



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Application No. 75/12

In the matter between

DAVID THEMBA DLAMINI

Applicant

and

SYLVIAN LONGENGO OKONDA

Respondent

Neutral citation: David Themba Dlamini v Sylvian Longengo Okonda (75/2012) [2013] SZSC 26 (31 May 2013)

Coram: RAMODIBEDI CJ, MOORE JA, and
MCB MAPHALALA JA

Heard: 17 MAY 2013

Delivered: 31 MAY 2013

Summary: **Jurisdiction – The Applicant bringing an application in the Supreme Court for a review of a decision 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: following the Full Bench case of Kenneth Ngcamphalala v The Principal Judge of the High Court and Others, Civil Application case No. 24/12, 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.**

JUDGMENT

RAMODIBEDI CJ

[1] This is an application for a review of the decision of the High Court (Hlophe J) delivered on 28 June 2011 in favour of the respondent and against the applicant.

[2] The background facts are fairly straightforward and hardly in dispute. In May 2008, the present respondent, as plaintiff, issued summons against the applicant for the following relief:-

- (1) Payment of the sum of E 280,000.00.
- (2) Interest at the rate of 9%.
- (3) Costs of suit.
- (4) Further and/or alternative relief.

[3] The respondent's claim was based on a written agreement of sale in terms of which the applicant sold to the respondent certain: Remainder of portion 637 of Farm 188 Dalriach, Mbabane, Hhohho District for E 680,000.00 as per Deed of Sale, Annexure "A" attached to the summons.

[4] It was the respondent's case that subsequent to the sale in question the applicant sold and transferred the same property to Ayanda Trust and that this constituted a repudiation of the agreement between the parties.

- [5] It was further the respondent's case that he elected to accept the repudiation and termination of the agreement between the parties, an election which was duly conveyed to the applicant by letter dated 13 May 2008, Annexure "B", which was once again attached to the summons.
- [6] The respondent further alleged in his particulars of claim that he paid a deposit of E 280,000.00 which was duly acknowledged in clause 2 of the agreement. He accordingly demanded a refund of the deposit.
- [7] After preliminary excursions, including the respondent's unsuccessful attempt to obtain summary judgment, the matter eventually went to trial before Hlophe J on 28 June 2011.
- [8] It should be noted, however, that on the morning of the trial, the applicant's attorney suddenly withdrew from the matter. The applicant applied for a postponement in order to obtain the services of another attorney.

- [9] The application was fiercely opposed, mainly on the ground that it was solely made to “frustrate” the respondent who had waited for “over 4 years for this matter to be heard.”
- [10] The court *a quo* turned down the applicant’s application for postponement on the ground that he had no *bona fide* defence to the action. As will become apparent shortly, the learned Judge was correct.
- [11] The respondent testified on oath on all the issues set out in the particulars of claim. He closed his case without calling any witnesses.
- [12] When given the opportunity to testify in the matter, the applicant made the following statement which confirmed in no uncertain terms that he had no *bona fide* defence:-

“Because of the evidence herein concerned and the fact that I am shown as having signed, I do not think I should

take an oath and go in there (in the witness box). It is clear I was not sure of what I was doing, but again I have since become aware that ignorance of the law is not an excuse. I therefore do not need to go in there (in the witness box), take an oath and defend myself as I have no defence.

I mean that I have no defence herein and that I will only be causing costs to escalate.” (Emphasis added.)

[13] Indeed, the applicant’s admission that he had no defence is hardly surprising when judged against the fact that he produced receipts which confirmed that he had paid the sum claimed through the applicant’s own estate agent, namely, Bee Zee Kay Investments (Pty) Ltd. It was no doubt precisely for that reason that clause 2, of the Deed of Sale signed by both parties stated the following in part:-

“The purchase price shall be the sum of E620 000 -00 (SI[X] HUNDRED AND TWENTY THOUSAND EMALANGENI ONLY) less E280 000-00 (TWO HUNDRED AND EIGHTY THOUSAND EMALANGENI ONLY.” (Emphasis added.)

[14] On 15 October 2012, and notwithstanding his unequivocal admission that he had no defence in the matter, the applicant launched the present application for an order reviewing the High Court's order dated 28 June 2011.

