



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No 2060/10

In the matter between;

**RAYMOND CARMICHEAL**

and

**ROSEMARY CARMICHEAL**

Nuetral citation                      Raymond Carmichael V Rosemary Carmichael  
(2060/10) [2012] SZHC 115

**Coram**                                      **DLAMINI J.**

**Heard**                                      **30<sup>th</sup> May, 2012**                      .

**Delivered**                                **4<sup>th</sup> June, 2012**

Stay of execution pending review application of this court judgment -  
application for review filed in the same court - powers of the court to  
review its own decision

**Summary:** This application is in sequel of an order to contribute towards maintenance of the respondent pending the outcome of an action for dissolution of a marriage between the applicant and the respondent. Applicant seeks for an order staying execution of a Writ issued pursuant to a judgment of this court in respondent's favour for maintenance *pendete lite* pending outcome of a review filed in this court.

[1] The chronicles as set out are briefly that the respondent served a Notice in terms of Rule 43 for maintenance arrears of E120 000 and maintenance *pendete lite* of E10 000 per month. This application was lodged in January 2011 in this court. Judgement was entered in favour of respondent in this present proceeding on 10<sup>th</sup> April 2012. On the 2<sup>nd</sup> May 2012 the deputy sheriff, armed with a Writ sought to execute the same. Four motor vehicles were attached as result. Two days later being 4<sup>th</sup> May 2012 applicant filed with the Registrar of this court a review application of the judgement of 10<sup>th</sup> April 2012 together with the present application.

[2] Respondent strenuously opposed applicant's application on the basis of Rule 53. He contends that this court cannot in the light of Rule 53 review its own decision

[3] Rule 53 (1) reads:

*“Save where any law otherwise provides all proceedings to bring under review the decision or proceedings of any **inferior court**.....”*

[4] In defining the term review Innes C.J. in **Johannesburg Consolidated Co. v Johannesburg Town Council 1903 TS 111** at 114-6 articulates:

*'If we examine the scope of this word as it occur in our statutes and has been interpreted by our practice, it will be found that the same expression is capable of three distinct and separate meanings. In its first and most usual signification it denotes the process by which apart from appeal, the proceedings of inferior courts of Justice both Civil and Criminal are brought before this court in respect of grave irregularities or illegalities occurring during the course of such proceedings..... But there is a second species of review analogous to the one with which I have dealt, but differing from it in certain well-defined respect. Whenever a public body has a duty imposed upon it by statute, and disregards important provision of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this court may be asked to review the proceedings complained of and set aside or correct them.... Then as to the third signification of the word. Legislature has from time to time conferred upon this court or a Judge a power of review procedures to which in my opinion was meant to be wide than the powers which it possesses under either the review procedures to which I have alluded.'*

- [5] **Hebstein and Van Winsel, The Civil Practice of Supreme Court of South Africa** at page 928 Innes C.J. classified three categories of review as follows:

*“review of proceedings of inferior courts; review of proceedings of quasi-judicial bodies (review under common law) review of proceedings of certain statutory bodies (review in its widest sense)”*

- [6] The above explicitly shows that anyone intending to review a decision must demonstrate that the judgement or decision was by an **inferior court, quasi-judicial body or statutory body.**

- [7] *In casu*, the applicant prays in its Notice of Motion:

*“2.1. That the Writ of Execution signed by the above Honourable Court on the 19<sup>th</sup> April, 2012 be stayed pending the determination of the application for review initiated by applicant on 4<sup>th</sup> May 2012.”*

- [8] It is common cause as already indicated and evident from the review application that the applicant seeks to review an order of this court and the review application is lodged in the very court.

- [9] The question then to be determined is that can the court review its on decision. From the authorities, decided cases and Rule 53 as outline *supra*, it is clear that this court cannot review its on decision.

- [10] In support of that application I was referred to the case of **Qhawe Mamba et al v The King Case No. 151/10....** where the applicant sought a recusal of my brother Levinson J. not before him but before the full bench of this court.
- [11] I must mention from the onset that the case *in casu* is not germane to the **Qhawe** *supra* matter both in terms of procedure and merits. In the Qhawe matter, the applicant moved an ordinary application by Notice of Motion seeking the recusal of the learned trier of fact in his criminal matter. The basis for the full bench of this court to constitute itself in his matter was because the applicant had asserted constitutional issues. In terms of this court's practice directive, it was imperative that the court constitute as a full bench to decide his matter. Neither a decision was taken by the presiding judge in the trial court nor was the application for a review. Senior Counsel is urged to verify his submission before making the same in court.
- [12] On the above premises, I consider that applicant's application has no basis at law.
- [13] I now consider the question of costs. Respondent urged the court to mete out costs. In support for an order as to costs, the respondent submitted that the application by applicant was intended to frustrate the respondent who had no means of support and thereby delay the cause of justice.
- [14] In ascertaining the scale for costs it is prudent that I consider the factors that propelled the applicant to file the application for review viz. had the applicant's application been allowed but for

Rule 53, would one conclude that applicant has alleged reasonable prospect of success.

