



**IN THE HIGH COURT OF SWAZILAND
JUDGMENT**

Civil Appeal Case No. 173/13

In the matter between

**HLANGANYELANI HARVERSTING AND
BUSINESS GROUP (PTY) LTD**

APPELLANT

And

**STANDANRD BANK SWAZILAND
LTD – VEHICLE AND ASSET
FINANCE**

RESPONDENT

Neutral citation

***Hlanganyelani Harvesting and Business Group (Pty)
Ltd vs Standard Bank Swaziland Ltd – Vehicle and
Asset Finance (173/13) [2014] SZHC262 7 October
2014***

Coram:

Ota J.

Heard:

22 September 2014

Delivered:

7 October 2014

Summary:

**Civil procedure: *rule nisi* confirmation thereof;
Appellant raising objections *in limine* and failing to**

file papers on the merits; rule confirmed; jurisdiction of the Manzini Magistrates' Court; whether ousted by consent of the parties; appeal dismissed.

JUDGMENT

OTA J.

[1] This is an appeal against the Judgment of the Manzini Magistrates Court, per **His Worship Mr D. V. Khumalo.**

[2] BACKGROUND

It appears from the papers serving before court, that the Appellant and Respondent on the 10th of June 2011, and at Manzini, concluded a written lease agreement in terms of which the Respondent leased and delivered to the Appellant a certain trailer to wit, a 2011 interlink cane Trailer (H) with chassis / serial No. 9H235HABAKA1080. Further, the Appellant was to pay a monthly rental in the amount of E8,106.41 (Eight Thousand One Hundred and Six Emalangeni Forty One Cents), for the lease.

[3] Alleging that the Appellant failed to pay the monthly rentals as agreed and was in arrears in the tune of E30,998.05 (Thirty Thousand Nine Hundred and Ninety Eight Emalangeni and Five Cents), the Respondent as Applicant, launched an

application against the Appellant as Respondent, under a certificate of urgency before the court *a quo*, contending for the following reliefs:-

- “1. Dispensing with the forms of service and the time limits provided by the rules of this Honourable court and hearing this matter urgently.**
- 2. An order authorizing the Messenger of Court for the Manzini District to seize and attach a certain trailer to wit a;**

**MODEL: 2011 INTERLINK CANE TRAILER (H)
CHASSIS/SERIAL NO: 9H235HABAKA1080**

Presently in the possession of the Respondent or with whomsoever it may be found, and to keep same in his custody pending the finalization of this application.

- 3. That members of the Royal Swaziland Police Force assist the Messenger of Court in the execution of this order.**
- 4. That a *rule nisi* be and is hereby issued against the Respondent and returnable on a date to be fixed by this Honourable court calling upon the Respondent to show cause why;**

- (a) The Respondent should not return to the Applicant the following trailer to wit a;**

**MODEL: 2011 INTERLINK CANE TRAILER (H)
CHASSIS/SERIAL NO: 9H235HABAKA1080**

Alternatively the Messenger of court should not seize and attach same wherever or with whomsoever it may be found, and to return it to the Applicant.

- (b) The Respondent should not pay the amount of E30,998.05 (Thirty Thousand Nine Hundred and Ninety Eight Emalangi Five Cents) plus interest thereon at the rate of 14.5%.**
- (c) The Lease Agreement between the Applicant and the Respondent herein should not be declared as cancelled.**
- (d) The Respondent should not forfeit all amounts paid.**
- (e) Respondent should not return the Blue Book or Registration Documents of the abovementioned trailer to the Applicant.**

(f) **The Respondent should not pay costs of suit on the attorney and own client scale in terms of clause 13.2 of the Lease Agreement between the parties herein.**

5. **That BHEKITHEMBA DLAMINI be appointed acting Messenger of court for the District of Manzini.**

6. **Granting such further and/or alternative relief.”**

[4] It is convenient for me from henceforward to refer to the parties as they appear in this appeal, to wit; Appellant and Respondent respectively.

