IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No.14/2012

In the matter between:

SILENCE GAMEDZE	**1ST CROSS-APPELLANT**
MICHAEL NDLELENI MASUKU	**2ND CROSS-APPELLANT**
MELUSI QWABE	**3RD CROSS-APPELLANT**
And	
THABISO FAKUDZE	**RESPONDENT**
In re:	
THABISO FAKUDZE	**APPELLANT**
And	
SILENCE GAMEDZE	**1ST RESPONDENT**
MICHAEL NDLELENI MASUKU	**2ND RESPONDENT**
MELUSI QWABE	**3RD RESPONDENT**

Neutral citation: *Silence Gamedze and 2 Others v Thabiso Fakudze (14/2012) [2012] SZSC 52 (30 November 2012)*

Coram: **M.M. RAMODIBEDI CJ, DR S. TWUM J.A. ,**

E.A. OTA J.A.

Heard: **12 NOVEMBER 2012**

Delivered: **30 NOVEMBER 2012**

Summary: **The Appellant an admitted attorney of this Court appealed the judgment of the Court *a quo* rendered against him: No grounds of appeal were filed: the appeal was therefore adjudged incompetent and dismissed: Costs awarded in the appeal on the scale of attorney-and-client costs as a mark of disapproval for Appellant's conduct. The Respondents cross-appealed the order of costs on the ordinary scale *a quo*: Cross-Appeal allowed: Appellant's conduct *a quo* was tantamount to an abuse of Court process warranting costs on a punitive scale.**

OTA J.A.

[1] The Appellant, **Thabiso Fakudze**, who is an admitted attorney of this Court, had as Applicant, launched an application *a quo* on the premises of the urgency procedure permitted by Rule 6 (25) (a) and (b) of the Rules of the High Court, seeking *inter alia* for rescission of the judgment of the Court *a quo*, rendered on the 16th day of

December 2010, in a suit styled Case No. 1393/2010. The Appellant also sought a stay of execution of any writ of execution that may be issued pursuant to the said judgment, pending determination of the rescission application. It appears that the Appellant obtained an interim order of the stay of execution sought. Thereafter, the parties filed papers *a quo* in motivation of the application for rescission.

[2] Suffice it to say that after a couple of adjournments and on the 23rd of February 2012, the matter proceeded in the absence of the Appellant and his counsel who had defaulted in appearance inspite of the fact that they were duly notified that the matter was set down for argument on that day, via a notice of set down dated 20th February 2012.

[3] It appears that after hearing oral submissions from Respondents' Counsel **Mr S K Dlamini**, the court a quo **per MCB Maphalala J,** on the same 23rd of February 2012, dismissed the entire application which dismissal is circumscribed within an order in the following terms

"Application dismissed with costs on the ordinary scale".

[4] It is the foregoing order that impelled the Appellant to approach this Court for it's intervention via a Notice of Appeal described as Appeal Case No. 14/12. I will avert to this Notice of Appeal in due course. It is on record that in answer to the appeal, the Respondents fired off a Notice of Motion for leave to Cross -Appeal the order of costs *a quo* on the ordinary scale. It appears that on the 16th of May 2012, this Court granted the Cross- Appellants leave to Cross-Appeal with costs and reserved it's reasons to the end of the Court's session in May 2012. See paragraph 2.2 of the Cross-Appellants heads of argument filed on 20th June 2012.

[5] The Court is therefore seized with both the appeal and Cross-Appeal which I will now proceed to consider *ad seriatim*.

The Appeal

[6] When this appeal was heard **Mr S K Dlamini** appeared for the Respondents. However, neither the Appellant nor his Counsel was present in Court. **Mr Dlamini** intimated to the Court that the Appellant had duly abandoned his appeal and tendered costs, by a

Notice of abandonment of appeal filed in October 2012. Counsel sought to urge the said notice of abandonment of the appeal on the Court. The Court however observed that since it was not seized of the Notice of abandonment it was disinclined to countenance same. It ordered that the appeal should be proceeded with to be determined on it's merits.

[7] In the wake of this order by the Court, **Mr Dlamini** tendered oral argument in support of the heads of argument filed on behalf of the Respondents. Now, two issues to my mind can be distilled from the totality of the papers serving before Court as well as **Mr Dlamini's** oral argument. They are as follows:-

1. Whether or not the appeal ought to be dismissed.

2. Whether or not the Respondents are entitled to punitive costs on the scale of Attorney –and- client costs in the event of the dismissal of the appeal. Let us now consider the efficacy and substantiality of these issues.

