IN THE HIGH COURT OF ESWATINI

JUDGMENT

Held in Mbabane Case No: 1508/2020

In the matter between:

MUZI P. SIMELANEAPPLICANT

AND

THE CHIEF JUSTICE OF ESWATINI1ST RESPONDENT

THE GOVERNMENT OF ESWATINI2ND RESPONDENT

THE ATTORNEY GENERAL3RD RESPONDENT

Neutral Citation:*Muzi P. Simelane v. The Chief Justice of ESwatini & Two Others (1508/20) [2020] SZHC 221 (28th October 2020)*

Coram :J.S Magagula J

D. Tshabalala J

N. Maseko J

Date Heard : 28/09/20

Delivered :28/10/20

Summary : ***Application to set aside a notice issued by the Chief Justice barring the Applicant from appearing before any court in Eswatini on account of his contempt of court; whether applicant can be heard by this court in light of the doctrine of unclean hands.***

[1] In this application the Applicant seeks an order in the following terms;-

1. " Dispensing with the forms, time limits and manner of service provided for in the rules of court and hearing this matter as one of urgency.

2. That a rule nisi do issue against the 1st Respondent and returnable on a date to be fixed by this Honourable court calling upon the 1st Respondent to show cause why;-

2.1 The notice of the 11th April 2018 barring the Applicant from appearing before all the counts of ESwatini should not be declared to be unconstitutional, unlawful and invalid.

2.2 Such a directive as described in (2.1) above should not be set aside as being of no force or effect.

3. Staying execution of the directive letter pending the finalization of this application.

4. Granting costs to Applicant on an attorney and own client scale ....."

[2]Before this application could be heard the Applicant filed what he described as an interlocutory application. In this latter application the applicant seeks an order in the following terms:

"1. That the Law Society be joined as the 4th Respondent.

2. Allowing the 4th Respondent to file by 10th September 2020 whatever representation they would have made as if they were initially cited and served.

3. The costs arising from the interlocutory application be costs in the cause……."

[3]The matter first appeared before this court on the 14th September 2020 and the purpose for this sitting was to set a date of hearing. The matter was on this date given the 28th September 2020 as the date of hearing. The court directed, at the request of counsel that the interlocutory application would be dealt with on this date.

[4]When the matter was called on the 28th September 2020 the court directed the parties to a point of law raised by the 1st Respondent in a preliminary affidavit answering the main application. This was the point on the doctrine of unlearn hands. In motivating this point the 1st respondent's counsel pointed out that the applicant has deliberately refused to comply with orders of this court as well as those of the Supreme Court. The 1ST Respondent therefore contended that on this basis the applicant should not be heard by this court until such time that he purges his contempt and complies with the orders of court.

[5]The High Court judgment is one issued in the matter of BEAUTY BUILD CONSTRUCTION (PTY) LTD vs MP SIMELANE ATTORNEYS (Case No. 387/13). In that matter the Applicant was ordered to pay the sum of E387 992-35 to Beauty Build. Applicant was also ordered to pay interest at the rate of 9% per annum calculated from the 2nd November 2011 to final date of payment as well as costs of suits on the punitive

scale. The judgment has to date hereof not been fully complied with since interest not been paid.

[6]It should be noted however that the applicant appealed this judgment but without success. On appeal the two parties registered a consent order in which the applicant was ordered by the Supreme Court to pay an amount of E547 992-35 being the capital amount ; costs a quo fixed at E60,000-00; interest on the capital amount at the rate 9% per annum calculated from the 2nd November 2011; as well as respondent's (Beauty Builds) costs on appeal including certified costs of counsel.

[7] During argument Mr Z. D Jele who appeared for the 1st respondent, acknowledged that the judgments have been partially complied with in so far as the capital sum has since been paid. He however maintained that the Applicant is still in contempt since he has not paid interest and costs as ordered.

[8]The Applicant maintained that he was not liable to pay any interest since the order of the Supreme court of the 30th June 2016 was subsequently varied by the very same court when issuing different orders on the 23rd August, 2018, 24th September 2018 and 1st March 2019.

[9]It is important to scrunitize these orders to see if they ever varied the Supreme Court Order of the 30th June 2016. The order of the 23rd August 2018 reads in part thereof:

> ***" Having heard counsel for the Applicant and 1st Respondent the court makes the following order :***
>
> ***1. That the judgments of the Supreme court set out in paragraph 1 of Applicant's Notice of Motion dated 18th May 2018 in this mater are of full legal force and effect and the 1st Respondent is enjoined at law to Obey them unless otherwise lawfully suspended or stayed by a***

competent court of law or as a consequence of the operation of the law."

