IN THE HIGH COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE **CASE NO. 1024/17**

SIBONISO CLEMENT DLAMINI **Applicant**

and

REGISTRAR OF THE SUPREME COURT OF SWAZILAND **1st Respondent**

THE MASTER OF THE HIGH COURT **2nd Respondent**

THE ATTORNEY GENERAL **3rd Respondent**

PHINDILE NDZINISA **4th Respondent**

Neutral citation*: Siboniso Clement Dlamini N.O. v The Registrar of the Supreme Court of Swaziland, The Master of the High Court, The Attorney General, Phindile Ndzinisa(1024/2017) [2017] SZHC155(27th July, 2017)*

CORAM: MAPHANGA J

Heard: 19th July, 2017

Delivered: 27th July, 2017

Summary:

Civil Law and procedure – urgent application for an interlocutory order of mandamus to compel the registration and enrolment of a contemplated application in terms of S148 (2) of the constitution – applicant seeking review of Supreme Court order against him for contempt – in the interim applicant having launched an unsuccessful application for leave to institute the review proceedings before the Supreme Court – Applicant bringing further application before the Supreme Court into 149(3) for variation of ruling dismissing his application for leave – In limine, a point on the jurisdiction of the High Court to grant mandamus one the same matter pending before the Supreme Court taken –

Held – High Court lacks jurisdiction therefore mandamus relief nor competent in matter dealt with and pending before the Supreme Court.

JUDGMENT

[1] The Applicant has brought an application for a writ of ***mandamus*** against the Registrar of the Supreme Court under a certificate of urgency. In his Notice of Motion he expresses the substantive relief prayed for in these terms:

1.1 Directing and compelling the 1st Respondent to accept, register and mark as registered with the official stamp the view of application dated 29th May 2017; and

1.2 Directing and compelling the 1st Respondent to take all steps ancillary to and necessary for purposes of enrolment before the Supreme Court of review application referred to in prayer 1 above it is apparent from the applicants' papers.

[2] Now it is apparent from the Applicant's papers that the purpose of the proceedings presently is to attain the enrolment of another application contemplated by him before the Supreme Court. This is alluded to *ex facie* the Notice of Motion but appears more fully in the founding affidavit he has deposed to in support of the injunctive relief he seeks presently. When the matter came before me I dismissed the application ***ex tempore***, at the conclusion of the hearing. I now set forth my reasons for the decision. I propose to lay out the background of the matter to place it in perspective.

[3] Firstly it bears noting that the basic factual circumstances of this application stem from a fairly protracted course of litigation primarily involving the applicant (an attorney and officer of this court) and the 4th respondent. This litigation recently culminated in the proposed application whose enrolment the applicant seeks to achieve in before the Supreme Court. To this end the applicant says that on the 29th of May he prepared certain papers with the intention of having the same launched but the 1st Respondent would not accept the same for registration and thereby the matter could not be enrolled. It is

indicated that the intended application was for the purposes of seeking a review before the Supreme Court (sitting in its review jurisdiction in terms of Section 148 of the Constitution of Swaziland) to review an earlier judgment of the Supreme Court upon which he was held in contempt of a maintenance order issued by the High Court. I elaborate on his aspect late herein he has attached the draft papers of the said review application bearing the date 29th May 2017 to his founding affidavit. For the ease of reference I refer to the papers for the purported application as the "S148 Review Papers".

[4] For reasons that I find unnecessary to mention here, is that when the applicant was unable to have the application enrolled as desired. Instead he then elected to directly petition the Supreme Court for leave to enroll the contemplated review application (the 148 Papers) in a separate urgent application to that court. That application came to be heard before the Supreme Court constituted as a single Justice and was heard by Justice MJ Dlamini. In the outcome it was dismissed by the court on the 30th June, 2017.

[5] What transpired thereafter is that on the 3rd July 2017 and prior to the application presently serving before us, the applicant invoked Section 149(3) of the Constitution Act and brought another application before the Supreme Court to have the Court's ruling of the 30th June, 2017 scrutinised and varied by the said court this time constituted in a compliment of 3 justices as per the provisions of that section of the Constitution. That application, as it happens, has been duly enrolled and registered. According to the applicant it is pending at this time. Applicant makes reference (albeit a passing one) to this application in his founding affidavit presently. It is however disconcerting that the

Applicant fails to makes a candid and comprehensive disclosure of the full circumstances and facts pertaining to these series of multifarious proceedings and to take the courts into his confidence by showing the paper trail and linkages between these proceedings. I observe that although these proceedings seem separate and unrelated, they are in fact inextricably interrelated and interlocutory in nature. I will endeavor to give further insight into this procedural matrix in the scheme of the evolution of this web of proceedings: this I hope will throw some light and clarify the process.

