IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

CIVIL APPEAL NO.66/2010

CITATION: [2010] SZSC 22

In the matter between:

THE SWAZILAND MOTOR VEHICLE ACCIDENT FUND **APPELLANT**

AND

SENZO GONDWE **RESPONDENT**

CORAM **:** **RAMODIBEDI, CJ**

: **DR. TWUM, JA**

: **FARLAM, JA**

HEARD : 9 NOVEMBER 2010

DELIVERED : 30 NOVEMBER 2010

SUMMARY

Practice – Judgments and orders – Correction, alteration or amendment of Court's own order – When Court will entertain application - Whether Court functus officio – Correction or amendment granted with costs.

JUDGMENT

RAMODIBEDI, CJ

[1] In this matter the Court is called upon to correct or amend its own order delivered on 28 May 2010 between the parties so as to give effect to the Court's true intention. The order in question appeared in paragraph [22] of the judgment in these terms:-

> *"[22] In the light of these considerations it follows that there is no merit in the appeal. It is accordingly dismissed with costs including*

certified costs consequent upon the employment of counsel."

[2] By letter dated 8 June 2010, the appellant's attorneys drew the Court's attention to the fact that the order in question contained a patent error.

[3] It was submitted on the appellant's behalf then, as it is submitted now, that the order is in stark contradistinction to the spirit and body of the judgment itself.

[4] It is again necessary to record that on 24 June 2010 both Mr. Masuku for the appellant and Mr. Manda for the respondent appeared before the Chief Justice in chambers and duly argued the need for correction and amendment of the order in question. Both counsel were ultimately unanimous, and properly so in my view, that the order should be amended as reflected in the preceding paragraph in order to reflect the true intention of the judgment itself. However, Mr. Manda sought and was granted an adjournment to the

following day in order to consult with his senior partner at his firm of attorneys. On the following day, 25 June 2010, Mr. Manda reported that the respondent had adopted the view that the Court was *functus officio* in the matter. It could not effect any correction or amendment of its judgment as agreed between the parties on 24 June 2010.

[5] Consequent upon the respondent's change of heart, the Court issued a directive to the parties putting them on notice to argue the following points:-

> *"1. Whether or not the order of this Court in paragraph [22] of its judgment dated 28 May 2010 should be corrected or amended in line with the spirit and body of the judgment itself. Is the Court functus officio or not to make such correction or amendment?*
>
> *2. Costs both in the High Court and in the Supreme Court.*

3. Costs consequent upon the hearing of 1 November 2010."

[6] These issues now fall for determination in this matter. As can be seen, the point is short and can quickly be disposed of as I shall endeavour to demonstrate shortly. Indeed Adv Kades SC for the respondent has very fairly and properly conceded that this Court is not *functus officio* to correct or amend its order since it does not reflect the substance of the judgment itself.

[7] The general principle in a matter such as the one we are seized with was in my view correctly restated by Trollip JA, writing for the Full Bench in **Firestone South Africa (Pty) Ltd v Genticuro A.G. 1977 (4) 298 (A)** at p306 in these terms:-

> *"The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to*

correct, alter, or supplement it. The reason is that it thereupon becomes functus officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased, See West Rand Estates Ltd. v. New Zealand Insurance Co. Ltd., 1926 A.D. 173 at pp. 176, 178, 186-7 and 192; *Estate Garlick v. Commissioner of Inland Revenue, 1934 A.D. 499 at p.502."*

The learned Judge of Appeal was, however, quick to recognise, and correctly so in my respectful view, that there are exceptions to this general rule. Two of these exceptions mentioned at p307 of the judgment are pertinent in the proper determination of the instant matter, namely:-

"(ii) The Court may clarify its judgment 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

judgment or order (See the West Rand case, supra at pp. 176, 186-7; Marks v. Kotze, 1946 A.D. 29).

Here the relevant parts of the orders of the T.P.D. and this Court relating to para. (8) are clear and unambiguous and reflect the true intention of both Courts, i.e. that the Fourth Schedule should not apply to counsel's fees. Moreover, Firestone has applied for the deletion of the word 'counsel's' from para. (8), the effect of which would be to render the dispensation from the Fourth Schedule applicable to all fees, including those for the patent agents or attorneys. That is not a clarification but a variation of the orders. Counsel for Firestone ultimately conceded that, and rightly desisted from pressing the prayer for clarification, for this exception is clearly inapplicable.

(iii) *The Court may correct a clerical, arithmetical or other error in its judgment or order so as*

to give effect to its true intention (see, for example, Wessels & Co. v. De Beer, 1919 A.D. 172; Randfontein Estates Ltd. v. Robinson, 1921 A.D. 515 at p.520; the West Rand case, supra pp. 186-7). This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance."

[8] It will thus be seen that in reinstating these principles the learned Judge relied on such cases as **Estate Garlick v Commissioner of Inland Revenue 1934 AD 499 at 502; West Rand Estates Ltd v New Zealand Insurance Co. Ltd 1926 AD 173.** See also **Thompson v South African Broadcasting Corporation 2001 (3) SA 746 (SCA)**. See further **Swazi M.T.N. Limited v MV Tel Communications (Pty) Ltd and Another Civil Appeal Case No.32/06.**

[9] On the basis of these principles there can be no slightest doubt that the order set out in paragraph [1]

above does not reflect the true intention of this Court. It is such "other error" mentioned in the preceding paragraph as to entitle this Court, as the final Court of Appeal in this country, to correct or amend its order in order to give effect to its true intention. Crucially, it will be seen that Trollip JA did not attempt to give an exhaustive list of exceptions to the general rule relating to correction or amendment of orders. As was correctly laid down in **Ex parte Barclays Bank 1936 A.D. 481**, the list is not exhaustive. Each case must be decided on its own peculiar circumstances. *In casu*, I have considered as an exception to the general rule the fact that on 24 June 2010 the parties were unanimous that a correction or amendment should be made to the order in question.