[5] The Respondent obtained a *rule nisi* in the terms prayed. In the wake of this application and the *rule nisi*, it appears that the Appellant raised two objections *in limine*. We are herein concerned with the second objection which sounds in the following terms:-

“AD LACK OF JURISDICTION OF THE MANZINI MAGISTRATES COURT

[1] **The Manzini Magistrates Court has absolutely no Jurisdiction over the matter. The Respondent as a legal persona is situate, resident and domiciled at Big Bend. This is at Lubombo. Proceedings follow the domicile of the Defendant / Respondent. The Respondent has not consented to the jurisdiction of the Manzini Magistrates Court. At the worst, the Applicant and with the Respondents consent should have instituted at the Lubombo Magistrates Court and not in Manzini. Even where a party gives consent to a Magistrates Court, it is in law still supposed to be a Magistrates Court which ordinarily has Jurisdiction over the person of the Defendant / Respondent and none other.**

Alternatively

[2] **The above Honourable, sitting as a Magistrates Court has no jurisdiction over the matter by virtue of the amount involved in the**

lis being beyond the jurisdictional limit of the above Honourable court.

[2.1] **The consent to jurisdiction signed by the Respondent at the time the agreement was entered into does not in law extend to consent when the action is eventually moved. Respondent did not give consent to jurisdiction when or after the action was moved. Respondent in fact declines to consent to such jurisdiction.”**

[6] The court *a quo* dismissed the foregoing points *in limine* and granted final judgment to the Respondent on the substantive issues in the pending lis, by confirming the rule.

[7] **THE APPEAL**

It is this judgment that has brought the parties to this court via a Notice of Appeal, Styled, Civil Appeal No. 174/13, commenced by the Appellant upon the following grounds of complaint:-

- “1. **The court *a quo* erred in law and in fact in concluding that the Respondent had consented specifically to the jurisdiction of the Manzini Magistrates Court.**
2. **The court *a quo* erred in law and in fact in further finding that the Manzini Magistrates Court had the necessary jurisdiction over the matter notwithstanding the explicit provisions of the parties agreement.**
3. **The court *a quo* erred further in law and in fact in finding that the cause of action had arisen entirely within the jurisdiction of the court.**
4. **The court *a quo* erred in granting final judgment against the Respondent.”**

[8] Let me observe right from the outset that when this appeal was heard, Learned Counsel for the Appellant Mr Ndlovu, indicated to the court that the Appellant was abandoning ground 3 of the Notice of Appeal on the basis that the issues raised therein, are subsumed in grounds 1 and 2 respectively. He was, in my view, well advised to do so.

[9] I agree with the Appellant that the issues for determination are as follows:-

1. **Whether the Manzini Magistrates Court has jurisdiction over the lis.
(This takes on grounds 1 and 2 of the Notice of Appeal).**

2. **Whether the learned trial Magistrate was at liberty, having dismissed the point *in limine*, to simply confirm the *rule nisi* without having afforded the Appellant the opportunity of filing papers on the merits.
(This takes on ground 4 of the Notice of Appeal).**

[10] Let us now interrogate these issues *ad seriatim*.

[11] **ISSUE ONE**

Whether the Manzini Magistrates Court has jurisdiction over the lis.

[12] What gave rise to the grouse over the jurisdiction of the court *a quo* is directly traceable to clause 13.1 of the agreement between the parties, wherein they covenanted as follows:-

“Lessee consents to the jurisdiction of the Magistrates Court having personal jurisdiction irrespective of the amount in dispute, but lessor shall not be obliged to institute action in the Magistrates Court.” (emphasis added)

[13] Mr Ndlovu has contended before me that the court *a quo* erred in assuming jurisdiction over the lis. This, he says is because, the court is not a Magistrates’ Court having personal jurisdiction over the Appellant (lessee), as agreed by the parties, regard being had to the fact that the Appellant is a company which is specifically domiciled at Big Bend in the Lubombo Region. Therefore, the Appellant is resident outside the jurisdiction of the Manzini Magistrates Court.

[14] The spirit behind clause 13.1, further contended Mr Ndlovu, was an appreciation of the fact that the value of the merx sought to be repossessed, as shown on the statement of balance as owing on one of the trucks, which is E250,707-45, as well as the outstanding instalments claimed on the monthly rentals, which is E30,998-00, are amounts which are far above the jurisdiction of any Magistrate Court in Swaziland. In a bid to bring the transaction within the limits of the jurisdiction of a Magistrates Court, the parties thus invoked the proviso to section 28 of the Magistrates Courts Act, which affords them the opportunity of consenting to the

jurisdiction of the Magistrates Court in instances wherein the Court's jurisdiction would ordinarily have been ousted.

[15] In these circumstances, where the value of the merx and the outstanding rental instalments fall outside the jurisdiction of the Magistrates Court, it would have had no jurisdiction over the *lis* even if the whole cause of action arose within its jurisdiction, but for the consent of the parties in clause 13.1 of the lease agreement, further contended Learned Counsel.

