



IN THE SUPREME COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

Civil Appeal No. 19/2007

In the matter between

SAMUEL MFANFIKILE MALAZA

Appellant

And

SWAZILAND ROYAL INSURANCE CORPORATION Respondent

Coram

BANDA, CJ
STEYN, JA
ZIETSMAN, JA

For the Appellant
For the Respondent

Mr. M.L. Maziya
Mr. P.E. Flynn

JUDGMENT

BANDA, CJ

[1] This is an appeal against the judgment of Maphalala J sitting in the High Court at Mbabane on 22nd June 2007 in which he dismissed the appellant's action on the

ground that it had already been dismissed. The learned judge also held that the matter was res judicata.

[2] The Notice of appeal in this matter gives two grounds of appeal as follows:

- 1) The learned judge erred in fact and in law in holding that the matter was dismissed on the third August, 2001.
- 2) The learned judge erred in fact and in law in holding that the matter is res judicata as the matter was never dealt with on the merits.

[3] The action in this case, started some seventeen (17) years ago, when the appellant instituted civil proceedings as a result of a motor vehicle accident which happened on 4th June 1988 along Manzini-Mbabane road. This case has taken seventeen years to complete from the date the cause of action arose. For whatever reasons there are for this delay, it is scandalous and inexcusable that a simple matter of motor vehicle accident claim should take this long to finalise. It does not give encouragement and confidence to the public to come to these courts to enforce their rights and claim reparation for the injury

suffered if they have to wait for this long.

- [4] During its long history, it would appear that a combined summons was issued on the 27th August 1990 and was duly served on the respondents who dealt with the motor vehicle accident claims before the Motor Vehicle Accident Fund took over the administration of such claims
- [5] According to papers before this Court an appearance to defend the action was entered and the pleadings ran their course until they were deemed closed. The Attorneys for the appellant, at that time, were M/S Carlston & Co. who closed their business many years ago. And then M/S Vilakati & Co took over representing the appellant but they, too, closed their business several years ago. A Notice of appointment was filed by M/S S.C. Dlamini & Co. on 22nd October 1997 and they continued to so act for the appellant until when they withdrew as Attorneys of Record through a Notice of withdrawal. On 19th April 2003 a Notice of appointment as Attorneys of Record was filed by M/S T.L. Dlamini of Mbabane.
- [6] The next time there was action, on the case, was on 29th April 1997 when a request for a Date of Hearing in

terms of Rule 55(A) was filed and served. Thereafter two Notices of Set Down, one for the 24th April 2003 and the other for 28th August 2003, were served but the matter was not proceeded with because of the application which was made by the respondents contending that the matter had been disposed of in terms of Rule 16 of the Rules of the Court. An application was made by the respondents for the dismissal of the appellant's action on the ground that:-

“ the plaintiff having failed to appoint a new address
in terms of the requirements of the Rules of the Court
subsequent to the withdrawal of his Attorney of Record, the plaintiff having been duly advised of such withdrawal of his Attorney of Record.”

[7] The respondent has always contended that the appellant's action had been dismissed on 28th August 2003. The Attorney who had appeared for the respondents was Mr. Muzi Matsebula. He has filed an affidavit to which he has annexed a transcript of a record of proceedings which took place when the application to dismiss was taken. Mr. Matsebula also gave evidence in the court below. Mr. Dlamini who was

the Attorney who had been representing the appellant was not the one who was present at the time when the application to dismiss the action was made. He, too, gave evidence in the court below. The respondents have contended that the practice of dealing with files in their Attorney's office is that after five years a case file is sent away for storage and that this is what happened in relation to their original file of this case. The respondents' Attorneys have contended that attempts were made to locate the file with searches at the Archives but that later it was found in their office. The extract from this file was annexed to the Matsebula's affidavit as "H".

- [8] Mr. Maziya has suggested, in his submission to this court, that the issue to be decided in this appeal depends on the credibility and probability of the two conflicting versions given by the two Attorneys who gave evidence in the court below. Mr. Maziya, properly concedes that there were these two conflicting versions, and has submitted that there is no credible and independent evidence to prove that the appellant's action was dismissed. He has contended that although Annexure "H" purports to be a copy of a transcript of court proceedings on the matter which was dismissed by Matsebula J, he states that he has serious misgivings

on the authenticity of the document. He has submitted that there is nothing to show that the document was obtained from the Registrar in that it does not have the Registrar's stamp; it has no date on its face and it does not show which judge dealt with the matter. Mr. Maziya has further contended that the document has no certificate to show who transcribed and whether it was a correct reflection of the contents of the tape. Mr. Maziya has submitted, therefore, that the cumulative effect of these factors render the document, annexure "H", highly improbable to show that the action was dismissed. He further submitted that no explanation was given why a court order was not made under the hand of the Registrar in keeping with the court's practice. He has also contended that it is highly inconceivable that the Registrar would refuse to hand over the tape on which court proceedings were recorded. He has cast serious doubt on the submission that an application to dismiss the action was made.

- [9] Mr. Flynn for the respondents has submitted that the judge's finding in the court below that the appellant's action was dismissed should be upheld. He contended that the evidence of Mr. Matsebula the Attorney who appeared on behalf of the respondent at the time of the application should be believed. He said that Mr.

Matsebula personally applied for the order for dismissal of the appellant's action. In his evidence Mr. Matsebula referred to the file on which he made a note on the 3rd August 2003 which indicates that the appellant's action had been dismissed with costs. A copy of the transcript obtained from the Registrar's records shows that -

"an application to dismiss plaintiff's action was made and was granted."

The effect of Mr. Maziya's contention is to suggest that the affidavit which Mr. Currie made and the affidavit and evidence which Mr. Matsebula gave in the court below were fraudulently manufactured for the specific purpose of this case. When it was enquired from Mr. Maziya if he was indeed suggesting that his two professional colleagues had fraudulently manufactured the evidence he agreed without any reservation although he said that he was making that allegation knowing that the two colleagues were officers of this court.

[10] This is an extraordinary allegation to make against professional colleagues especially so that it is being made in their absence without any opportunity to

challenge the allegation made against them. We note that during the *viva voce* evidence of Mr. Matsebula in the court below, his evidence was never challenged by Mr. Maziya who had the opportunity to cross examine him and put to him the allegation which he makes against him now. Fraud is a serious allegation to make and it should not lightly be made unless there is evidence to substantiate it.

[11] We have carefully considered the submissions made by counsel before us together with the evidence disclosed on the papers filed in court. We are unable to find any motive why Mr. Currie and Mr. Matsebula would want to fraudulently manufacture evidence to mislead this or indeed any court. As we have already observed Mr. Maziya had the opportunity to put the allegation of fraud to Mr. Matsebula and did not nor did he in any way challenge the evidence of Mr. Matsebula or the affidavit made by Mr. Currie. We are satisfied, as the court below, that there was sufficient evidence to prove that the appellant's action had been dismissed.

[12] This appeal must therefore fail and it is dismissed with costs.

Delivered in open court at Mbabane this 15th day of November, 2007

R.A. BANDA, CJ

I agree

J.H. STEYN, JA

I agree

N.W. ZIETSMAN, JA