Issue 1. Whether or not the appeal ought to be dismissed.

[8] On this issue **Mr Dlamini** urged the Court to dismiss the appeal for non compliance with Rule 6 (4) of the Rules of this Court. He contended that this is so because the Notice of Appeal is devoid of any grounds of appeal in contravention of that Rule of Court and therefore ought to be dismissed.

[9] Now, the *ipsissima verba* of the Notice of Appeal bears recitation at this juncture, for a proper decision of the issue at hand. It states as follows:-

> "
>
> NOTICE OF APPEAL
>
> BE PLEASED TO TAKE NOTICE that the Appellant hereby notes an appeal to the Supreme Court of Swaziland on the order and/or judgment issued by the High Court in the matter
> The grounds of appeal will be filed in due cause after going through the entire judgment''

[10] It cannot be gainsaid that the Appellant dismally failed to make good his undertaking to file the said grounds of appeal. I say this because

up to the time this appeal was heard no such grounds of appeal were urged in these proceedings. It is this feature of the Notice of Appeal that **Mr Dlamini** complains offends Rule 6 (4) of the rules of this Court.

[11] In casu, testing the Notice of this Appeal against the rigours of Rule 6 (4), it appears to me that **Mr Dlamini's** contention that the appeal is incompetent has much to commend itself for. I say this because that Rule of Court provides as follows:-

> "The Notice of Appeal shall set forth concisely and under distinct heads the grounds of appeal and such grounds shall be numbered consecutively''.

[12] The literal legis of the legislation ante, puts it beyond controversy that not only are the grounds of appeal concomitant to the Notice of Appeal, but the said grounds of appeal must be detailed numerically in different paragraphs. That is why the Rule dictates that the grounds are *"numbered consecutively"*. The ordinary grammatical meaning of the word *"consecutive"* by **Websters Comprehensive Dictionary**

(Deluxe encyclopedic ed) is *"Following in uninterrupted succession, successive, characterized by logical sequence"*

[13] Furthermore, the use of the word "*shall"* makes Rule 6 (4) a mandatory command.

[14] It is thus inexorably apparent that a competent Notice of Appeal must contain grounds of appeal which are consecutively numbered in separate paragraphs. This is however not such a case.

[15] This Court has continued to be faced with appeals which are urged as though there are no established practice and procedure regulating appeals before this Court, or as if adherence to such procedure can be easily waived. This is a challenge which is heightened in situations where the Notice of Appeal clearly violates the established rule of practice regulating it, but the parties in their heads of argument anxiously and vigorously canvass substantial issues of law.

[16] In the past the sort of scenario depicted above generally posed a dilemma for the Court whether to throw the Notice of Appeal in the

gabbage bag like a piece of unwanted meal, or to condone the irregularity and proceed to the determination of the issues arising. The event of condonation would be in acknowledgment of the recent trend of the Courts towards substantial justice, which dictates that Courts should strive to do justice and should not sacrifice same on an altar of procedural technicalities, which were put in place in the first place as a handmaid to justice.

[17] A lot of juristic ink has poured and will continue to pour on how Courts should deal with this situation. What has emerged from a plethora of judicial pronouncements is that though rules of Court are not sacroscant, they are however meant to be obeyed, and the Court has a duty to discourage the violation of it's rules except for very good reasons and in exceptional circumstances. What will constitute an exceptional circumstance that would warrant a condonation of non compliance with the rules will depend on the peculiar facts and circumstances of each case. However generally, such a situation will arise where the irregularity has been waived by the other party or where the irregularity does not affect the merits of the case or where a miscarriage of justice will be occasioned if the irregularity is allowed

to vitiate the proceedings. In such situations the Court will be entitled to waive strict compliance with it's rules,

[18] It is however also the judicial accord across jurisdictions, that the Court will insist on strict compliance with rules of procedure meant to safeguard the Fundamental right of the adverse party to fair hearing such as notice. See **Ifeanyi v A.C.B. Ltd and Another (1997) ZSCNJ 93 (Nigeria).**

[19] Grounds of Appeal are to the appeal what pleadings are to the parties at the trial *nisi prius*. The requirement that the Notice of Appeal contains grounds of appeal is not merely cosmetic. It is underscored by the fair hearing rule which is expressed by the maxim *audi alteram partem*. This is because the object and purpose of the grounds of appeal just like pleadings, is to give the Respondent adequate notice of the issues in controversy in the appeal. That is why rule 6 (4) requires that the grounds shall be numbered consecutively and shall be concise i.e be specific and clear not couched in general terms. This is to ensure that the element of notice is not defeated by vague and general statements of complaints. It is also for this reason that the

grounds of appeal must relate to issues decided in the impugned judgment. They must be fixed and circumscribed within a particular issue in controversy, if not, they cannot be said to be related to that decision.

