THE HIGH COURT OF SWAZILAND

JOHANNES NKW ANY AN A

Applicant

Vs

THE ACCOUNTANT GENERAL et al

Civil Case No. 2942/2000

Coram: S.B MAPHALALA - J

For the Applicant:MR. M. SIBANDZE

For the Respondents: Advocate L. Maziya

(Instructed by the Attorney General)

JUDGMENT

(On the merits) (20th May 2005)

[1] This matter came before the court on a Certificate of Urgency, the Applicant is seeking an order against all four Respondents, primarily that they be held in contempt of court in that they had not paid a judgment amount due to the Applicant. The judgment amount is pursuant to an order of the Court of Appeal issued on the 18th March 2005. I heard preliminary arguments on the question of urgency and furthermore on the question of whether or not a case had been made out against the 2nd Respondent with respect to the order sought against him

in his personal capacity. I ruled that the issue of urgency had been overtaken by events and furthermore that the application against the 2nd Respondent was not proper. For ease of reference, the ruling in respect of that aspect of the matter forms part of this judgment. I then directed that the matter be argued on the merits as against the remaining Respondents.

[2] On the 12th May 2005,1 heard full arguments on the merits of the matter as I had directed. Mr. Sibandze who appeared for the Applicant relied on the Heads of Argument he had filed when the matter commenced in limine. Mr. Maziya filed Heads of Argument on the merits where he raised a number of points therein. The first point raised is that the Applicant on the papers has dismally failed to establish any case against the 1st Respondent. In this regard the court was referred to Herbstein and Von Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Ed at page 366 where the following proposition is put forth:

"The general rule which has been laid down repeatedly is that an Applicant must stand or fall by his Founding affidavit and the facts alleged in it and that although sometimes it is permissible to supplement the allegation contained in that affidavit, still the main foundation of the application is the allegation of facts stated there because those are the facts that the Respondent is called upon to either affirm or dent..."

[3] The argument therefore, is that there is no averment in the Founding affidavit of the Applicant that the 1st Respondent is refusing or otherwise neglecting to pay the sum in question. No allegations have been made that the reason 1st Respondent has not paid up to now is neither wilful nor mala fide as propounded in the cases of Craw and another vs Jarvis 1982 - 1986 (1) S.L.R 219 and Haddow vs Haddow 1974 (2) S.A. 181 at 183.

[4] The second issue raised by the Respondents in their defence is that there is no allegation in the Founding affidavit that the 1st Respondent has unduly delayed the payment. At paragraphs 5.1.1.1.1 to 5.1.1.13 of the

Heads of Argument various arguments are advanced in support thereto.

[5] The third argument put forth for the Respondents is that it is not alleged anywhere in the Founding affidavit that he was aware of the Order of the Court of Appeal. However, Mr. Maziya later withdrew this argument after he was made aware by Mr. Sibandze in his address that this was not so. As a point of fact the 1st Respondent is aware of the Order of the Court of Appeal dated the 18th March 2005.

[6] The fourth argument put forward is based on the Applicant's contention that the l st respondent is in contempt because he is compelled by statute to pay once he becomes aware of a Court Order to that effect irrespective of whatever directive comes from the office of the Attorney General. The argument in this regard is that Section 4 of the Government Liabilities Act of 1967 is not applicable in this case as this Section is not authority for the proposition that the Accountant General has a duty to pay once he becomes aware of a Court Order whatever the circumstances. This Section deals with a situation whereby a Judgment Creditor seeks to attach property belonging to the Government. All it says is that rather than have Government property attached to satisfy a judgement debt the Accountant General has a duty to pay the amount in question.

[7] The fifth submission advanced for the Respondents is that the Court of Appeal judgment does not specify a time frame within which the Government was expected to have paid. If this court were to stipulate a time frame, it would in effect be amending the Appeal Court decision. This court does not have the power to amend a Court of Appeal decision since it is an inferior court.