[16] It follows in these premises, so goes the argument, that the court *a quo* was duty and legally bound to follow to the letter the exact terms of the agreement between the parties, which was a consent to the jurisdiction of a Magistrates Court with personal jurisdiction over the person of the lessee (the Appellant). This is a Magistrates Court situate in the domicile of Appellant, at Lubombo and not the Manzini Magistrates Court. In these circumstances, the court *a quo* erred in assuming jurisdiction solely because the entire cause of action arose within its jurisdiction, and the parties had consented to the jurisdiction of a Magistrates' Court.

[17] In any case, further contended counsel, the mere fact that a party consented to the jurisdiction of a particular court at the time of agreement, does not preclude it from

objection to the jurisdiction at the institution of litigation, as the Appellant sought to do before the court *a quo*.

[18] On his part, Learned Counsel for the Respondent, Mr Dlamini, argued to the contrary, that the court *a quo* was correct to assume jurisdiction because the entire cause of action arose within its jurisdiction. The issue of the value of the merx and the outstanding rentals claimed being beyond the jurisdiction of the presiding Magistrate, is of no moment. This, counsel contends, is because, the substantive claim before the court is the repossession of the merx. The value of the merx does not come into play in these circumstances.

[19] The claim for cancellation of the lease agreement and the outstanding rentals are at best ancillary to this substantive claim and the jurisdiction of the Magistrates Court with regard to the outstanding rentals, is saved by the provisions of section 22 (2) of the Magistrates Courts Act, so further contended counsel.

[20] Furthermore, since the Appellant had from the outset consented to the jurisdiction of the Magistrates Court, it cannot resile from it at this stage of litigation, also argued Mr Dlamini.

[21] Now, how the learned trial Magistrate reached the conclusion that he has the jurisdiction to hear and determine the application launched *a quo*, appears in the

assailed decision as reproduced on pages 40 – 42 of the book of pleadings, in the following terms:-

“In determining this issue, provisions of Section 15 (d) of the Magistrates’ Court Act 66/1938 must be factored in. This provision reads thus:

‘Serving any other jurisdiction assigned to any other law the persons in respect of whom the court shall have jurisdiction shall be- ...(d) any person, whether or not he resides, carries on business, or is employed within Swaziland, if the cause of action arose wholly within the district.’

The essence of this provision and the meaning it bears is that a Magistrates’ Court will have power to entertain the matter if the cause of action arose within the district of that court, notwithstanding that one of the parties is not resident within the district of the seat of that court. The question to be answered is whether the conclusion of the contract by the parties in the Manzini district does constitute a ‘cause of action’ in view of the definition of the term as shown in the above cited cases. We have already seen the above that the term ‘cause of action’ refers to ‘every fact necessary for the Plaintiff to prove if traversed in order to support his right to the judgment’ In context of this case, it is a necessary material fact to be proved by the applicant that the agreement with the Respondent was concluded within the Manzini District. This is however not all that would be necessary to prove in order to give rise to a ‘cause of action.’ Other facts would still be necessary to prove, for example the fact that the other party later breached the contract and other facts attendant thereto. This hinges to the requirement inherent in the provision of Section 15 (d) of this court’s Act as shown above which stipulates that the court will have jurisdiction over the matter even if the party or parties are not resident within the district of the court if the ‘cause of action’ wholly arose within the district of the court. It is not in dispute that the contract was concluded within the jurisdiction of this court. In paragraph 12 of the founding affidavit by the Applicant it is averred that the ‘cause of action’ arose wholly within the jurisdiction of the court – meaning that over and above conclusion of the contract within the district of this court, the rest of the other facts necessary to substantiate the claim by the Applicant such as the breach of contract, occurred within the district of this court. This averment by the applicant has not been gainsaid by the respondent save for some denial made in the heads of arguments which I have found to be irregular since these are facts which ought to have been averred in an affidavit in order to enable the other party to reply to same. I have as much disregarded them, and as such I am inclined to conclude that the breach of contract together with other attendant facts necessary to constitute the ‘cause of action’ in the absence of any admissible challenge,

arose within the district of this court as alleged by the Applicant in paragraph 12 of the founding affidavit.