[20] The role of the grounds of appeal also has another dimension, a jurisdictional one. I say this because the grounds of appeal also define the jurisdiction of the appellate Court to entertain and determine the appeal. It curtails and restricts the issues on appeal only to the complaints properly raised in the grounds of appeal, except where the appellate Court permits an issue not raised in the grounds of appeal or decided in the trial *nisi prius*, to be raised and argued in the appeal with the leave of the Court.

[21] From the above it is crystal clear that grounds of appeal are akin to pleadings at the trial *nisi prius.* That is why the law dictates that parties are bound by their grounds of appeal just as they are bound by their pleadings.

[22] It is therefore beyond any per adventure from the totality of the foregoing, that a bare Notice of Appeal without the requisite grounds of appeal is valueless, incompetent and in some instances an outright abuse of process. See **Halaby v Halaby (1951) 13 WACA 170.**

[23] In casu, I find myself completely at a loss to comprehend what the Notice of Appeal purports, intends to say or convey. It is a valueless general statement which lacks even the common decency to properly identify the judgment assailed. It is completely devoid of any grounds of appeal. As this case lies, it violently and incurably offends Rule 6 (4).

[24] Since this is a feature in this case that renders the whole appeal incompetent thus depriving this Court of the jurisdiction to entertain and determine same, we cannot ignore it and in that event proceed on a voyage in futility with it's attendant waste of time and expenses. The result is that this appeal fails and is dismissed accordingly.

[25] This brings us to the inquiry in issue 2 to wit:-

ISSUE 2 Whether or not the Respondents are entitled to punitive costs on the scale of Attorney-and-client costs in the wake of the dismissal of the Appeal.?

[26] The Respondents raised this issue in paragraph 1.6 of the Cross-Appellants heads of argument filed on 20 June 2012, in the following words

> "It is submitted that this Honourable Court can only dismiss the appeal and the Cross-Appellants pray that it does so with costs at attorney and client scale given the conduct of the Appellant whose appeal was obviously motivated by the First Cross-Appellant's execution and the writ''

[27] In support of the foregoing prayer, **Mr Dlamini** contended that the Respondents are indeed entitled to the punitive costs sought. This, he says is because the Appellant who was only compelled to file this appeal in the face of the execution of the judgment *a quo*, failed to remedy the defects in his Notice of Appeal notwithstanding being urged to do just that via a letter written to him by the Respondents' counsel. He decried the fact that the Appellant only abandoned the

appeal in October 2012, almost at the dawn of the present session of this Court. **Mr Dlamini** therefore called upon the Court to deprecate the reprehensible conduct of the Appellant with an award of the punitive costs sought.

[28] The question of costs is a matter that lies within the discretionary power of the Court. The only duty placed on the Court in the exercise of this discretion, is to exercise it judicially and judiciously weighing in the balance the various issues raised by the peculiar facts and circumstances of the case which may bear on it's proper decision.

[29] Having stated the general principle as above, I however hasten to add here, that an award of attorney –and- client costs is one which the Court views with disfavor, as it is loath to penalize a party who has lawfully exercised his right to obtain a judicial decision in any complaint he might have. Therefore, judicial precedent demands that the Court proceeds cautiously in it's approach in awarding such costs only subscribing to same where there are compelling circumstances warranting it to do so.

[30] As this Court stated in the case of **Jomas Construction (Pty) Ltd v Kukhanya (Pty) Ltd Civil Appeal No. 48/2011 para 16,**

> "Generally speaking an award of costs on attorney-and-client scale will not be granted lightly. The authors **Cilliers, Loots and Nel. Costs 5th Edition** state the principle succinctly at **p 971** in the following apposite terms:-
>
> "An award of attorney-and client costs will not be granted lightly. As the Court looks upon such orders with disfavour and is loath to penalise a person who has exercised a right to obtain a judicial decision on any complaint, such party may have
>
> We agree with this statement. We wish to caution, however, that everything has its own limits. It is not inconceivable that even a person who exercises his right to obtain a judicial decision may abuse such right. In such a situation the Court would be entitled within it's discretion to award costs on attorney and client costs against such person in order, for example, to mark the Court's displeasure".

