IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 154/2012**

In the matter between:

SEBENZILE ZIKALALA Applicant

And

BAYLOR COLLEGE OF MEDICINE CHILDREN'S FOUNDATION SWAZILAND Respondent

In re:

SEBENZILE ZIKALALA Applicant

And

BAYLOR COLLEGE OF MEDICINE CHILDREN'S FOUNDATION SWAZILAND Respondent

Neutral citation: *Sebenzile Zikalala v Baylor College of Medicine Children's Foundation Swaziland (154/2012) [2018] SZIC 23 (March 29, 2018)*

Coram: N. Nkonyane, J
(Sitting with G. Ndzinisa and S. Mvubu

Nominated Members of the Court)

Heard submissions : 21/03/2018

Delivered judgement: 29/03/2018

JUDGEMENT

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1. This is an application that was filed by the Applicant against the Respondent on Notice of Motion for an Order in the following terms;

   "1. The Applicant is awarded costs of this application for determination of unresolved dispute against the Respondent.

   2. The Respondent is ordered to pay costs of this application.

   3. The Applicant can be granted further and/alternative relief."

2. The application is opposed by the Respondent which duly filed its answering affidavit deposed thereto by Cebile Malinga, the Finance and Administration Manager of the Respondent. The Applicant thereafter filed a replying affidavit.

3. Although the prayers of the Applicant are not clear, the essence of the application is found in the body of the founding affidavit. The

Applicant is seeking an order correcting the judgement of this Court handed down on 07th February 2018, wherein the Court stated that there was no prayer for costs and therefore it will not make any order for costs.

4. It was argued on behalf of the Applicant that the Court committed an error when it stated that the Applicant did not pray for an order for costs. It was argued that the pleadings were amended and in the amended application for determination of the unresolved dispute, a prayer for costs was included.

5. On behalf of the Respondent it was argued that the Court has no jurisdiction to entertain the application. It was argued that having delivered its judgement on the matter, this Court is now *functus officio* and cannot review or set aside its own decision.

6. On behalf of the Applicant it was argued to the contrary that the Court does have the power to correct an error in its own judgement.

7. The general principle applicable in such matters was stated by **Trollip JA,** in the case of **Firestone South Africa (Pty) Ltd V Genticuro A.G 1977 (4) SA 298 (A)** at page 306 as follows;

"The general principle, now well established in our law, is that, once a Court has duly pronounced a final judgement or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes functus efficio; its jurisdiction in the case having

been fully and finally exercised, its authority over the subject – matter has ceased…."

There are, however, exceptions to this general principle. These were also stated by the Court on page 307 as follows;

(ii) *"The Court may clarify its judgement or order if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter the 'sense and substance' of the judgement or order ….*

(iii) *The Court may correct a clerical, arithmetical or other error in its judgement or order so as to give effect to its true intention….."*

8. Dealing with this subject, the Supreme Court of Swaziland in the case of **The Swaziland Motor Vehicle Accident Fund V Senzo Gondwe**, case number **66/2010,** had occasion to refer to the case of **S V Wells 1990 (1) S.A. 816 (A)** where the Court referred to the two diametrically opposed views on the principle of *functus officio*, namely the strict approach and the enlightened approach. **Joubert JA** in the **S V Wells** case, at page 819 – 820 stated that;

"According to the strict approach, a judicial official is functus officio upon having pronounced his judgement which is a sententia stricti juris and as such incapable of alteration, correction, amendment or

addition by him in any manner at all…… The more enlightened approach, however, permits a judicial officer to change, amend or supplement his pronounced judgement, provided that the sense or substance of his judgement is not affected thereby (tenor substantial of his judgement is not affected thereby (tenore substantiae perseverante.)"

9. The Supreme Court, per Ramodibedi CJ, as he then was, after having referred to the principles enunciated in the above paragraph, stated at paragraph 11 that;

"I am mainly attracted by the more enlightened approach which permits a judicial officer to change, amend or supplement his pronounced judgement or order provided that he does not change its sense or substance. I consider that this approach should guide this Court as the highest Court in the country so as to enable it to do justice according to the circumstances of each case. This is such a case."

This Court aligns itself with the above position of the law. However, each case must be determined in terms of its own peculiar facts and circumstances.

10. In the present application, the Court delivered a judgement in favour of the Applicant but made no order as to costs. That is the substance of the Court's order or judgement. It has now transpired that the Court's attention was not brought to the amended pleadings in terms

of which a prayer for costs was added. It is not hard to understand why the Court committed the error. The amended statement of claim was not part of the Book of Pleadings.

11. It has now been shown that it was an error on the part of the Court to say in its judgement that there was no prayer for costs as the evidence has now shown that the statement of claim was amended to incorporate the prayer for costs. However, any correction of the order will clearly have the effect of changing the sense or substance of the order that the Court made. The view of the Court is that the change or correction that this Court is being called upon to make is not a minor correction or clarification of the order, but it will amount to the Court reviewing its own order, changing it from one of "no order as to costs" to one of judgement with costs. This Court has no power to review its own judgement.

12. Taking into account all the foregoing observations and all the circumstances of the case, the Court will make the following order;

a) The application is dismissed.

b) *There is no order as to costs*.

13. The members agree.

N.NKONYANE

JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

For Applicant : *Mr. N.D. Jele*

(Attorney at Robinson Bertram)

For Respondent: *Mr. F. Tengbeh*

(Attorney at S V Mdladla & Associates.)