Part of the contention by the Respondent was that Magistrate Groening and perhaps this court itself lack jurisdiction by virtue of the fact that the amount claimed is beyond the allowed jurisdiction. Worth noting in this matter is that the main application is attachment and repossession of the assets involved and cancellation of the contracts. The payment of outstanding amount of money is an alternative application. Section 22 (2) of the Magistrates' Court Act 66 of 1938 states where the relief sought is within the jurisdiction of the court, such jurisdiction will not be simply ousted merely because the amount involved is beyond the jurisdiction of the court. In this matter the main relief sought, which includes attachment and repossession was within the jurisdiction of Magistrate Groening at the time of determination of the matter. The fact that on the alternative, amounts of money relating to the outstanding balances were beyond the jurisdictional limit of Mr. Groening's court, could not oust his jurisdiction to entertain the matter as per the provision above."

[22] I am unable to fault the foregoing exposition by the learned trial Magistrate. It is not only in accord with sound legal principles, but it also pays homage to the jurisdiction of the Magistrates' Courts in Swaziland as prescribed by statute. I will now proceed to demonstrate why I say so.

[23] In the first place, the contention that the court is duty and legally bound to honour clause 13.1 of the lease agreement, wherein the parties consented to the jurisdiction of the Magistrates Court having personal jurisdiction over the lessee, is clearly unsustainable. While agreeing that section 28 of the Magistrates Courts Act, empowers the Magistrates Court to determine any action or proceeding which are otherwise beyond its jurisdiction if the parties consent in writing thereto, and of course subject to the matters excluded by section 29 of the Act, I am however of

the firm view, that this legislation cannot operate to oust the jurisdiction of one Magistrates' Court in preference to another.

[24] This is because the jurisdiction of a court is prescribed by statute and is therefore determined by the statute or constitution that created it. Parties cannot agree to exclude statutorily prescribed jurisdiction of the court, except if the statute itself permits ouster of the jurisdiction.

[25] It follows that the mere fact that the parties had consented to the jurisdiction of the Magistrates Court having personal jurisdiction over the Appellant, cannot be construed as an ouster of the jurisdiction of other Magistrates' Court who are statutorily empowered to exercise such jurisdiction over the lis. Section 28 makes provisions for actions beyond the jurisdiction of a Magistrates' Court. It does not seek to draw any distinctions between the Magistrates Courts.

[26] Now, Section 15 of the Magistrates Courts Act prescribes the jurisdiction of Magistrates Courts, in respect of persons, to be as follows:-

“15 Saving any other jurisdiction assigned to any courts by this Act, or by any other law the persons in respect of whom the court shall have jurisdiction shall be –

- (a) any person who resides, carries on business, or is employed within the district;**
- (b) any partnership whose business premise are situated or any member whereof resides within the district;**

- (c) any person whatever, in respect of any proceedings incidental to any action or proceeding instituted in the court by such person himself;
- (d) any person, whether or not he resides, carries on business, or is employed within Swaziland, if the cause of action arose wholly within the district;
- (e) any party to interpleader proceedings, if –
 - (i) the execution creditor and every claimant to the subject matter of the proceedings reside, carry on business, or are employed within the district; or
 - (ii) the subject matter of the proceedings has been attached by process of the court;
- (f) any defendant (whether in convention or reconvention) who appears and takes no objection to the jurisdiction of the court.” (emphasis added)

[27] What is beyond controversy from section 15 (d) above, and as correctly espoused by the court *a quo*, is that **“the court will have jurisdiction over the matter even if the party or parties are not resident within the district of the court if the cause of action wholly arose within the district of the court.”**

[28] *In casu*, it is an established fact that the cause of action arose wholly within the Manzini District which falls within the jurisdiction of the Manzini Magistrates Court. The Respondent acknowledged this fact in paragraph 12 of its founding affidavit in the following words:-

“Further the cause of action arose wholly within the jurisdiction of this honourable court”

[29] As rightly deduced by the court *a quo*, this averment simply means that, quite apart from the lease agreement being entered by the parties in Manzini, the breach of the contract and all other material facts necessary to be proved to entitle the Respondent to judgment arose within the Manzini District.

[30] There is no contrary allegation of fact in the record, on the other side from the Appellant countering the allegation that the cause of action arose wholly within the jurisdiction of the Manzini Magistrates Court. I am fully persuaded that in these circumstances, since it is an established fact that the cause of action arose wholly within Manzini, the Manzini Magistrates Court, was well within its powers to assume jurisdiction over the lis.

[31] Furthermore, it does not lie in the mouth of the Appellant to contend that the amounts involved in the lis exceed the jurisdiction of the Magistrates Court. This is so because, in terms of clause 13.1 of the lease agreement, the Appellant as lessee consented to the jurisdiction of the Magistrates Court irrespective of the amount in dispute. This is pursuant to section 28 of the Magistrates Courts Act, which I have hereinbefore enunciated above. It needs no repetition.