[31] The foregoing proposition of the Court finds jurisprudential backing in the text **The Civil Practice of The Supreme Court of South Africa 4th Edition page 717 by Herbstein et al,** where the learned editors state that though the Court should proceed cautiously in

awarding this nature of costs, attorney-and-client costs may however be levied on grounds of the following compelling factors:- an abuse of process of Court, vexatious, unscrupulous conduct, on the part of the unsuccessful litigant, absence of *bana fides* in conducting litigation, unworthy, reprehensive and blameworthy conduct an attitude towards the Court that is deplorable and highly contemptuous of the Court, conduct that smarks of petulance, the existing of a great defect relating to proceedings, as a mark of the Courts disapproval of some conduct that should be frowned upon, and where the conduct of the attorney acting for a party is open to censure. Attorney and client costs have also been awarded where, *inter alia* proceedings were brought over-hastily on ill advised grounds see **Billy Groening v Sabelo J Bhembe Civil Case 1751/2011.** The list is not exhaustive. Each case must thus be treated within the purview of it's own pecullar facts and circumstances .

[32] In casu, having viewed the conspectus of the facts serving before this Court through microscopic lenses, I am inclined to subscribe to **Mr Dlamini's** proposition that the Respondents are indeed entitled to the punitive costs sought.

[33] I say this because, it appears to me that this whole appeal was orchestrated by the Appellant as a dilatory and disingenuous stratagem geared at stultifying the process of execution of the judgment *a quo.* My view on this is informed by the invidious conduct displayed by the Appellant in this appeal.

[34] This is because having lodged the appeal which achieved the desired result of holding the execution a quo in abeyance as far back as 3rd March 2012, the Appellant appears to have retired into a sleeping slumber thereafter. He failed to file the requisite grounds of appeal to give life to his appeal. He refused to wake up from his slumber in this respect, when on the 13th of March 2012, the Respondents caused to be served on him an ominous letter emanating from Respondents' Counsel, which was also copied to the Registrar of the High Court, in which they threatened to move for a dismissal of the appeal, even in the face of an application for condonation, if the said grounds of appeal are not urged. The relevant portions of the said letter which appears on pages 43 and 44 of the record of appeal sound in the following terms:-

"1.3.1 Your purported Notice of Appeal dated 5 March 2012 in the above matter does not set out the grounds upon which it is based and therefore does not constitute an appeal in terms of the Rules of Court.

1.3.2 The prudent course would have been to wait until you were certain of the grounds of your appeal and thereafter file a proper notice of appeal in view of the fact that you have four (4) weeks after the date of the judgment to file an appeal in terms of the Court of Appeal Rules.

1.3.3 You therefore have at least ten (10) days to file a notice of appeal in which case the haste is unwarranted.

1.3.4 Kindly file a proper notice of appeal on or before 22 March 2012 failing which we shall not only resist any application for condonation in this regard but also move for the formal dismissal of your purported Notice of Appeal dated 5 March 2012"

[33] The Appellant, it cannot be gainsaid, thumbed his nose at the letter above and failed to file the grounds of appeal.

[35] This issue, I should mention, was replicated in the Respondents/Cross-Appellants heads of argument filed on the 20th of June 2012, which was duly served on the Appellant on the 28th of the same month. Inspite of these persistent warnings, the Appellant bluntly refused or failed to urge the said grounds of appeal.

[36] It is thus suspect to my mind, that in the wake of the commencement of the current session of this Court on the 1st of November 2012, the Appellant in October 2012, served a Notice of abandonment on the Respondents abandoning the appeal, having effectively stayed execution of the judgment *a quo* from March to November 2012, a space of about 9 months. I should note here that no such notice was filed with the Court. This conduct is certainly unacceptable, warranting a mark of disapproval from this Court.

[37] The unconscionable conduct of the Appellant is further compounded by the fact that he failed to attend Court in the wake of abandoning his appeal. This would have demonstrated some contrition and respect for all the parties who had been put out of pocket due to the obvious

expenses attendant to litigation, as well as time expended in preparing for this appeal.

[38] The Appellant by distancing himself completely from the Court also held this Court in opprobrium. We have had to expend considerable energy and the scarce commodity of precious judicial time in perusing the record of this appeal as well as all relevant research materials to enable us arrive at a just decision. Yet, the Appellant simply abandonment the incompetent appeal without even as much as a nod of apology to the Court, which would have perhaps helped to ameliorate the egregiousness of his conduct.