The orders referred to in the said Notice of Motion are the one of the 30th June 2016 and one of the 15th May 2017. The above cited order puts it beyond doubt that the two orders were not being varied. To the contrary the orders were being entrenched. Clearly therefore the order of the 23rd August 2018 did not vary these two orders.

[10]The order of the 24th September 2018 repeats the order of the 23rd August 2018 verbatim. It does not vary the order of the 30th June 2016 in any manner. The only additions made by these orders to the order of the 30th June 2016 is to stipulate the period within which the capital amount of E547 992-35 must be paid. They also add that if the applicant herein fails to do so he may be incarcerated for contempt of court.

[11]The order of the 1st March 2019 requires the Applicant to pay the capital amount within 14 days. It does not necessarily mean that the other orders made in the judgment of the 30th June 2016 should not be complied with. Any variation of that order would have to be specifically made. It cannot be made by inference. In the premises it is the finding of this court that the order of the 30th June 2016 has not been reviewed or altered in any manner.

[12]On the question of costs, the Applicant contended that he could not be accused of non-compliance with the orders for costs since it is the respondent who is frustrating taxation of the Bill of costs. In response to this contention Mr Jele who appeared for the 1st respondent directed the court to certain correspondence in order to demonstrate that it is actually the applicant who is frustrating taxation.

[13]The first piece of correspondence in this regard is a latter from MPS Law Firm (the applicant's law firm) to the Taxing Master. This letter reads:

> ***" 1. We refer to the above matter and confirm that our attorneys have written two letters about this matter.***
>
> ***1.1 The first was directed to the Registrar of the Supreme Court when the roll was issued. Mr Howe enquired about the non enrolment of the review application that was filed in September 2018.***
>
> ***1.2The second was directed to the Taxing Master when the Bills were set down for taxation early in the year. In that letter he requested for the taxation to be postponed on account of the pending Review.***
>
> ***2. The purpose of our letter is to re-iterate that this matter is not ripe/ready for taxation as the matter has not been finalized.***
>
> ***3.We trust you will take advisement and deffer this taxation to a date after the Review would have been determined.***
>
> ***4.If the review succeds, the consequences of this taxation would be irreversible. There is absolutely no reason to tax a matter that still awaits final determination.***
>
> ***5. We have heard situations where the opponents tend to request for a court order interdicting the taxation***

from proceeding. No court order is necessary in this (sic) circumstances, it is a matter of procedural law."

[14]From the foregoing it is clear that the Applicant did not only frustrate taxation, he actually went to the extent of contemplating obtaining a court order to stop it.

[15]On the other hand the 1st Respondent wrote, in a letter dated 2nd June 2020, inter alia the following;-

" .....We note that you have employed every delaying tactic in the book so that the taxation cannot proceed.....

We will therefore now seek a date for taxation and tax whether you attend or not."

Again the foregoing demonstrated that the 1st Respondent is the one that has been pressing for taxation all the time. The contention that the 1st Respondent has been frustrating taxation lacks factual basis and it is rejected as such.

[16]The Applicant also contended that taxation could not go ahead since there is a pending review at the Supreme Court. This allegation was disputed by Mr. Jele who maintained that no such review was served on his office or filed at the Supreme Court. Applicant's attorney was asked in court to produce a copy but he could not produce one. After conclusion of arguments on the 28th September 2020, the Applicant filed further submissions to which he attached what appeared to be a draft application for review. The document is not signed on behalf of the applicant nor has it been served upon the 1st respondent. Although spaces for insertion of the date and time for hearing the application are

provided for, no such date or time has been inserted. This leads only to one conclusion; there is no review application pending before the Supreme Court.

[17]In the final analysis, although the applicant has paid the capital sum due to Beautibuild Construction, he has not paid interest and costs as ordered by the court. He has therefore partialy complied with orders of the Supreme Court. The High Court had also ordered that the Applicant should pay interest on the capital sum of its judgment together with costs. There is nothing to show that the Applicant has paid any interest at all. He therefore has not fully complied with this order which was not set aside on appeal.