[8] On the other hand, on the totality of the averments in the Applicant's affidavits and what is contained in the Heads of Argument which advances the Applicant's application the Applicant's case is based on the following facts which are common cause:

i) There is an order of the Appeal Court in this matter;

ii) The Respondents are aware of the Order;

iii) The 1st Respondent although being aware of the Order has not complied therewith;

iv) The Respondents have not put into motion any legal process to have the order of the court varied and are therefore in blatant contempt.

[9] Mr. Sibandze cited the celebrated words of Justice Braideis of the Supreme Court of the United States of America in the case of Olmstead and others vs United States where the learned Judge stated the following:

"In a Government of Laws in existence of the Government will be imperilled, if it fails to observe the law scrupulously ... Government is the potent omni present Teacher. For good or for ill it teaches the whole people by its example.... if the Government becomes a law breaker, it breeds contempt to the law; it invites every man to become a law unto himself; it invites anarchy".

[10] The gravamen of the Applicant's case on the basis of the above cited facts which are common cause between the parties is that there can be no challenge whatsoever. The court, therefore ought to issue an appropriate order in the circumstances that the Respondent be ordered to comply with the court order no later than the close of business on the 27th April 2005 failing which 1st Respondent be committed to prison as prayed.

[11] The defence proffered by the lsl Respondent is found in paragraphs 4 in fin 6 of his supporting affidavit wherein he states that he admits that on the 22nd March 2005, the office of the Attorney - General issued a directive to his office for the payment of E5, 162, 036-39 in respect of a taxed Bill of Costs which was annexed to the covering memo. He further admits that the office of the Attorney - General then issued another directive

revoking the earlier one to pay. This was done on the 23rd March 2005. Furthermore that he has not issued any cheque in payment of Applicant's claim since the directive to stop payment was issued. He admits that he has not received another instruction to proceed with payment.

[12] The defence by the 3rd Respondent is found in the Answering affidavit of John Sipho Magagula who is employed by Government in the Attorney-General's Chambers. He deposes at paragraph 6 thereof that he had never had sight of the Court Order and he had no basis for instructing the Accountant General to effect payment.

[13] The issues for determination in this case therefore may be classified under

several headings viz i) the Applicant's Founding and Replying affidavits;

i) noallegations that 1st Respondent has unduly delayed payment;

iii) that 1st Respondent is aware of order; iv) that Section 4 of the Government Liabilities Act does not apply; v)

◦whatever order this court grants will be amending the order of Superior Court; and vi) the question of costs.

[14] I shall address these questions in a rather haphazard fashion starting with the last point that this court docs not have the power to amend a Court of Appeal decision since it is an inferior. I find it imperative to first deal with this jurisdictional point before the other issues that have been raised. The general principle is that an order for committal for contempt can be granted only by the court whose order has been flouted. The author Herbstein et al (supra) at page 819 put it this way:

"Application should be brought in the court that made the order which the Respondent is alleged to be disobeying. This rule holds good even if the Respondent is no longer residing within the jurisdiction of that court".

[15] In the South African case of Wright vs St Mary's Hospital, Melmoth and another 1993 (2) S.A. 226 Magid J

was vexed with a similar case as the present where an application came before him to commit the Respondent to prison for alleged contempt of a determination of the Industrial Court in terms of which the 1st Respondent [in that case] was ordered to reinstate the Applicant in his position as its Medical Superintendent. The learned Judge in a very impressive review of cases on this subject held inter alia, that the Supreme Court did not have the jurisdiction to commit for contempt anyone infringing an order of the Industrial Court. The learned Judge held at page 228 B - C as follows:

"Normally, the court whose order is alleged to have been disobeyed is the court which is asked to commit to prison the person who disobeyed it. The central issue in this case is whether the Supreme Court has this power when it was not the author of the order alleged to have been infringed" (my emphasis).