[39] I say this because a similar scenario as *in casu* presented itself in the case of **Jomas Construction (Pty) Ltd (supra),** and it was the profuse apologies of counsel that saved the day. This fact is depicted in the following paragraphs of that decision, which I deem expedient to set forth in extenso:-

> "(20) Reverting now to the facts, what is of grave concern to this Court is the fact that the present application was launched and yet withdrawn within a very short space of time, this raises

the question whether the application was necessary in the first place?. This is so especially because it was always known that the next session of this Court was just around the corner. The Court has been put to considerable inconvenience. And so, too, has the respondent. The record will show that before the application was withdrawn the Court had to sit no fewer than four times, albeit in chambers, to deal with preliminary issues in the matter.

(22) What stands out like a sore thumb is that **Mrs Boxshall-Smith** inexplicably allowed her better judgment to be overruled by that of her clients. That in itself is unacceptable conduct, to put it mildly. A legal practitioner's first duty is to the Court and not his/her client. We need hardly stress that where there is a conflict between counsel's *"interest"* counsel is obliged to withdraw from the matter. It cannot be otherwise in a proper conduct of litigation. Otherwise the whole justice system would soon be brought into disrepute. It is, therefore, the duty of this Court to nip such conduct in the bud.

(23) But, there is another consideration which has weighed heavily with this Court. It is that **Mrs Boxhall-Smith** has apoligised profusely for her conduct in the matter. She has done so both in her affidavit and in oral submissions before us----.

(24) We interrogated **Mrs Boxshall-Smith** extensively during submissions in this matter. It turned out, and we accept, that she is fairly new in the legal profession. She has been

practising for about three years to date. We are satisfied that the whole fiasco can reasonably be put down to inexperience. It is the duty of the Court to guide her rather than destroy her overnight. She is a decent young lawyer who obviously did not mean any harm. Indeed the record will show that as she tendered her apology to the Court she literally broke down in tears. We were deeply touched.

(25) There is yet another factor in favour of **Mrs Boxshall-Smith.** It is this. **Mr Mamba** for the respondent very fairly and properly left the matter in the Court's hands, certainly in respect of costs *de bonis propriis*. It was for that reason that he made submissions, in his own words, as *amicus curiae.*

(26) We are satisfied that the foregoing circumstances call for mercy. We must stress, however, as **Mr Mamba** correctly submitted, that this is the highest Court in the Kingdom. We expect the highest standards from legal practitioners. Again as **Mr Mamba** correctly put it, the dignity and respect which the members of the public have for the Courts must be channeled through the legal practitioners who represent them. That is the fundamental duty of any self respecting legal profession anywhere in the world". (emphasis added)

[40] It is thus beyond dispute from the above, that it was **Mrs Boxshall-Smith's** high display of professionalism, evident in her apologies to her adversaries and the Court, that earned her approval, swaying both

the Court and Counsel on the other side **Mr Mamba**, to her side. This saved her from an award of costs *de bonis propriis*.

[41] This is however not such a case. The Appellant who is an admitted attorney of the Court is expected to display a high degree of courtesy not only to the Court but also to his adversaries. We are however not so fortunate. We have not been availed of such courtesy.

[42] Appellant's overall conduct in the way and manner he proceeded in this appeal is thus worthy of condemnation by an award of costs on the punitive scale of attorney and client costs sought by the Respondents. I so hold.

THE CROSS-APPEAL

[43] On the 22nd of May 2012 the Cross-Appeallant's Cross -Appealed as follows:-

1. The learned judge in the Court *a quo* erred in law in not giving reasons for not awarding costs of suit at attorney-and-client scale

notwithstanding a specific prayer for such duly supported by pointed heads of argument and verbal submissions in this regard.

2. The learned judge in the Court *a quo* erred in not finding that, in instituting the dismissed rescission application in the Court *a quo*, the Appellant did not genuinely exercise a right to obtain a judicial decision on a valid complaint but merely abused such a right.

3. The learned judge in the Court *a quo* erred in law and in fact in not finding that the Appellant's conduct was not only vexatious but constituted dilatory conduct and trifling with the Court which all amounted to an abuse of Court process.

4. The learned judge in the Court *a quo* erred in law and in fact in not giving consideration to the fact that the Appellant was an attorney of the Court *a quo* who was experienced in litigation and to whom higher standards of observance of the Rules of Court applied. The learned judge more particularly erred in not finding that the Appellant was guilty of misconduct justifying an award of costs against him at attorney-and-client scale.