[18]The Applicant has also been found guilty of contempt of court by the Supreme Court. The reason for this verdict is the non – compliance by the applicant with orders of that court in refusing to pay certain monies to Beautibuild Construction (Pty) Ltd. This inquiry has proved that he has still not fully paid the monies he was ordered to pay. He therefore has still not purged his contempt and he accordingly approaches the court with dirty hands. The decision or ruling of the Supreme Court that the Applicant is guilty of contempt of court is binding upon this court until such time that the Appellant demonstrates that he has since purged his contempt.

[19]Regarding the law, the doctrine of unclean hands is a swell established one which has found application in our jurisdiction. Mr Jele referred the court to inter alia the case of HOAGEYS HANDICRAFT (PTY) LTD vs ROSE MARSHALL VILANE (High Court Civil case No. 2614/2011); PHOTO AGENCIES (PTY) LTD Vs THE ROYAL SWAZILAND POLICE & ANOTHER 1970 – 76 SLR 398 as

well as the South African case of MILLIGAN vs, MILLIGAN 1925 WLD where the court stated:

> ***".....Before a person seeks to establish his rights in a court of law he must approach the court with clean hands; where he himself, through his own conduct makes it impossible for the process of the court.....to be given effect to, he cannot ask the court to set its machinery in motion to protect his civil rights and interests."***

[20]Other cases in which this doctrine found application in our jurisdiction include that of the Attorney General vs Ray Gwebu & Another (High Court case No. 3699/02); SIBONISO CLEMENT DLAMINI VS THE CHIEF JUSTICE OF SWAZILAND & TWO OTHERS (1148/2019) [2019] SZSC (8 November 2019). In the latter case the Supreme Court stated *inter alia* at paragraph 82:

> ***".....It is my considered view that the justice in this matter favours that the Applicant's application be declined. To grant him the right to audience in light of the doctrine of unclean hands would indirectly set aside the Supreme court judgment which has reached its finality in that it has been adjudicated upon even on review.... At any rate the directive to debar applicant by the 1st respondent was nothing else than a confirmatory of the doctrine of unclean hands. Whether the directive to debar is there or not is immaterial as applicant will always be confronted by this doctrine in every court he appears; until he purges his contempt."***

[21]The import of the above statement is that even in the absence of the directive debarring the applicant to appear in the courts, he would still be debarred anyway because no court would hear him unless he first complies with judgment of this court and the Supreme Court. I agree with this statement.

[22]Mr Jele further submitted in his heads of argument:

> *" It is submitted therefore that the Supreme Court having found that the applicant is in contempt, to allow him to access the court without purging his contempt would be tantamount to setting aside the Supreme Court decision. We submit that this court cannot override the order of the Supreme Court."*

This submission appears to me to be just on point. Once the Supreme Court found the applicant to be in contempt, it automatically meant that his hands were dirty as regards approaching the courts. To allow him to then approach this court without him first demonstrating that he has purged his contempt would be tantamount to setting aside the decision of the Supreme Court and this court has no authority to do that. It is bound by decisions of the Supreme Court.

[23]In the English case of Hadkinson vs Hadkinson (1952) ALL ER 571 at 574 Lord Denning pointed out that it is a very strong thing for a court to refuse to hear a party. He stated:

> *" It is a step which the court will only take when the contempt itself impedes the course of justice and there is no other means of securing a compliance."*

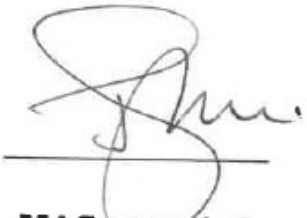
Lord Denning also indicated in this case that the court has a descretion in such matters. ***In casu*** this court does not appear to have any such discretion. As shown above, it is the Supreme court that found the applicant guilty of contempt and this court cannot go against the

decision of a court superior to it. In any event applicant's contempt impedes the course of justice as it seeks to demonstrate that orders of the court are ineffective as they can be disobeyed with impurity. Such conduct cannot be countenanced particularly when parpetrated by an attorney who is an officer of the court.

CONCLUSION AND VERDICT

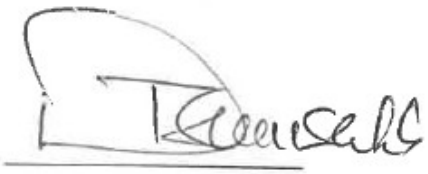
For the foregoing reasons it is a finding of this court that the applicant is approaching the court with dirty hands. He cannot therefore be heard by this court.

The application is accordingly dismissed with costs.



MAGAGULA J

I agree,



TSHABALALA J

I agree,

MASEKO J