[16] It appears to me that even in the instant case the question is whether the High Court has this power when it was not the author of the order alleged to have been infringed. The learned Judge at page 230 paragraphs C to E of the Wright case (supra) continued to state as follows:

"This line of authority tends to show that an order for committal for contempt can be granted only by the court whose order has been flouted (compare Herbstein and Van Winsen, The Civil Practice of the Superior Courts of South Africa 3rd Ed at 652; Law of South Africa Vol. 3 paragraph 395).

[17] The learned Judge further cited the cases of Komsane vs Komsane 1962 (3) S.A. 103 (C) and the landmark judgment of Kotze CJ in Re Dormer (1891) 4 S.A.R 64 at 89 where the learned Chief Justice said the following at page 84:

"All the books and decided cases lay down that contempt of court is punished summarily, for this lies in the very nature of the matter, and they also show that the Court or Judge attacked, and none other, are the proper tribunal to deal with it".

[18] The learned Judge in Wright case (op cit) interpreted the words "and none other" in Dormer's (supra) to imply that the only court entitled to deal summarily with a contempt of court is that which has suffered the contempt. The learned Judge in Wright (supra) further dealt at great length with the inherent jurisdiction of the Supreme Court of South Africa and in this instance he relied heavily on a treatise by Dr J Taitz, titled "The Inherent Jurisdiction of the Supreme Court at 11 - 12 as follows:

"The inherent powers of the court are diverse and cover a wide range of circumstances, concerning as they do the independent regulation by the court of its function in accordance with justice and good reason. Whether through its inherent jurisdiction the court may adapt, adopt or create relief to meet a remediless cause is a contentious subject and one which will be considered separately ... Save for this contentious aspect, for the purpose of the analysis, contained below, the inherent powers have been classified under the following headings: Regulating its proceedings and preventing the abuse of its process;

Imposing sanctions for the impairment of its dignity or for failure to comply with its lawful orders;

Controlling and supervising its officers;

Restraining irregularities in the proceedings of lower (or inferior) courts; and

Restraining irregularities in the proceedings of administrative (and like) authorities, or judicial

review of administrative (and like) action".

[19] The learned Judge went further to hold at paragraph F to G as follows:

"Nowhere does the learned author suggest that the Supreme Court is at large to right wrongs or prevent injustices save in the specified spheres. Indeed lie slates positively to the contrary, at

"...The inherent jurisdiction of the court should not be regarded as an equitable jurisdiction in terms of which the court dispenses Solomon -like judgments based upon subjective notions of simple justice between man and law".

[20] From the above review a question may be asked in casu whether what is said by the learned author Dr J. Taitz applies to the High Court of Swaziland.

[21] The answer to this vexed question lies in the provisions of the High Court Act No. 20 of 1954 where Section 2 thereof reads as follows:

"Jurisdiction of the High Court of Swaziland.

2 (1) The High Court shall be a superior court of record and in addition to any other jurisdiction conferred by the constitution, this or any other law, the High Court shall within the limits and subject to this or any other law possess and exercise all the jurisdiction, power and authority vested in the Supreme Court of South Africa.

[22] It is abundantly clear therefore from the above-cited Section that the High Court of Swaziland has the same powers as the Supreme Court of South Africa and therefore what is said by Dr J. Taitz and embraced by Magid J in Wright case (supra) applies in the present case. The inherent powers of the High Court are circumscribed within the classification by the learned author cited above. The court does not have equitable jurisdiction, moreso in the face of the principle of law that the court whose order is alleged to have been disobeyed is the court which is asked to commit to prison the person who disobeyed it. Clearly, the High Court has no power when it was not the author of the Order alleged to have been infringed. Therefore the argument by Mr. Maziya makes a lot of sense when viewed against this backdrop.

[23] For the above reasons therefore I hold that the proper court to hear the matter is the Appeal Court whose order has been flouted or is alleged to have been flouted and I dismiss this application forthwith.

[24] On the issue of costs I rule that costs follow the event to be levied at the ordinary scale.

S.B. MAPHALALA