



## **IN THE SUPREME COURT OF SWAZILAND**

### **JUDGMENT**

**Civil Application Case No. 24/12**

**In the matter between**

**KENNETH B. NGCAMPHALALA**

**Applicant**

**And**

**THE PRINCIPAL JUDGE OF THE HIGH COURT**

**1<sup>st</sup> Respondent**

**SWAZILAND DEVELOPMENT AND SAVINGS BANK**

**2<sup>nd</sup> Respondent**

**NEDBANK [SWAZILAND] LIMITED**

**3<sup>rd</sup> Respondent**

**STANLEY MATSEBULA**

**4<sup>th</sup> Respondent**

**NOAH NKAMBULE**

**5<sup>th</sup> Respondent**

**SIBUSISO KUBHEKA**

**6<sup>th</sup> Respondent**

**DUMISANI DLAMINI**

**7<sup>th</sup> Respondent**

**NELLY DE SOUSA**

**8<sup>th</sup> Respondent**

**FRED MCFADDEN**

**9<sup>th</sup> Respondent**

**ELLIAS NDZIMANDZE**

**10<sup>th</sup> Respondent**

**Neutral citation:** Kenneth B. Ngcamphalala v *The Principal Judge of the High Court, Swaziland Development and Savings bank, Nedbank [Swaziland] Limited, Stanley Matsebula, Noah Nkambule, Sibusiso Kubheka, Dumsani Dlamini, Nelly De Sousa, Fred Mcfadden, Ellias Ndzimandze* (24/12 [2012] SZSC 41 (30 November 2012)

**Coram:** RAMODIBEDI CJ, EBRAHIM JA, MOORE JA, DR TWUM JA, and LEVINSOHN JA

**Heard:** 9 NOVEMBER 2012

**Delivered:** 30 NOVEMBER 2012

**Summary:** **Jurisdiction – The applicant bringing an application in the Supreme Court for an order reviewing a judgment of the High Court – Sections 146, 147 and 148 of the Constitution – Read with sections 14, 15 and 16 of the Court of Appeal Act – Held that the jurisdiction of the Supreme Court is wholly statutory and appellate only – The Supreme Court has no jurisdiction to review decisions of the High Court – The application accordingly dismissed with costs.**

### **RAMODIBEDI CJ**

[1] The sole issue for determination in this application is whether the Supreme Court of Swaziland has jurisdiction to review decisions of the High Court.

[2] The background facts giving rise to the dispute between the parties are common cause. It all started on 24 September 2008, when the 3<sup>rd</sup> respondent bank obtained judgment against the applicant for the payment of the sum of E113, 795.12 in respect of an overdraft, plus interest and costs.

[3] On 6 December 2011, the third respondent issued a garnishee notice in terms of Rule 45 (13) (a) of the High Court directed to the second respondent bank.

[4] On 12 December 2011, the applicant commenced motion proceedings in the High Court seeking relief in the following terms:-

(1) Setting aside the garnishee notice dated 6 December 2011;

(2) Committal of the 4<sup>th</sup> to the 10<sup>th</sup> respondents to prison for a period of sixty (60) days for contempt of the Supreme Court order that was issued on 30 November 2011;

(3) Costs on the attorney and own client scale.

[5] On 19 April 2012, the first respondent handed down a written judgment dismissing the applicant's application with costs.

[6] On 24 April 2012, the applicant launched the present application seeking an order reviewing the decision of the High Court referred to in the preceding paragraph.

[7] A good starting point in determining the question whether the Supreme Court has jurisdiction to review decisions of the High Court is the Constitution as the supreme law of the Kingdom of Swaziland. In plain and unambiguous language, sections 146 and 147 of the Constitution confer appellate jurisdiction on the Supreme Court. In relevant parts these sections provide as follows:-

*“146. (1) The Supreme Court is the final court of appeal. Accordingly, the Supreme Court has appellate jurisdiction and such other jurisdiction as may be conferred on it by this Constitution or any other law.*

*(2) Without derogating from the generality of the foregoing subsection, the Supreme Court has –*

*(a) such jurisdiction to hear and determine appeals from the High Court of Swaziland and such powers and authority as the Court of Appeal possesses at the date of commencement of this Constitution; and*

*(b) such additional jurisdiction to hear and determine appeals from the High Court of Swaziland and such additional powers and authority, as may be prescribed by or under any law for the time being in force in Swaziland.*

147. (1) *An Appeal shall lie to the Supreme Court from a judgment, decree or order of the High Court –*

*(a) as of right in a civil or criminal cause or matter from a judgment of the High Court in the exercise of its original jurisdiction; or*

*(b) with the leave of the High Court, in any other cause or matter where the case was commenced in a court lower than the High Court and where the High Court is satisfied that the case involves a substantial question of law or is in the public interest.”*

[8] In relevant parts sections 14, 15 and 16 of the Court of Appeal Act in turn read as follows:-

*“14. (1) An appeal shall lie to the Court of Appeal -*

*(a) from all final judgments of the High Court; and*

*(b) by leave of the Court of Appeal from an interlocutory order, an order made ex parte or an order as to costs only.*

15. *A person aggrieved by a judgment of the High Court in its civil appellate jurisdiction may appeal to the Court of Appeal with the leave of the Court of Appeal or upon the certificate of the judge who heard the appeal, on any ground of appeal which involves a question of law but not on a question of fact.*

16. *An appeal shall lie to the Court of Appeal where provision is expressly made in an Act for such appeal.”*

