IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Civil Appeal No. 46/2004

In the matter between

AFRICAN ECHO (PTY) LIMITED Applicant

And

MINISTER OF FINANCE 1st Respondent

ATTORNEY GENERAL 2nd Respondent

CHAIRMAN, COMMISSION OF ENQUIRY INTO THE LIQUIDATION OF HVL ASBESTOS

MINE (SWAZILAND) LTD 3rd Respondent

Coram LEON, JP

BECK, JA

ZIETSMAN, JA

REASONS FOR JUDGMENT

LEON, JP

At the hearing of this matter the Court granted an order enrolling the appeal as a matter of urgency.

Thereafter we granted the following order:-

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1. The appeal is allowed with costs against the first respondent. Such costs to include the costs of the application to have this matter enrolled as a matter of urgency.
2. The order of the Court a quo dismissing the application is set aside. In its place it is ordered that the application is granted with costs against the first respondent.

The Court indicated to counsel that the reasons for the Court's decision would be given on Tuesday 23rd November, 2004. These now follow.

This is an application by the appellant (African Echo (Pty) Limited) for an order :-

1. Enrolling the appeal in the above matter for urgent hearing
2. That costs be costs in the appeal. There follows a prayer for further and/or alternative relief.

The application is supported by a certificate of urgency signed by Mr. Patrick Flynn an Advocate of the High Court of Swaziland.

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The application is brought on behalf of the appellant by its General Manager Mr. Patrick Nxumalo.

In his affidavit Mr. Nxumalo states that the appellant is the publisher of the Times of Swaziland, Swazi News and Times Sunday,

On the 26th October 2004 the appellant (then the applicant) brought an application on a certificate of urgency before the High Court of Swaziland seeking an order that the proceedings of the Commission of Enquiry into the Liquidation of HVL Asbestos Mine (Swaziland) be held in public, and that the direction of the Minister of Finance (The first respondent) that the proceedings be held in camera be set aside. The Attorney General appeared on behalf of the 1st and 2nd respondents and raised certain points in limine.

The matter was argued before Mr. Acting Justice Shabangu who, at the close of arguments, dismissed the application with costs. The learned Judge did not give any reasons for his decision and has failed to provide any written reasons despite being requested to do so. The appellant assumes that the learned Judge upheld one of the points in limine raised by the respondents. The appellant has filed a notice of appeal against the judgment dismissing the application.

The appellant has caused the proceedings in the Court a quo to be transcribed as the learned Judge made remarks during the hearing concerning the press and his perception of its role "which are of concern to the appellant and reflect upon his judgment."

The appellant alleges that the application was brought by way of urgency because:

i. The proceedings before the Commission of Enquiry are of great public interest;
ii. The media and the press are the means by which the public at large may be informed of matters of public interest and in particular proceedings before the courts, tribunals and commissions of enquiry.
iii. The appellant alleges that the Minister acted ultra vires in directing that the proceedings of the Commission be held in camera,
iv. The appellant has an interest as the watchdog of the public to ensure that the proceedings are held in public and also that the report of the Commission is made public.

v. The Commission will only operate for a limited period of time. Mr. Nxumalo states that the Commission has already begun hearing evidence and that its term of office expires 8 weeks after the 30 September 2004, i.e. on or about 25th November 2004.

Mr. Nxumalo avers that the same reasons justifying the urgent hearing of the matter apply to the appeal for if it is decided after the 25th November, the result will be of academic interest only.

Finally it is alleged by Mr. Nxumalo that the issues arising in the appeal impact greatly on important constitutional principles regarding the right to information and freedom of expression.

In opposing the application for enrolment of the appeal on an urgent basis, the respondents have not filed an opposing affidavit on the merits but have given notice of their intention to raise the following points in limine:-

1. The appellant has failed to make sufficient allegations showing that the matter is urgent.

2. The procedure for the hearing of urgent appeals is not provided for in the Rules of Court.

3. The record of proceedings in the High Court is incomplete because the judgment of the judge a quo does not form part of the record and that this Court is therefore left in the dark with regard to the reasons for the dismissal of the application.

With regard to the respondent's contention that there is no procedure for the hearing of urgent appeals I do not agree with that contention.

Rule 17 provides that the Court of Appeal may on application and for sufficient cause excuse any party from complying with any of the Rules. The Court of Appeal may also give such directions in matters of practice and procedure as it considers just and expedient. I am of the view that rule 17 is wide enough for this Court to enrol and hear an urgent appeal.
I turn now to consider the next point in limine raised by the respondents i.e. that the matter is not urgent and that any alleged urgency is of the appellant's own making. I fully subscribe to the principle that a party cannot rely upon his own remissness and rely upon a self-created urgency. The question is whether this is such a case.

In this regard Mr. Flynn, for the appellant has drawn attention to the fact that the notice establishing the Commission was published in the Swazi Observer on 7 October 2004 and the matter was set down for hearing on 26 October 2004. Had the time periods provided for in the Rules been followed the purpose of the application would have been defeated. In this regard rule 6(26) of the High Court Rules provides that a respondent must be given not less than 14 days after the service of the Notice of Motion upon him to serve his Notice of Intention to oppose the application, and a further 14 days within which to file his answering affidavits.
Had the appellant waited for a hearing in the ordinary course the matter would have been heard after the 25th November which would have been too late for the Commission would then have completed its business in camera.