[44] When this matter was heard learned counsel for the Cross-Appellants **Mr S. K. Dlamini** tendered very copious and lengthy argument in support of the heads of argument he filed in favour of the Cross-Appeal. It is convenient for me to refer to the Respondent in this Cross-Appeal as Appellant.

[45] After a very careful appraisal of the matrix of facts serving before Court, I find that the whole Cross-Appeal crystalizes into one issue to wit:

> **Whether or not the Court *a quo* erred is not awarding costs to the Cross-Appellants on the punitive scale of attorney and client costs?**

[46] I have no wish to re-invent the wheel by embarking on another long exposition of the attitude of Courts to the this sort of punitive costs. I have already exhaustively demonstrated this in paragraphs [28] to [31] above, in which paragraphs, I also extensively catalogued a panoply of factors that will found exceptional circumstances which would warrant the Court to accord this scale of costs.

[47] Having stated as above, I should quickly observe here, that the question of costs is one that lies in the discretionary province of the trial Court, and this Court will not lightly interfere with that exercise of discretion except where it is shown that it was not exercised judicially or judiciously within the context of the facts and circumstances that served before the lower Court. It is not for this Court to dictate along which lines the Court *a quo* should have exercised it's discretion.

[48] **Mr Dlamini** invites this Court to take over the lower Court's exercise of that discretion. This, he says is because that Court failed to give reasons for that exercise of discretion. He further submitted that generally where matters are contested the position of the law is that a Court should give a reasoned judgment as it not only enhances the public confidence in the administration of justice but also for the purposes of an appeal. For this proposition Counsel urged the case of **Road Accident Fund v Marunga 2003 (5) SA 164 (SCA) at 171 para 31.**

[49] Now, a judicious exercise of discretion is one that considers the facts and circumstances of the case and a judicial exercise is one that embraces the law. Therefore, whether there was a judicial and judicious exercise of discretion can be extrapolated from the reasoning of the Court in exercising that discretion, as demonstrated in the record. Where no such reasons enure for that exercise of discretion this Court cannot reach the concluded opinion that the discretion was properly exercised.

[50] I have hereinbefore set out the order of the Court *a quo* in paragraph [3] above. It bears no repetition. There are no reasons contained in the record for that exercise of discretion. There is thus much force in the contention of **Mr Dlamini**, that this state of affairs gives this Court the latitude to decide how the discretion should be exercised. As the Court stated in the case of **Peters Transport (Pty) Ltd and 70 Others v Municipal Council of Manzini and 6 Others – Appeal Case No. 69/2009 page 8**

> "In another case heard this session, **Nondlela Suzan Nkonyane v Ngwane Park Township (Pty) Ltd, Civil Appeal 58/09,** this Court had to deal with a matter where a judicial discretion had been

exercised without reasons being given and it was held that because no reasons were given this Court was obliged to consider the matter itself and decide how the discretion should be exercised".

See **Ezishineni Kandlovu v Ndlovunga Dlamini and Another Civil Appeal No. 58/2012.**

[51] Having stated as above, I should however observe that due to the daunting work load in this jurisdiction as is also the case in contemporary jurisdictions, an unwritten practice has evolved where a Court might elect to grant orders as *in casu*, and reserve it's reasons for a latter date. Where this becomes the case or even where the Court did not reserve it's reasons, it is incumbent upon a party wishing to appeal the order of the Court to formally approach the Court with a written request for it to reduce the said reasons in writing for the purposes of the appeal. This is in appreciation of the fact that the appellate Court would be desirous of being apprised of such reasons.

[52] It does not appear that **Mr Dlamini** who is a senior attorney at the Side-bar and who is *au fait* with the protocol, practice and procedure

of the Court *a quo*, bothered at all to make this request before launching the Cross-Appeal. There is no evidence that he made a request for a written judgment and the Court *a quo* did not oblige him. He cannot therefore be availed of his attempts at distancing himself from blame on this issue which he anxiously sought to lay at the doors of the Court *a quo*. I cannot subscribe to this posture.

[53] The foregoing said and done, let us now decide whether the facts and circumstances of the proceedings *a quo* are deserving of an award of punitive costs against the Appellant.

[54] After a very careful consideration of the totality of the record of proceedings *a quo*, I agree entirely, that the conduct of the Appellant *a quo* is as attenuated in paragraphs 5.1 to 5.8.4 of the Cross-Appellants' heads of argument, which is as follows:-

> "
>
> 5.1 In the proceedings in the Court *a quo* that are the subject matter herein and instituted on 26 July 2011 the Appellant was challenging a decision that had been made on 16 December 2010.

