as a "judgment" for appeal purposes. I would not think so unless and until it is accompanied by reasons for the decision, reasons which may follow the *ex tempore* order or judgment.

(b) The constitutional right to fair hearing as found in section 14 and 21 of the Constitution, I would argue also entails the giving of reasons for a decision arrived at after the hearing to qualify it as fair. Giving of reasons for a decision by a court is a tenet of fair hearing.

(c) If section 33 of the Constitution compels administrative bodies to give reasons for their decisions how much more would that standard requirement be on Comis, the fountains of justice. Courts are pall bearers of justice and the section provides -

> ***"Right to administrative justice***
>
> *33. (I) A person appearing before any administrative authority has a right to be heard and to be treatedjustly andfairly in accordance with the requirements imposed by law including the requirements of* ***fundamental iustice*** *or fairness and has a right to apply to a*

court of law in respect of any decision taken against that person with which that person is aggrieved.

(2) A person appearing before an administrative authority ***has a right to he given reasons in writing for the decision*** *of that authority".*

(d) "A fundamental right is a human right and is a basic entitlement that every individual is granted .. **.simply because they are human",** (Wikipedia).

(t) The right is constitutionally attached (under section 33 above) to a person appearing before an administrative authority to be given reasons for it's decision. One does not cease to be a **human** just because one has appeared be a court of justice hence the right to be given reasons in writing follows or accompanies that person even to a court of law.

[28] It is a well-established practice that after giving facts and discussing admissible and relevant evidence a Judge is required to give reasons for deciding the issues framed by him. The reasons convey the judicial ideas in words and sentences. In certain demanding and urgent circumstances Judges do give an immediate order soon after hearing without any accompanying reasons. In such cases or circumstances the reasons should be delivered by the Judge later to make the earlier delivered order a complete judgment. Reasons are meant to explain how and why a Judge arrived at the decision.

[29] In Strategic *Liquor Services* v *Mvumbi NO and Others [2000] ZA CCI* 7 the Court stated-

> *"It is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, and, when a judgment is appealed, written reasons are indispensable. Failure to suµply them will usually be a grave lapse o(duty, a breach of litigant's rights, and impediment to the appeal process.* "(my underlining)

[30] *In Bates and Another* v *Nedbank Ltd I 983 (3) SA27,* Corbett JA pointed out that-

> *"A reasonedjudgment may we/1 discourage an appeal loser" ... the failure to state reasons may have the opposite effect. In addition, should the matter be taken on appeal, as happened in this case, the Court of Appeal has a similar interest in knowing why the Judge who heard the matter made the order which he did"*

[31] In Strategic Liquor Services *(Supra)* it is stated that-

> *"Judges ordinarily account for their decision by giving reasons and the rule of law requires that they should not act arbitrarily and that they be accountable. Furnishing reasons, explains to the parties, and to the public at large which has an interest in courts being transparent, why a case* is *decided as it is. It* is *a discipline which curbs arbitrary judicial decisions. Then, too, it* is *essential for the appeal process, enabling the*

losing party to take an informed decision as to whether or not to appeal or, where necessary, to seek leave lo appeal. "

[32] The case of *Brendon Robertson v Ferstrand Bank Ltd t/a Westbank, case No. CA 352/2012,* delivered 24 February, 2015 also has benefits for our jurisprudence as per Pickering J. The following excepts are taken from this case at paragraph 18 -

"... [6] The importance of the giving of reasons for judicial decisions has been commented on by the highest Courts. In Bates and Another v Nedbank, Corbet/ JA said the.following of a failure by a Judge to give reasons for a decision-

" ...Ina case like this, where the matter is opposed and the issues have been argued, litigants are entitled to be informed of the reasons.for the Judge 's *decision.* "

Further down on that paragraph 18-

"[7}... There is no express constitutional provisions which requires Judges to furnish reasons for their decisions. Nonetheless, in terms of section I of the Constitution, the rule of law is one of.founding values of our democratic state, and the Judiciary is bound by it. The rule of law undoubtedly requires Judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by fitrnishing reasons. This serves a number of purposes. It explains to the parties, and the public at large which has an interest in courts being open and transparent, why a case is decided as it is. *It*

is a discipline which curbs arbitrmyjudicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take informed decision as to whether or not to appeal or, where necessa,y, seek leave to appeal. It assists the Appeal Court to decide ·whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may ,veil be, too, that where a decision is subject to appeal it would be a violation of the constitutional right to access to courts if reasons for such decision were to be withheld by a judicial officers."

[33] The above judicial observation and pronouncement resonate well with our judicial dispensation. We are having almost the same legal system and share many legal principles hence there is no reason of not relating same to our legal system. In conclusion as I do hereby conclude in respect of provision of reasons-

(a) Judicial officers, more so in contested matters, should give reasons for their judicial decisions and more especially when requested to do so by any one of the contestants.

(b) Where one party intends or wants to appeal a decision, reasons should be given as soon as practicable.

(c) For purposes of transparency, judicial officers, should strive to give reasons for their decisions.

(d) Failure by a court of justice to give reasons for its decision is an affront to the rule of law and a violation of a litigant's right to access to law including appeal processes.

[34] In *casu*, reasons for the decision were a pre-requisite before the appeal could be prosecuted in this Court. I believe, if the judicial officer was not forthcoming with the reasons, the Appellant should have utilized other legal remedies available to him at law including an exercise under section 148 (I) of the Constitution by involving the Supreme Court's supervisory powers.

Judgment

[35] This Court has come to the conclusion that:

(a) The Appellant failed to prove that the Deed of Settlement was forged or that fraud in respect of the Deed of Settlement had occmTed;

(b) The Plaintiff's cause of action was correctly dismissed by the court *a quo* on the basis of the exception,

And accordingly, the following orders are made:

1 . The appeal is dismissed.

2. No order is made to costs.

S.J.K. MATSEBULA

JUSTICE OF APPEAL

I, agree

N.J. HLOPHE

JUSTICE OF APPEAL

I, agree

ACTING JUSTICE OF APPEAL

M.Ndlangamandla — Counsel for Appellant

K. Simelane — Counsel for Respondent