[10] Finally, it is instructive to note that the Court in **S v Wells 1990 (1) SA 816 (A)** correctly, in my view, recognised that there are two "diametrically opposed" views on the principle of *functus officio*, namely, (1) the strict approach and (2) the enlightened approach. Joubert JA put the point in the following terms at page 819-820 of the judgment:-

"According to the strict approach a judicial official is functus officio upon having pronounced his judgment which is a sententia stricti juris and as such incapable of alteration, correction, amendment or addition by him in any manner at all. See D 42.1.55 (Ulpianus), D 42.1.62, Gail (1526-1587) Practicarum Observationum lib 1 obs 116 nrs 1 et 3, Huber (1936-1694) HR 5.37.2-6, Van der Linden (1756-1835) Judicieele Practijcq 3.5.10. In the case of In re Appeal: S v Stofile and Others 1989 (2) SA 629 (Ck) at 6301 Pickard CJ would seem to prefer this strict approach. A variant of this strict approach permits a judicial officer to effect linguistic or other minor corrections to his pronounced judgment without changing the substance thereof. See Damhouder Practycke in Civile Saecken cap 220 nr 1, Merula (1558-1607) Manier van Procederen titel 90 cap 1 nr 2, Wassenaar (1589-1664) Practcyk Judicieel cap 21 nr 21.

The more enlightened approach, however, permits a judicial officer to change, amend or supplement his pronounced judgment, provided that the sense or substance of his judgment is not affected thereby (tenore substantiae perseverante).”

[11] I am mainly attracted by the more enlightened approach which permits a judicial officer to change, amend or supplement his pronounced judgment or order provided 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.

[12] Giving full weight to the foregoing considerations, I am persuaded that the order delivered by this Court on 28 May 2010 as reflected in paragraph [1] above should be corrected or amended so as to give effect to the Court’s true intention.

[13] On the question of costs, I desire only to say that this Court is now enjoined to make the order which it would have made but for the patent error contained in its judgment of 28 May 2010. The order of costs proposed is as set out in paragraph [18] below.

[14] Adv Kades SC contended that the point on which the appeal was abandoned was what he called 'the main point.' The respondent was, he said, 'caught by surprise at the hearing of the appeal' when the point was abandoned without prior notice. He had been entitled to come to Court to protect more particularly this aspect of the judgment in the Court *a quo* as he has succeeded in doing. 'Such prior notice', he continued, 'could well have resulted in respondent reconsidering [his] attitude on the remaining matters of the appeal which are adjective in character.' In the circumstances he submitted that the costs order in favour of the respondent in the original judgment of this Court should stand.

[15] I do not agree that the remaining points dealt with in the appeal were 'adjective in character'. They raised

points of substance relating to the validity of the other regulations considered in the appeal. Adv Kades argued vigorously in support of what the judge *a quo* had held thereon. I am satisfied that, even if prior notice had been given by the appellant of his intention to abandon the appeal against the decision of the judge *a quo* regarding regulation 4(1)(a)(iv), the respondent would have persisted in his attempt to uphold the decision on the other points. It follows that if the error now corrected had not been made the respondent would have been ordered to pay the costs of the appeal.

[16] As far as the costs in the Court *a quo* are concerned, in view of the fact that the respondent's success in the Court *a quo* in relation to regulation 4(1)(a)(iv) has not been reversed it follows that the appropriate costs order in the Court *a quo* should reflect that success. The fairest outcome in my opinion would, in view of the partial success enjoyed by both sides, be no order as to costs.

[17] Insofar as the present hearing is concerned, the concession by Adv Kades SC that this Court is *functus officio* in the matter cannot, in my view, assist the respondent from escaping costs, seeing that the concession was belatedly made. The respondent ill-advisedly persisted in his attitude that this Court was *functus officio* until the matter was actually argued in this session. In the event, the convenience of the court, as well as that of the respondent, was compromised. The Court will, therefore, mark its displeasure by an appropriate order of costs proposed below.

[18] In the result the order reflected in paragraph [22] of the judgment delivered on 28 May 2010 is corrected or amended to read as follows:-

(1) *"[22] In the light of these considerations it follows that there is merit in the appeal. It is accordingly upheld (except as regards the point abandoned) with costs including certified costs consequent upon the employment of counsel."*

(2) The court a quo's order is set aside and replaced with the following order:-

> *"The plaintiff's points raised in his replication seeking to declare Regulations 4(1)(a)(ii) and (iii) as well as 4(1)(b) of the Motor Vehicle Accidents Regulations 1992 ultra vires the empowering provisions of s18 of the Motor Vehicle Accidents Act No.13 of 1991 are dismissed. No order is made as to costs."*

(3) The respondent shall pay the costs consequent upon the hearing of 9 November 2010. Such costs shall include certified costs consequent upon the employment of counsel.

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M.M. RAMODIBEDI

CHIEF JUSTICE

I agree : _____

DR. S. TWUM

JUSTICE OF APPEAL

I agree : _____

I.G. FARLAM

JUSTICE OF APPEAL

FOR APPELLANT : ADV VAN DER WALT

FOR RESPONDENT: ADV KADES SC