[32] In any case, and as correctly expounded by the court *a quo*, the Magistrates' Court has jurisdiction by virtue of section 22 (2) of the Magistrates Courts Act, which enables it to exercise jurisdiction over a matter even if one of the reliefs sought for

is above its jurisdiction, provided, that the principal reliefs sought for in the same case are within its jurisdiction.

[33] For the avoidance of doubts, section 22 (2) of the Magistrates Courts Act, which is headed incidental jurisdiction, postulates as follows:-

“22 (2) Where the amount claimed or other relief sought is within the jurisdiction, such jurisdiction shall not be ousted merely because it is necessary for the court, in order to arrive at a decision, to give a finding upon a matter beyond the jurisdiction.”

[34] I agree with the court *a quo* that the principal and primary reliefs claimed, namely, repossession of the merx and cancellation of the lease agreement are within the jurisdiction of the Magistrates Court.

[35] The claim for arrears of the rentals is incidental in the sense that it is dependent on the repossession of the merx and cancellation of the lease agreement. Ordinarily, claims for arrears of rentals are within the jurisdiction of the Magistrates Court. It is the quantum of the amount that exceeded the monetary jurisdiction of the Principal Magistrate **His Worship Mr. D.V. Khumalo**, by E998=00.

[36] The general principle of law is that it is the principal or primary relief that determines the jurisdiction of the court and not the incidental claim. Once the principal or primary reliefs are within the jurisdiction of the court, the fact that the incidental relief exceeds its jurisdiction will not deprive it of the jurisdiction to entertain the case.

[37] In the light of the totality of the foregoing the Appellant's complaint in these respects fails. I resolve issue one in favour of the Respondent.

[38] **ISSUE TWO**

Whether the learned trial Magistrate was at liberty, having dismissed the point *in limine* to simply confirm the *rule nisi* without having afforded the Appellant the opportunity of filing papers on the merits.

[39] What the Appellant complains about in this regard, is that it was denied its constitutional right to a fair hearing, by the procedure adopted by the learned Magistrate in confirming the *rule nisi* immediately after dismissing the points *in limine*, without first hearing the Appellant.

[40] The right to fair hearing is preserved by section 21 (1) of the Constitution Act, 2005, in the following language:-

“In the determination of civil rights and obligations or any criminal charges a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by law”.

[41] Mr Ndlovu has urged upon me my decision in the case of **Ernest Mazwi Mngometulu v Lucky Groening and Two Others, Civil Case No. 2107/2010,**

wherein, in adumbrating on the right to a fair hearing as encapsulated in section 21

(1) of the Constitution Act, within the context of the case, I postulated as follows:-

“The *literal legis* of the foregoing legislation puts it beyond controversy that it creates rights both in civil and criminal proceedings which although related are separate and distinct. Thus there is a right to a fair hearing, a right to a speedy hearing within a reasonable time, a right to a public hearing and a right to a hearing by an independent and impartial court or adjudicating authority established by law. For the purpose of this exercise, I will concern myself with the aspect of that legislation which demonstrates, that whenever a need arises for the determination of the Civil Right and obligations of individuals in The kingdom of Swaziland, that the individuals are guaranteed a fair hearing within a reasonable time. The poser here is : what then is fair hearing? To my mind fair hearing is synonymous with fair trial and implies that every reasonable and fair minded observer who watches the proceedings should be able to come to the conclusion that the court or other tribunal has been fair to all the parties concerned. The rule of fair hearing is not a technical doctrine, it is one of substance. The question is not whether injustice had been done because of lack of hearing. It is whether a party entitled to be heard before deciding had in fact been given the opportunity of a hearing. Once an appellate or reviewing court comes to the conclusion that the party was entitled to be heard before a decision was reached, but was not given the opportunity of a hearing, the order or judgment thus entered is bound to be set aside. This is because such an order is against the rule of fair hearing, one of the twin pillars of natural justice which is expressed by the maxim *audi alteram partem*.” (underlining my own)

[42] The question here is, was the Appellant’s right to a fair hearing breached by confirmation of the rule?