[6] To begin with, as indicated earlier, I must mention that the Supreme Court order sought to be impugned in the Section 149 application was a decision of the court in an application brought by the applicant before his Lordship MJ Dlamini for leave to bring the contemplated Section 148 review application to which I have referred to above (the 148 papers). Again as stated earlier the Supreme Court as per Justice MJ Dlamini's judgment dismissed that application for the brought leave

[7] The central purpose in the Applicants"148 Papers" was the review of a judgment of the Supreme Court handed down on the 24th May 2017 in terms of which he was held by that court to be in contempt of a judgment of this (the High Court) ordering that applicant pays the 4th Respondent maintenance at a monthly rate of E8, 000.00. The contempt proceedings in turn arose out of a dispute involving a deceased estate in which the applicant was cited as a party. It is worth mentioning how this came about.

The origins

[8] In the chain of background events applicant has alluded to the underlying factual background to the circumstances giving rise to the litigation over the estate late Musa Martin Ndzinisa and ultimately the present flurry of litigation. That is the original source of the matters before us. It all has to do with the administration of that estate and the ensuing course of litigation in that estate. This ultimately is the substantive source of the series of the recent and current interlocutory proceedings I have alluded to above. For that reason it is worth outlining the basic circumstances in the history of that estate matter.

[9] It is common cause that the 4th Respondent, Ms Phindile Ndzinisa is a beneficiary of the estate late Musa Ndzinisa over which the Applicant was a co-executor. After the death of the late Mr Mzamo Nxumalo, the other joint executor in the said estate, the Applicant became the sole surviving executor. On the 5th October, 2010 the 4th Respondent brought an application before the High Court for an order compelling the Applicant to render an account for his administration of the said estate. Unfortunately far from bringing finality to the matter, that application became a drawn out affair in the course of which the High Court had to issue a series of orders compelling compliance by the Applicant.

[10] The first of these orders was handed down by the court compelling the Applicant to render an account in the estate. On the 2nd October, 2012 the Court had to follow up this order with a specific directive putting the Applicant on terms to file an account no later than the 7th December, 2012 in the financial affairs of the said estate. It is unclear to what extent the Applicant abided by the latter order but it appears from the Applicant's

averments in the present affidavit that whatever the exact position of the account he rendered was before the court, by his admission at that time the estate was out of pocket.

[11] Undeterred on the 12th March 2014, the 4th respondent sought a further interim order before the High Court which was granted by his Lordship SB Maphalala PJ (as he then was) dated 10th October 2014, in terms of which the Applicant was now ordered by the court to pay maintenance to the 4th Respondent pending the finalization of the proceedings concerning the estate account.

[12] That is the seminal order that has led to the present set of circumstances concerning the application presently. It comes about thus: It would seem that owing to the failure of the Applicant to comply with the maintenance order the 4th Respondent on the 27th October, 2014 then brought contempt proceedings that eventually came to be dealt with in the application that came before the Supreme Court on the 20th March 2017, the outcome of which was the order committing the Applicant for contempt.

[13] That order was issued by the Supreme Court on the 24th March 2017. As indicated that is the very judgment that the Applicant seeks to impugn by way of the contemplated review application and for which he now seeks the present relief.

[14] It was at that point that the applicant set about to petition the Supreme Court for leave to enroll the contemplated review of the Court's contempt ruling on an urgent basis; being as stated earlier, an application in terms of Section 148(2) of the Constitution.

[15] Ultimately the applicant found it prudent to seek leave from the Supreme Court to bring the contemplated review proceedings. That was the application that served before his Lordship MJ Dlamini JA and was dismissed in the judgment of the Supreme Court of the 30th June 2017.

[16] There has been a further twist in the tale. Having been unsuccessful in his bid to obtain leave from the Supreme Court, the applicant has embarked in two disparate courses of action:

> ***1.3 He has launched the pending Section 149(3)(of the Constitution) application before the Supreme Court for the variation of the ruling dismissing his application for leave; and***
>
> ***1.4 At the same time has brought the present application (in casu) for the mandatory interdicts.***

[17] As regards the Application that the Applicant has referred to as pending before the Supreme Court ostensibly brought in terms of Section 149(3) of the Constitution, it may be noted that the relevant section he invokes provides as follows:

> "***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" `(Added emphasis)

[18] Thus it would seem applicant has generated at least two parallel applications wrought in what seems to be in the same proceedings before this and the Supreme Court.