[15] In paragraph 18 of his founding affidavit, the applicant avers:

*“I respectfully submit that I have reasonable grounds of success with regards to the application for review, and that in all likelihood my application for review of the orders granted by the Honourable Justice Sey will succeed.”*

[16] Nothing can gainsay from the above averment. The assertion by the applicant amounts to nothing but a salutary procedure. Reasons for so stating must be explicitly alleged so as to enable the court to reach a justifiable decision on whether the application so filed or noted is not meant to delay the course of justice. Applicant’s application is also silent on the balance of convenient.

[17] It would seem that applicant’s application was hastily prepared in order to facilitate the immediate return of the motor vehicle that had been attached by the deputy sheriff following a Writ of Execution in favour of the respondent.

[18] Discussing the question of costs on attorney - client scale, my sister **Ota J.** in **Swaziland Water & Agricultural Development Enterprises Ltd v Doctor Lukhele and Another Case No. 1504/11** and drawing from **Hebstein and Van Winsen in the Civil Practice of the Supreme Court of South Africa 4<sup>th</sup> Ed page 717**, the learned Justice states at page 21:

*“... an award of attorney and client costs will not be granted lightly, as the court looks upon such orders with disfavour and is loathe to penalize a person who has exercised his rights to obtain a judicial decision in any complaint he may have. ....some circumstances under which this scale of cost can be awarded. These are, on the ground of an abuse of the process of court, vexatious, unscrupulous, dilatory or mendacious conduct on the part of the unsuccessful litigant, absence of bona fides in conducting litigation, unworthy, reprehensible and blameworthy conduct, an attitude towards the court that is deplorable and highly contemptuous of the court, conduct that smirks of petulance, the existing of a great defect relating to proceedings, as a mark of the courts disapproval of some conduct that should be frowned upon and where the conduct of the attorney acting for a party is open to censure. ...where inter alia proceedings were brought hastily on ill advised ground.”*

- [19] On the same question, my brother Maphalala M. C. B. J. as he then was, in **Swaziland National Housing Board v Thulani Abande Dlamini Civ. No. 48/10** informs that the list is not exhaustive.
- [20] As highlighted above, it is my considered view that the applicant brought the present application solely to abuse the court process and was ill prepared.

[21] I refer to **Vilakati Khumalo Design and Quantity Surveyors (PT) Ltd v Covenant of Christ Ministries**, where my sister **Ota J.** points as follows:

*“The courts must not be undaunted with matters in which it is clear that there is no case or where it appears that the legal position has not been explained to a litigant. If a litigant insist on proceeding to court notwithstanding advice to the contrary, the practitioner may properly withdraw.”*

[22] It is worth noting that applicant prayed to be granted costs of senior counsel. I am not inclined to revisit applicant on the same scale. It suffices that applicant pays costs on attorney and client scale.

[23] In the foregoing, I enter the following orders:

1. Applicant’s application is dismissed.
2. The security held by the Registrar in terms of the order granted by consent on the 7<sup>th</sup> May, 2012 be released to the Respondent;
3. Applicant to remain in possession of the 4 motor vehicle cited in this application pending the outcome of the main application.
4. The Writ of Execution of 2<sup>nd</sup> May, 2012 is hereby cancelled.
5. The maintenance arrears of two months due to be paid from the security held by the Registrar.



6. Applicant is ordered to pay monthly maintenance in terms of the judgment of this court issued on the 10<sup>th</sup> April 2012.
7. Applicant is ordered to pay costs of this application on attorney and client scale, such to be paid direct from applicant's pocket and not from the matrimonial pool.

**DLAMINI M. J.**

**JUDGE OF THE HIGH COURT**

**For Applicant: Advocate I. Carmichael instructed by M.S. Simelane Attorneys**

**For Respondent: S. A. Nkosi**