[43] In confirming the rule, the court *a quo* stated as follows:-

“Having said the above, it follows that the point *in limine* fails. I have already pointed out that the respondent in their first point *in limine*, had alleged that if that point *in limine* would be dismissed leave would be sought for filing of opposing papers. Such was not done and no reason was given during arguments. On the other hand the applicant has applied for confirmation of the existing rule. The Respondents being way out of time to file their papers, and there being no move taken to seek condonation and leave of the court to

file opposing papers, and there being no reason advanced for such failure, this court is inclined to confirm the rule as I hereby do.”

[44] In this case, when the Appellant was served with the order *nisi* which was issued on 15 February 2013, judging by the stamp of the clerk of court that appears thereon, the Appellant was supposed to have filed its papers in response to that before the return date. It did not. On 18 February 2013, Appellant entered a notice of intention to defend. Instead of filing its opposing papers, the Appellant rather raised its first objection *in limine* on 21 February 2013. This objection according to the record, was taken before Magistrate Groening at the Manzini Magistrates Court.

[45] It is trite learning that where a party is served with an order *nisi* and instead of filing papers in response thereto to contest it on the facts, chooses to raise an objection *in limine*, that party has a duty to indicate to the court that should the objection fail, he still desires to contest the merits of the case. Where he does not so indicate, it means that he intends to rely only on his objection without more.

[46] *In casu*, the Appellant had indicated when it raised the first objection *in limine* before Magistrate Groening, that it desires to file papers if it failed. When it failed, the Appellant did not file any papers as it had undertaken. Rather, Appellant raised a second objection. There is nothing in the record to show that in raising the second objection the Appellant indicated that it should be granted leave to file

opposing papers if it is dismissed. When the second objection failed the court went ahead and confirmed the rule.

[47] Since the Appellant did not indicate his desire to file papers in the wake of the second objection, I cannot fault the procedure adopted by the court *a quo* in confirming the rule, immediately upon dismissing the second point *in limine*.

[48] The resort to a second objection without filing papers and without indication of any intention to do so, appeared dilatory and gave the impression that the Appellant had nothing on the merit to contest the order *nisi* and so is resorting to piecemeal objections to prevent it from being made absolute.

[49] Moreover, the second objection was filed on 4 October 2013, judging by the stamp of the clerk of court appearing thereon. The time for a party to respond upon being served with an order *nisi* had long elapsed. The Appellant did not apply for extension of time or seek the leave of court or condonation to file opposing papers, even when the Respondent applied for confirmation of the rule when the second point *in limine* was argued before the court *a quo*. The court *a quo* noted this fact in the assailed decision in the following terms:-

“The Applicant has also applied that the *rule nisi* it obtained in this matter be confirmed contending that in respect of the notice dated 21st February, 2013, the Respondent stated that in the event the preliminary point of law it had raised then would be dismissed, it would seek leave from this court to file opposing papers, an undertaking it has failed to fulfill, but has rather decided to raise another point of law. Worth noting, is that no counter

argument in this regard has been forth coming from or on behalf of the Respondent.” (underlining mine)

[50] It is trite that where a party against whom an order *nisi* is made, upon being served with the order *nisi*, fails to file a response to the order *nisi* within the period prescribed by law for doing so and has not sought for an order of court either by way of extension of time, leave or condonation, to enable him to do so outside the period, the court must enter an order absolute without hearing him. That is the natural result of the situation.

[51] It is clear from the foregoing analogy, that the Appellant was given reasonable opportunity to respond to the suit. It responded to it by objections and filed no other papers. The rule was confirmed due to the failure of the Appellant to file opposing papers.

[52] It remains for me to emphasise, that a party who had reasonable opportunity to present its case before the decision of the court on any point, if it fails to utilize the opportunity afforded to present its case and failed to take the required steps to do what it is supposed to do so as to be heard, cannot turn around to complain that it was not given a fair hearing.

[53] Court proceedings are not conducted at the dictates or the whims and caprices of either party to the case. Proceedings are conducted in accordance with established

due process. Each party has a window of opportunity to take the relevant steps so as to be heard. If it fails to take the steps, as in the instant case, it should not expect the court to wait.

[54] For the above stated reasons, the complaint of denial of fair hearing has no basis. It is frivolous. It fails and is accordingly dismissed.

[55] **CONCLUSION**

In the result the appeal lacks merits. It fails and is dismissed in its entirety.

[56] **ORDER**

Civil Appeal Case No. 173/13 be and is hereby dismissed with costs.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS
THE DAY OF2014**

**OTA J.
JUDGE OF THE HIGH COURT**

For the Appellant: T.M. Ndlovu

For the Respondent: T.L. Dlamini