



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Case No. 1007/2017

In the matter between:

Siboniso Clement Dlamini

Applicant

And

Phindile Ndzinisa

1st Respondent

The Commissioner General of His Majesty's

Correctional Services

2nd Respondent

The National Commissioner of the Royal

Swaziland Police

3rd Respondent

Master of the High Court

4th Respondent

The Attorney – General

5th Respondent

Neutral citation: *Siboniso Clement Dlamini vs Phindile Ndzinisa & Others*
(1007/2017) SZHC 149 [2017] (21 July 2017)

Coram : **T. L. Dlamini J**

Date heard : 14 July 2017

Date of delivery : 21 July 2017

Summary: *Civil law and Procedure – on the 10th October 2014 the High Court issued an order directing the Applicant to pay maintenance of E8,000.00 monthly to the 1st Respondent pending the liquidation and distribution of an estate account – The Applicant is an executor of the estate of the late husband of the 1st Respondent – The Applicant did not comply with the maintenance order and the Supreme Court found him to be in contempt and committed him to goal for thirty (30) days suspended for one month on condition that he complies with the order – on the 13th July 2017 the Applicant filed an urgent application with this court for a stay of execution of the order of the Supreme Court.*

Held: *That the High Court lacks jurisdiction to grant the relief sought – Application dismissed with cost.*

JUDGMENT

The Application

[1] The Applicant filed under a certificate of urgency an application wherein he seeks the following relief

1. Dispensing with the full and proper compliance with the Rules relating to service and time limits, by reason of the urgency of the matter.

2. Condoning applicant's non – compliance with the rules of the court.

3. Issuing a *rule nisi* to operate with immediate interim effect returnable on a date to be determined, calling upon the first respondent to show cause why the following order should not be made.

3.1 Staying the execution of the order granted by this Honourable Court on the 10th October, 2014 and the subsequent order granted by the Supreme Court on the 24th May 2017 pending the finalization of the review application filed by the applicant before the Supreme Court.

3.2 Declaring that the execution of the order of the Supreme Court granted on the 24th May, 2017 whilst the review application of the applicant is pending is contrary to the interests of justice.

[2] The orders in respect of which the Applicant seeks a stay of execution as per prayer 3.1 of the Notice of Motion were issued by the High Court and the Supreme Court respectively.

- [3] The Applicant was appointed to be an executor of the estate of the late husband of the 1st Respondent. He however did not discharge his executorship duties as required in terms of the Administration of Estates Act. The 1st Respondent then approached the court for intervention, whereupon on the 10th October 2014 the High Court ordered the Applicant to pay a monthly maintenance of eight thousand emalangeneni (E8, 000.00) to the 1st Respondent.
- [4] On the 24th May 2017 the Supreme Court issued a judgment wherein it found the Applicant to be in contempt of the maintenance order issued by the High Court. The Supreme Court therefore committed the Applicant to goal for a period of thirty (30) days suspended for a month on condition that the Applicant complies with the maintenance order during the period of suspension. These are the orders in respect of which the Applicant now seeks an order directing a stay of their execution.
- [5] The application is opposed and the attorney for the 1st Respondent Mr H. Mdladla has raised points of law. I heard arguments from attorneys of the Applicant and the 1st Respondent, and the attorney representing the 2nd to 5th Respondents informed the court that his clients will abide by the decision of the court as they have no interest on the issues being contested.
- [6] In determining this application I will first deal with the points of law raised and will do so *seriatim*. The points of law raised are lack of jurisdiction, *res*

judicata, that this court is *functus officio* and that the Applicant approached this court with dirty hands and therefore ought not to be granted audience by this court.

POINTS OF LAW

Jurisdiction

- [7] It was submitted by Mr Mdladla that this court does not have the jurisdiction to order a stay of the execution of the order of the Supreme Court. He contended that the Supreme Court is a superior court than the High Court. He argued that the judgment of the Supreme Court is binding upon this court and that this court has no power to interfere with the judgment. The application, per Mr Mdladla, flies in the face of the *stare decisis* principle.
- [8] Mr Mdladla referred this court to section 146 (5) of the Constitution of the Kingdom of Swaziland Act No. 1 of 2005 and argued that the decision of the Supreme Court ordering the arrest of the Applicant is binding to this court and that this court has no power to stay it. The section provides as quoted below:

Jurisdiction of Supreme Court (General)

146. (1) ...

(2) ...

(3) ...

(4) ...

(5) *While it is not bound to follow the decisions of other courts save its own, the Supreme Court may depart from its own previous decision when it appears to it that the previous decision was wrong. The decisions of the Supreme Court on questions of law are binding on other courts.*” (emphasis added).

[9] Mr A. C Hlatshwako who appeared on behalf of the Applicant submitted that this court has the power (jurisdiction) to grant the relief sought; viz, to order a stay of the execution of the judgment of the Supreme Court. He referred this court to sections 151 (1) and 35 (1) of the Constitution as a source of that power. He further referred this court to section 2 of the High Court Act of 1954 also as a source of the authority.

[10] I entirely agree with Mr Mdladla’s arguments that the sections relied upon by the Applicant provide for the general powers of the High Court and the original jurisdiction that it has in respect of both criminal and civil matters. None of the provisions relied upon by the Applicant however, grant the High Court the power to interfere with judgments of the Supreme Court.