[15] Before dealing with the applicant's application it is necessary to record, for the sake of completeness, that on 2 April 2013 the applicant filed a notice of appeal in the same matter between the same parties. In fairness to Mr Bhembe for the applicant, when it was pointed out to him at the hearing of this matter that we cannot have an application for review and an appeal between the same parties in the same subject matter subsisting side by side, he very fairly and properly withdrew the appeal filed on 2 April 2013.

[16] Returning now to the applicant's application for a review of the High Court's decision, the point is short and will not bear any elaboration. As the Full Bench of this Court meticulously held in **Kenneth B. Ngcamphalala v The Principal Judge of the High**

Court and others, Civil Application Case No. 24/12, in terms of sections 146 and 147 of the Constitution, read with sections 14, 15 and 16 of the Court of Appeal Act, the jurisdiction of the Supreme Court is wholly statutory and appellate only. Importantly, this Court held that it has no review jurisdiction over High Court decisions. This is precisely so because review is a remedy which lies against inferior courts. In terms of s 139 (1) (a) (ii) of the Constitution, the High Court is a Superior Court. See also **John Roland Rudd v Rex, Criminal Appeal Case No. 26/12**.

[17] Mr Bhembe relied heavily on s 148 (1) of the Constitution for his proposition that the Supreme Court has review jurisdiction over High Court's decisions. This section provides 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.”

[18] The difficulty which Mr Bhembe has is that the application before us is not for “supervision” but “review”. It would appear that counsel wrongly uses the words “supervision” and “review” interchangeably, as if they mean one and the same thing. The scheme of s 148 is that “supervisory” jurisdiction is provided for under subsection 148 (1) whereas “review” jurisdiction appears in subsection 148 (2). The latter subsection reads as follows:-

“(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.” (Emphasis added.)

[19] For the sake of brevity, it will no doubt suffice to quote paragraphs [10] and [11] of the Full Bench judgment in **Kenneth B. Ngcamphalala v The Principal Judge of the High Court and Others** (supra):-

“[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.)

Those remarks, coming as they do from the Full Bench of this Court, decide the present matter against the applicant’s contentions. It is hardly necessary to add that a Full Bench decision cannot be overturned by a court of three judges as we are presently constituted in this matter. Similarly, the case of **Lindimpi Wilson Ntshangase and Others v Prince Tfohlongwane and Two Others, Civil Appeal No. 1/07** on which the applicant sought to rely cannot assist him. Not only

was it a judgment of three judges but the question whether the Supreme Court has review jurisdiction over High Court decisions did not pertinently arise. The same situation obtained in the case of **University of Swaziland v Ndlangamandla and Others, Case No. 10/2008.**

[20] Faced with these difficulties, Mr Bhembe sought to rely on decisions from English common law jurisdictions such as Ghana effectively for the proposition that supervisory jurisdiction means the same things as review jurisdiction. We have meticulously perused the decisions in question but are unable to agree with counsel. None of those decisions say that when the Supreme Court exercises “supervisory” jurisdiction it is necessarily exercising “review” as we understand the concept in this jurisdiction.

[21] Before closing this judgment I should record that the applicant also filed a series of applications purportedly ancillary to the review application. These were as follows:-

(1) On 15 February 2013, the applicant filed an application to have an affidavit of one Sithembile Kunene admitted as part of the applicant's founding affidavit in support of the review application.

(2) On 26 March 2013, the applicant filed a notice of "intention" to strike out certain paragraphs of respondent's answering affidavit as well as the confirmatory affidavit of Zonke Magagula.

(3) On 2 April 2013, the applicant filed a notice of application for condonation of the late filing of the record of proceedings.

[22] In light of the foregoing considerations I consider that the applicant's applications must fail in their entirety.

[23] In the result the following order is made:-

(1) The application for review is dismissed with costs.

(2) The applicant's ancillary applications referred to in paragraph

[21] above are dismissed with costs each.

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

S.A. MOORE
JUSTICE OF APPEAL

I agree

MCB MAPHALALA
JUSTICE OF APPEAL

For Applicant : Mr S. Bhembe

For Respondent : Mr Z. Magagula