[9] It is plain from the foregoing sections that the jurisdiction of the Supreme Court is wholly statutory. It is appellate only. In the words of Lord Diplock in the case of **in re Racal Communications Ltd [1981] AC 374 (HL)** at 381, 384, the Supreme Court has no jurisdiction itself to entertain any original application for judicial review. In terms of s 148 of the Constitution, the only review power which the Supreme Court enjoys is the power to review its own decisions. It is of fundamental importance to recognise that this section deals with two different concepts, namely, “supervisory” and “review” jurisdiction. In relevant parts, it reads as follows:-

*“148. (1) The Supreme Court has supervisory jurisdiction over all courts of judicature and over any adjudicating authority and may, in the*

*discharge of that jurisdiction, issue orders and directions for the purposes of enforcing or securing the enforcement of its supervisory power.*

*(2) The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by an Act of Parliament or rules of court.”*

[10] Mr S.C. Dlamini who appeared for the applicant in this Court submitted that the review jurisdiction entitling this Court to deal with the matter is contained in s 148 (1) of the Constitution. This submission is misconceived. It is instructive to stress that section 148 deals with two different concepts. Subsection (1) deals with “supervisory” jurisdiction of the Supreme Court. As the word itself denotes, “supervisory” in its ordinary meaning simply refers to “overseeing” and not “reviewing.” Subsection (2) on the other hand deals with “review” jurisdiction of the Supreme Court over its own decisions. Indeed, one has merely to look at the heading of s 148 to see that it refers to two different concepts. The heading is “Supervisory and review jurisdiction.” I have underlined the word “and” to emphasise that it is disjunctive and not conjunctive as Mr S.C. Dlamini would like the Court to believe. It follows that supervisory jurisdiction in s 148 (1) is not the same thing as review jurisdiction in s 148 (2).

[11] It is of fundamental importance to stress that the scheme of s 148 confining review jurisdiction of the Supreme Court to its own decisions only, as opposed to High Court decisions, is consistent with the common law position. At common law judicial review, in the words of Lord Diplock in the case of **in re Racial Communications**, (supra), is available as a remedy for mistakes of law made by inferior courts and tribunals only. Mistakes made by High Court judges can only be corrected by means of an appeal and not review. See, for example **Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others 2003 (2) SA 385 (SCA)** at para [35]. The Lesotho Appeal Court also took a similar view in **Molise v Lehohla NO and Others 1995 – 1999 LAC 442** at 444 – 445. This is so because the High Court is not an inferior tribunal. On the contrary, it is a Superior Court of record. In this regard section 139 (1) (a) (i) and (ii) of our Constitution provides in relevant parts as follows:-

*“139. (1) The Judiciary consists of -*

*(a) the Superior Court of Judicature comprising -*

*(i) The Supreme Court, and*

*(ii) The High Court.” (Emphasis added.)*

[12] Mr S.C. Dlamini sought to rely on the case of **University of Swaziland v Ndlangamandla and Others, Case No. 10/2008** for the contention that this



Court has jurisdiction to review High Court decisions. That case was presided over by three members of this Court. With the greatest respect to the learned Judges, there is confusion in the judgment whether what served before them was an appeal or a review. By way of random examples, the last paragraph on page 4 of the judgment reads as follows:-

*“The present application is brought before this Court under Case Number “Civil Appeal 10/2008”. It concerns the refusal by Mabuza, J to recuse herself in the interlocutory application already referred to which has been finalized in the judgment of this Court dated 16 May 2008.”*

And yet the last paragraph on page 5 of the judgment adds more confusion as follows:-

*“Despite these remarks the present review came before us by way of the Notice of Appeal lodged in Case No. 7/2008 against the refusal of Mabuza J to recuse herself.”*

Finally, the last paragraph on page 12 of the judgment reads as follows:-

*“ In the result, the application for the review and setting aside of the judgment of Mabuza J giving reasons for her refusal to recuse herself, is dismissed with costs.”*

I have underlined the words “application”, “appeal” and “review” in these paragraphs to highlight the confusion whether what served before the learned Judges was an appeal or an application for review.

[13] What is clear, however, is that the Court in the **University of Swaziland** case (supra) was never called upon to determine the question whether the Supreme Court has jurisdiction over the High Court decisions. There is no indication from the judgment that sections 146, 147 and 148 of the Constitution were drawn to the attention of the Court. At any rate, even if the Court had assumed jurisdiction for review consciously, we should be prepared as a Full Bench of 5 Judges to depart from such a decision. This is so in terms of s 146 (5) of the Constitution. It reads as follows:-

*“(5) 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.”*

[14] In light of the foregoing considerations, the conclusion is inescapable that the Supreme Court has no jurisdiction to review the decisions of the High Court and we so find.

[15] The result is that the application is dismissed with costs.

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**M.M. RAMODIBEDI**  
**CHIEF JUSTICE**

**I agree**

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**A.M. EBRAHIM**  
**JUSTICE OF APPEAL**

**I agree**

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**S.A. MOORE**  
**JUSTICE OF APPEAL**

**I agree**

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**DR S. TWUM**  
**JUSTICE OF APPEAL**

**I agree**

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**P. LEVINSOHN  
JUSTICE OF APPEAL**

**For Applicant : Mr S.C. Dlamini**

**For 2<sup>nd</sup>, 4<sup>th</sup> to 10<sup>th</sup> Respondents : Mr M. Sibandze**

**For 3<sup>rd</sup> Respondent : Mr E. J. Henwood**