See prayers 3 and 4 of the Appellant's notice of motion at page 5 of the record of appeal (the record)

5.2 The Appellant did not explain the reason for a delay of over (7) months only to bring the application on an urgent basis giving the Cross-Appellants three (3) days' notice.

5.3 It is submitted that this application was motivated by the execution of a writ which this Honourable Court will note was issued in July 2011 and the execution of which commenced on or about 20 July 2011.

See pages 32 of the record read with paragraph 5.1 of the answering affidavit at page 39 of the book.

5.5 The Cross-Appellants' answering affidavit had been served and filed by 29 July 2011 *(see pages 35 and 36 of the record*) but there was no replying affidavit nor heads of argument filed even though the matter was finally heard on 16 December 2010.

5.6 The conduct of the Appellant is made worse by his visible reluctance to conclude the proceedings when he had the benefit of a stay of execution of an order in his favour against the Cross-Appellants which order was obtained before the latter had opportunity to file their affidavits in opposition. Reference is made to the following developments in the earlier proceedings

recorded at paragraphs 9 and the sub paragraphs thereunder. (*pages 42 and 43 of the record).* The objectionable conduct of Appellant is more fully captured in annexure **"SD4"** of the Cross-Appellants' answering affidavit at page 50 where the following is addressed to the Registrar of the Court *a quo* in correspondence copied to the Appellant's attorneys.

5.6.1 We refer to the above matter the argument of which could not proceed before **Justice Hlophe** on 25 November 2010.

5.6.2 The Judge directed that both legal representatives involved in these proceedings approach him on Wednesday 1 December 2010 to get a date for the hearing of argument.

5.6.3 However, the Applicant's legal representative did not show up and we could not approach the Judge in his absence. Our **Mr. Dlamini** then called the Applicant's attorneys whose **Mr. Khumalo** undertook to make himself available on 3 December 2010 for the exercise of getting a hearing date.

5.6.4 Again, **Mr. Khumalo** could not make it on 3 December 2010 and **Mr. Nkomondze** who was in Court did not know anything about the matter. **Mr. Nkomondze** was however helpful

in that he indicated he would make himself available for hearing of argument on any date up to 17 December 2010.

5.6.5 In the circumstances and given that our **Mr. Dlamini** is also available from 10 to 17 December 2010, we would appreciate allocation of a date of hearing during this period to enable us to finalise the matter which was instituted on an urgent basis.

5.7 The Appellant's default on 16 December 2010 was simply inexcusable in the circumstances and his subsequent application for rescission was a still born from the onset, a blatant abuse of Court process.

5.7.1 The Appellant had been served with a notice of set down for 16 December 2010 at least two (2) days before the hearing date aforesaid.

*See annexure **"TF2"** of his founding affidavit at pages 20 and 21 of the record.*

5.7.2 The Appellant's attorneys notice of withdrawal on 15 December 2010 was another stratagem designed to delay finalization.

See pages 18 and 19 of the record.

5.7.3 In any event, the said notice of withdrawal was set aside by the Court in the earlier proceedings.

5.7.5 The Appellant himself an attorney of the High Court experienced in litigation (*see paragraph 5.1 of the answering affidavit at page 39 of the record)* was personally informed that the matter was proceeding that morning of 16 December 2010 but he ignored this notification.

See paragraph 6.3of the answering affidavit at page 41 of the record.

5.8 The Appellant's impunity also finds manifestation in his persistence in half-hearted applications that are no more than attempts to avoid the execution of lawfully issued writs of execution.

5.8.1 Similarly with the earlier proceedings, the Appellant did not file a replying affidavit in the Court *a quo* and the book of pleadings had to be prepared by the Cross-Appellants even though the Appellant was *dominus litis*.

See Paragraph 15.7 at page 12 of the book.

5.8.2 The Appellant did not file heads of argument in the Court *a quo*

See Paragraph 15.8 at page 12 of the book.

5.8.3 The Appellant could not even prosecute argument in support of his application in the Court *a quo.*

5.8.4 The Appellant actually came about forty five (45) minutes late notwithstanding being served timeously with a notice of set down specifying the date and time of the hearing.

See paragraph 15.10 at pages 12 and 13 of the book.