In this regard I need only refer to the following statements made in applicant's own words in paragraph 11 of his founding affidavit where this position is self-evident. In reference to the 1st Respondent, he says:

"11. I have had to endure an application for leave to mount a section 148 (2) review which in law is without any basis, at a great inconvenience and expense to me due to the failure of the first respondent to perform the functions of her office.

11.1 As a result of the first respondent's failure to do her job I have not been able to avoid the expense and inconvenience of the S149 (3) application currently pending before the Supreme Court" (sic)

[19] As indicated the application before me is opposed by the 4th Respondent who has, to this end file filed a notice to raise a *point in limine*. In essence she objects to the application on the basis that this court lacks jurisdiction to consider the application for *mandamus.* I now turn to this aspect.

JURISDICTION

[20] In essence the preliminary point is to this effect: that on account of the judgment of the Supreme Court of the 30th June 2017 effectively dismissing the applicants application for leave to bring the contemplated Section 148(3) application it is not competent for this Court to open, alter and consider the

Present application as it cause or subject matter is the very matter on which the Supreme Court has pronounced itself.

[21] It was contended by Mr. Mdladla on behalf of the respondent that on proper regard to Section 146(5) of the constitution, this Court now lacks the jurisdiction to determine this application wherein an order compelling the 4th Respondent of the court to receive and register the contemplated review application in effect the enrolment of that review application was the very subject matter and therefore essentially the same matter that was dealt with by the Supreme Court in the ruling of the 30th June, 2017.

[22] The relevant portion in the provision of Section 146 (5) of the Constitution reads:

"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"

[23] I am inclined to agree with Mr Mdladla. In light of the subject matter of the series of applications it is apparent that what the Applicant has done in the conduct of these proceedings is employ some sleight of hand. He has embarked on some revolving door exercise in that under the guise of merely reviving a pending registration of the review papers he is essentially seeking the re-hearing of the very matter brought before his Lordship MJ Dlamini for the enrolment of the very review application.

[24] Whilst the decision of the Supreme Court is extant it is binding upon this Court and this Court lacks the competence pronounces upon its subject matter and the issues determined therein. Besides the very matter much as the applicant has sought to conceal this material fact is essentially the same issue or matter pending before the Supreme Court in the applicant's application in terms of Section 149 (3) of the Constitution. This is so regard being had to the provisions of the constitution as it is in light of the hierarchy and jurisdictional status of the courts. This application therefore clearly lacks merit.

[25] It is apparent that the applicant is seeking to abuse of the Court process. It is also evident that he is, by concealing the full facts circumstances and history of this matter, he seeking to countermand the Supreme Court and thus bring the counts into disrepute.

[26] By way of example I find his selective approach in the disclosure of the pertinent Court documents pertaining to the true circumstances of the interlocutory proceedings; which facts are substantially germane to this application; to be highly inappropriate and unbecoming of an officer of this Court.

[27] His extraction of only two pages of the Supreme Court judgment of the 30th June to only show the *"excerpts"* he has chosen to attach, is evidence of this reprehensible conduct. The Court takes a serious and dim view of this conduct. It is unconscionable.

[28] With this in mind I have noted Mr Mdladla's prayer for an award of costs on a punitive scale as between attorney and own client *de bonis propriis*, in the event I dismiss this application. Nonetheless Mr Mdladla did not fully motivate the award of such extraordinary costs nor was the matter canvassed fully at the hearing. Certainly the Mr Hlatshawako was not afforded an opportunity to deal with the prayer for such an adverse measure. I am not persuaded that a case for such award of costs has been made.

[29] In the circumstances I can only find it fair that at this time, whilst registering the courts displeasure and disapproval at the applicants conduct, to award costs against the applicant on an ordinary scale.

This is the order I make:

21.1 The application is dismissed; and

21.2 The applicant is ordered to pay costs.

MAPHANGA J

For Applicant	**:**	**MR C.A HLATSHWAKO**
For 1st – 3rd Respondent	**:**	**MR K. NXUMALO**
For 4th Respondent	**:**	**MR. H. MDLADLA**