The respondents have submitted that this Court can not hear this matter as the record is incomplete. This submission is based upon the fact that the learned Judge a quo has not furnished his reasons for judgment. This is not due to the fault of the appellant but is due solely and exclusively to the fact that the learned Judge has failed to provide reasons for judgment despite being requested by the appellant to do so. The absence of such reasons does not prevent this Court from hearing the appeal. The issues

in this case are purely legal issues which this Court is able to determine with or without the judgment of the Court a quo.

In our view the points raised by the respondent in limine fell to be dismissed and we accordingly decided to enrol and hear this appeal as an urgent matter. It was ordered accordingly.

The next matter which fell to be decided was whether the appellant had locus standi to bring the application. In this regard it is contended by the respondent that, even if the public may have an interest in the proceedings of the Commission, the appellant is not the agent of the public. I agree with Mr. Flynn for the appellant that the public does indeed have an interest in the proceedings. It appears from the papers that the appellant is the publisher of three

newspapers which are widely circulated in Swaziland. I agree too, that the media including the appellant have a duty to inform the public. It seems to me to follow that, as the right of the public to know has been denied by the first respondent the appellant had locus standi to bring the application. In other words the appellant has a direct and substantial interest in the proceedings.

In National Media Limited & others vs Bogoshi 1998(4) SA 1196 (SCA) there is a reference by Hefer JA to the unreported judgment of the

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English Court of Appeal in Reynolds vs Times Newspapers & Others delivered on 8 July 1998 where the following is stated:-

"As it is the task of the News Media to inform the public and engage in public discussion of matters of public interest, so is that to be recognised as its duty. The cases cited show acceptance of such a duty, even where publication is by a newspaper to the public at large..." Hefer JA went on to say at page 1210G:

"If we recognise, as we must, the democratic imperative that the common good is best served by the free flow of information, and the task of the media in the process....."

The above remarks fortify my conclusion that the appellant has and had locus standi. See also Khumalo and others vs Holomisa 2002(5) SA 401(cc)

The remaining matters which fall to be considered are:-

1. Whether the Commission is an adjudicating authority and, if so

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2. Whether Section 10 of the Constitution prevents the first respondent from directing the proceedings of the Commission to be held in camera.

Section 3(2) of the Commissions of Enquiry Act No. 35 of 1963 reads:-

"In the absence of a direction to the contrary under Section 4(3)(c) the enquiry shall be held in public....."

Section 4(3)(c) provides:-

3. The Minister may direct –

(c) Subject to Section 10 of the Constitution whether the enquiry shall be held in camera."

Section 10(10) of the Constitution provides:

"All proceedings of every adjudicating authority, other than a court, -

1. for the determination of the existence or extent of any civil right to trade or carry on a business or occupation; or

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2. for the determination of the existence or extent of any civil right or obligation which on 6th September 1968 it is within the original jurisdiction of the High Court to determine,

shall be held in public."

The functions of the Commission in question are set out in Legal Notice No. 115 of 2004. Section 3 provides:-

"The Commission shall:

1. investigate whether the liquidation of HVL Asbestos Mine (Swaziland) Limited (hereinafter referred to as "the company ") was carried out professionally and legally;
2. Investigate whether Government's interests were protected in the liquidation process;
3. Investigate the role of all Government Officials involved in the liquidation process;

(e).....

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(f) Establish who is liable for the rehabilitation of the Bulembu Mine and any other claims associated with the mine operations, including the health of ex-workers.

Section 3(f) is of particular importance because the reference to "who is liable" clearly refers to civil liability and that is a matter in respect of which the High Court would have jurisdiction. When the Commission deals with section 3(f) of its terms of reference it would thus be acting as an adjudicating authority.
In terms of section 10(10) of the Constitution the proceedings of an adjudicating authority must be held in public.

The Constitution has been repealed. However that repeal does not repeal the incorporation of section 10 into section 4(3)(c) of the Commission of Enquiry Act.

In Solicitor-General vs Malgas 1918 AD 489 Innes CJ said the following at page 491;-

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"It is no doubt a rule of interpretation in England that where the provisions of one statute are incorporated by reference in another, the repeal of the earlier measure does not operate to repeal the incorporated provisions. That of course is logical and correct whenever the intention to incorporate by reference is clear; because the provisions referred to become part of the second statute. They have, in effect, been enacted twice as separate Acts, and the repeal of the one does not affect the operation of the other."

The approach of Innes CJ has been followed and endorsed in a number of subsequent cases. Some of them are referred to by Eloff, JP in End Conscription Campaign vs Minister of Defence and others 1993(1) SA 589 at 593 C - D. Eloff JP went on to say this at page 593 E:-

"It has to be accepted that this rule is but an aid to construction and that the ultimate objective must be to ascertain the intention of the Legislature.....It is nevertheless an important factor which in the absence of cogent countervailing indications goes far to dispel any notion that the repeal of the earlier statute leads to the repeal from the latest statute of the incorporated provisions."

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I am unaware in the present case, of any "cogent countervailing considerations" and none have been suggested.

In the result the contentions of the appellant were all upheld and the appeal was accordingly allowed.

delivered in open court this.. ..day of november 2004

R.N. leon, JP

I AGREE

C.E.L. BECK, JA

I AGREE

N.W. ZIETSMAN, JA