[11] Section 35 (1) of the Constitution falls under Chapture III which is entitled “*Protection and Promotion of Fundamental Rights and Freedoms.*” This section makes provision for the enforcement, protection and promotion of fundamental rights and freedoms. It empowers the High Court to hear, determine and grant an appropriate relief in matters where an affected person

alleges that the right protected and conferred upon him or her by the Constitution is being or is likely to be contravened.

[12] The contention by the Applicant is that it filed a review application whose determination is pending before the Supreme Court, hence the execution of the judgment of the Supreme Court of 24th May 2017 whilst the review application is pending is contrary to the interest of justice.

[13] Mr Mdladla argued *contra* and submitted that *in casu* the Applicant has had his matter decided by the High Court and twice by the Supreme Court.

[14] I agree with Mr Mdladla's argument that section 35 (1) of the Constitution is being invoked or pleaded by the Applicant in circumstances where it is no longer applicable. The matter is now in the domain of the Supreme Court and not the High Court.

[15] Section 35 of the Constitution is to be read and understood in its entirety. In terms of subsection (3) of this provision, if any question arises as to the contravention of any of the provisions under Chapter III of the Constitution, that question is to be referred to the High Court for determination.

[16] In terms of subsection (4) of this provision, the High Court shall give its decision upon the question and the question shall be disposed of according to that decision. Where the decision is the subject of an appeal to the Supreme Court, the question is to be disposed of in accordance with the decision of the Supreme Court.

[17] A full bench of this Court, in the case of **Gavin Khumalo and Others v Umbane Limited and Others (880/2013) [2013] SZHC 5 (15TH October 2013), paragraph 28**, interpreted subsection (4) of section 35 of the Constitution in the following words:

“[28] The words in subsection (4) *“if that decision is the subject of an appeal to the Supreme Court,”* need no further explanation than that applying the very first canon of interpretation viz, the golden rule which is to the effect that words must be given their plain and simple meaning. It clearly informs that this court is a court of original jurisdiction in matters pertaining to the constitutional rights of litigants as enshrined under Chapter III. It further connotes that the Supreme Court is the court of appeal. It does not end there. It enjoins subordinate courts to uphold and apply the decision of the Supreme Court as it stipulates: *“if that decision is the subject of an appeal to the Supreme Court in accordance with the decision of the Supreme Court.”*”

[18] This court, in my view, does not therefore have the power or jurisdiction to make any determination and issue an order on the matter as it is now pending before the Supreme Court.

[19] Dealing with this matter from a different angle, I take note that the application which the Applicant contends to be pending before the Supreme Court is premised on section 149 (3) of the Constitution. The section provides as follows:

“Power of a single Justice of Supreme Court

149 (1) ...

(2) ...

(3) In civil matters, any order, direction or decision made by a single Justice may be varied, discharged or reversed by the Supreme Court of three Justices at the instance of either party to that matter.” (own emphasis).

[20] In my view and finding, to grant the relief which the Applicant seeks would not be in conformity with the said section 149 (3) because the stay would constitute a variation of the judgment or order of **M.J. Dlamini JA**. I say it would constitute a variation because it would effectively be a variation of the period in which the order is to become effective.

[21] Section 149 (3) of the Constitution state in clear terms that any order, direction or decision made by a single Justice of the Supreme Court may be varied by the Supreme Court of three Justices.

[22] I therefore find and hold that as a Judge of the High Court, I lack the necessary jurisdiction to grant the relief which is being sought by the Applicant.

[23] For the foregoing, the point of law on jurisdiction is upheld and the application stands to be dismissed on this point alone and I so order.

[24] The question of jurisdiction decides the entire application. I will therefore not labour to consider the other points of law raised.

Costs

[25] On the issue of costs Mr Mdladla submitted that the application is an abuse of the court processes. He applied that costs be granted *de bonis propriis* against the Applicant's attorney. He argued that the application is baseless, meritless and seeks to disrupt the course of justice as there is already an application filed with the Supreme Court by the same attorney who is now before this court. Mr Mdladla described the Applicant's conduct as reckless and a blatant attack on the integrity of our courts because it puts the justice system into disrepute.

[26] The Supreme Court, per M.J Dlamini JA, extensively applied itself to the issues raised by the Applicant and held that no substantial question arises to justify a review. His Lordship went on to issue a reminder that in general, leave is granted where there is a reasonable prospect of success or the matter is of substantial importance to one or both of the parties concerned. He held that there is no prospect of success in this matter as it has been idling for the

past decade or so, nor does the matters in dispute have any importance. He stated that its conclusion is long overdue.

[27] When considering the period of time that has passed from the time when the matter was first decided by the court up to present day, it suggests to me that what the Applicant is determined to see is a non- conclusion of the matter. I am persuaded by Mr Mdladla's submission that the costs should at this stage be ordered *de bonis propriis* against the Applicant's attorney. I will however exercise my discretion against such an order on account of the fact that the Applicant is not relying on the advice of or is being ill- advised by his attorney as he is himself a senior practicing attorney. I have no doubt that he has a hand in the conduct that demonstrates a reluctance to accept and abide by the judgments of the courts. Had Mr Mdladla applied for costs at attorney and client scale, I would not have hesitated to grant them.

[28] For the foregoing, I issue the following order.

1. The application is dismissed.
2. Costs are granted in favour of the 1st Respondent.

Sich Dlamini

T.L. DLAMINI J
JUDGE OF THE HIGH COURT

For Applicant : Mr A.C. Hlatshwako

For 1st Respondent : Mr H. Mdladla

For 2nd to 5th Respondent : Mr S. Dlamini