5.9 The Appellant's persistence in his objectionable conduct is also exhibited in the letters written and delivered to the Appellant's attorneys dated 1 August 2011, 12 October 2011 and 11 January 2012

See pages 28,29,30 and 31 of the book"

[55] Having distilled the foregoing facts through judicial scrutiny, I am inclined to agree with **Mr Dlamini** that the Appellant's conduct a quo was tantamount to a gross abuse of Court process. He was merely using the Court process to accomplish a purpose other than that for which it was designed and thereby cause damage. His conduct was inimical to the frivolous and vexatious process which he purported to initiate, and thus an abuse of Court process.

[56] **Jowitt's Dictionary of English Law 2nd Ed Vol 2** defines a frivolous and vexatious action as when the party bringing it is not acting *bona fide* and merely wishes to annoy or embarrass his opponent or when it is not calculated to lead to any practical result.

[57] **Blacks Law Dictionary 8th ed by Bryan A Garner** *et al* states that abuse of process is

> "The improper and tortious use of a legitimately issued Court process to obtain a result that is either unlawful or beyond the process's scope-Also termed abuse of legal process, malicious abuse of legal process, wrongful process, wrongful process of law----
> "One who uses a legal process, whether criminal or civil against another primarily to accomplish a purpose for which it is not designed is subject to liability to the other for harm caused by the abuse of process" (Restatement (second) of Torts 682 (1977).

[58] Furthermore, the learned authors on **Street On Torts 8th Ed. 439** also expressed the view that

> "It is a tort to use legal process in it's improper form in order to accomplish a purpose other than that for which it was designed and thereby cause damage"

[59] Finally, is the proposition of **Lord Denning,** propounded in the case of **Goldsmith v Sperrings (1977) I WLR 478**, as follows:-

> "A legal process is diverted from it's true course so as to serve extortion or oppression or to exert pressure so as to achieve an improper end."

[60] It is overwhelmingly evident from the totality of the foregoing that the Appellant's conduct *a quo* amounted to an abuse of Court process.

[61] The Court has inherent jurisdiction to discourage abuse of it's process, by for example, an award of punitive costs. In this regard the pronouncement of the Court in **Jomas Construction (Pty) Ltd (supra),** bears repetition**:-**

> "It is not inconceivable that even a person who exercises his right to obtain a judicial decision may abuse such right. In such a situation the Court would be entitled within it's discretion to award costs on attorney-and –client costs against such person in order, for example, to mark the Court's displeasure".

[62] Finally, I find the words of the Court in the case of **Khunon and Others v M Fishrer and Sons (Pty) Ltd and Others 1982 (3) SA 353(w) at page 355-356,** germane, in these circumstances:-

> "The proper function of a Court is to try disputes between litigants who have real grievances and so see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in turn, the orderly functioning and indeed the very existence, of society is inextricably interwoven. The Rules of Court are in a sense merely a refinement of the general rule of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues aforementioned are clarified and tried in a just manner.
>
> Of course the Rules of Court, like any set of rules, cannot in their very nature provide for every procedural situation that arises. They are not exhaustive and moreover are sometimes not appropriate for specific cases. Accordingly, the superior Courts retain an inherent power exercisable within certain limits to regulate their own procedure and adapt it, and, if need be, the Rules of Court, according to the circumstances----.
>
> It follows that the principles of adjectival law, whether expressed in the Rules of Court or otherwise, are necessarily flexible.

> Unfortunately, this concomitant brings in it's train the opportunity for unscrupulous litigants and those who would wish to delay or deny justice to so manipulate the Courts procedure that their true purpose is frustrated. Courts must be ever vigilant against this and other types of abuse. What is more important is that the Court's officers, and especially attorneys, have an equally sacred duty. Whatever the temptation or provocation, they must not lend themselves to the propagation of this evil, and so allow the administration of justice to fall into disrepute. Nothing less is expected of them and, if they do not measure up, a Court will mark it's disapproval either by an appropriate order as to costs against the defaulting practitioner or in a proper case, by referring the matter to the Law Society for disciplinary action".

[63] On these premises, the Cross-Appeal has merits. It succeeds. The order a quo for costs on the ordinary scale is hereby set aside. In it's place I substitute the following order

> "Costs on the scale of attorney-and-client costs".

_____

E. A. OTA
JUSTICE OF APPEAL

_____

I agree **M .M. RAMODIBEDI**
CHIEF JUSTICE

_____

I agree

DR S. TWUM
JUSTICE OF APPEAL

For the Cross-Appellant : Mr S. K. Dlamini

For the Respondent : No appearances