



IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

JUDGMENT

Civil Appeal No. 68/2013

In the matter between

MESHACK DLAMINI

Appellant

And

**SANDILE THWALA N.O.
COWIGAN (PTY) LTD
MANZINI CITY COUNCIL
THE REGISTRAR OF DEEDS
MASTER OF THE HIGH COURT
THE ATTORNEY GENERAL
NHLANGANO TOWN COUNCIL
MUNICIPAL COUNCIL OF MBABANE
MATSAPHA TOWN COUNCIL**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent
Eighth Respondent
Ninth Respondent**

Neutral citation: Meshack Dlamini v Sandile Thwala N.O. & 8 others (68/2013) [2014] SZSC 12 (30 May 2014)

Coram: RAMODIBEDI CJ, EBRAHIM JA, MOORE JA, DR TWUM JA and DR ODOKI JA

Heard: 14 MAY 2014

Delivered: 30 MAY 2014

Summary: **Civil Appeal – The doctrine of binding precedent or stare decisis – The High Court, sitting as the Constitutional Court defying the order of the Supreme Court in remitting the matter to it specifically “to retry the case so that all the issues, including the constitutional questions raised by the trial judge and by the parties, could be fully ventilated and adjudicated upon” – Instead, the High Court taking a different direction and insisting that the matter was not a constitutional one and thus deciding it on another basis – Appeal upheld with costs and the order of the Supreme Court reinstated.**

JUDGMENT

RAMODIBEDI CJ

[1] The dispute in this matter has regrettably degenerated into a ding-dong affair as it shuttles unabatedly between the High Court and this Court, something that can only benefit the lawyers financially while the litigants wait in vain for finality.

[2] The chronology of the relevant events in the matter reveals the following:-

- (1) On 8 October 2007, the appellant and the first respondent entered into a written agreement in terms of which the first respondent sold to the appellant immovable property described as Lot 260, Manzini District for E 940,000.00 (Nine Hundred and Forty Thousand Emalangeni). It is the appellant's case that he paid a deposit of E700,000.00 (Seven Hundred Thousand Emalangeni) and that the balance of E240,000.00 (Two Hundred and Forty Thousand

Emalangen) was to be secured by a bank or building Society guarantee drawn in favour of the seller's conveyancers to be furnished within 30 days from 8 October 2007.

(2) On 19 August 2010, and following an apparent misunderstanding between the parties in the matter, the appellant launched motion proceedings in the High Court against the first to sixth respondents. He sought the following relief, *inter alia*:-

(a) Reviewing and setting aside the order of the Magistrate's Court for the District of Manzini granted on 12 April 2010.

(b) Setting aside the transfer of Lot/ ERF 260 in the Manzini District to the 2nd Respondent and directing the 4th Respondent to expunge Deed of transfer No. 491/2010 from the Register of Deeds.

- (c) Directing the 5th Respondent to issue written authorisation of the sale of Lot/ ERF 260 in the Manzini District at **E 940 000.00 (Nine Hundred and Forty Thousand Emalangeni)** property to the Applicant or his bank **SWAZILAND DEVELOPMENT AND SAVINGS BANK.**
- (d) Directing the 1st Respondent to do all that is necessary to give full effect to the written agreement between the Applicant and 1st Respondent dated 8 October 2007, in particular to pass transfer of Lot /ERF 260 in the Manzini District to the Applicant forthwith, failing which the Registrar of the High Court be authorised to sign all relevant documents necessary to pass transfer to the Applicant.
- (e) Directing the 1st Respondent to pay the Applicant's costs at attorney-and-client scale with the rest of the

Respondents to pay costs only if they oppose the application.

- [3] On 15 December 2011, the High Court (MCB Maphalala J) upheld the appellant's application as reflected at paragraph [103] of his judgment. Regrettably, in doing so the learned Judge *mero motu*, without any prayer in that regard, granted the following constitutional relief:-

“(h) The procedure for the recovery of outstanding rates as laid down in section 32 of the Rating Act No.4 of 1995 is null and void for inconsistency with the provisions of sections 21 (1) and (10), 33 (1), 138, 139 (1) and (2) as well as section 140 of the Constitution No. 001 of 2005 as well as conflicting with the Principles of Natural Justice to wit the “Audi Alteram Partem.”

- [4] On 31 May 2012, and on appeal in case No. 51/2011, this Court remitted the matter to the High Court. Because of the strong view which this Court holds on the doctrine of binding precedent or *stare decisis*, it is necessary to reproduce, firstly,

paragraphs [9] and [10] of the judgment of this Court and, secondly, the order itself. The Court minced no words when it said this:-

“[9] From a perusal of the record as a whole and particularly of the judgment of the court a quo, and taking account of the forceful submissions of counsel for the appellants, we are satisfied that the question of the constitutionality of sections of the Rating Act now looms large and is [ameanable] to judicial resolution in the High Court in an atmosphere where all interested parties are able to present ample arguments for or against the constitutionality of the impugned statute or parts thereof.

[10] As is to be imagined, we have read the submissions contained in the heads of argument of all the parties to the existing controversy. In the light of our decision to remit this matter to the High Court for ventilation in that forum, we refrain at this stage from expressing any view concerning the validity of the arguments which have been advanced on both sides by the parties.”

The order itself at paragraph [10] of the judgment is plain, clear and unambiguous. It is in these terms:-

“ORDER

It is the order of this Court that:

1. *The matter be remitted to the High Court to retry the case so that all of the issues, including the constitutional questions raised by the trial judge and by the parties, could be fully ventilated and adjudicated upon.*
2. *The matter be heard expeditiously by a different judge or judges from those who have presided in hearings in the court a qu*
3. *o.*
4. *That the status quo as ordered in the interim rule of the 20th August 2010 be preserved until a full hearing and final determination of this matter.*

No order as to costs.” (Emphasis supplied.)

[5] Astonishingly, on 30 September 2013, the High Court sitting as the Constitutional Court effectively overturned the order of this Court as fully set out in the preceding paragraph. In so doing, the *court a quo* defiantly, it would seem, said the following at paragraph [16] of its judgment:-

“This application is, however, not a constitutional matter or one with a public character. It is purely a private matter.” (Emphasis added.)

As if that was not enough defiance already, the *court a quo* added the following at paragraph [19] of its judgment:-

“[19] For the foregoing, we hold that the applicant has failed to demonstrate that he has the required standing to challenge the validity and sale of the property herein. His remedy against the 1st respondent lies elsewhere and not in this application. That being the case, the application must fail and it is hereby dismissed with costs, such costs to

include those of counsel to be duly certified in terms of the applicable rule of this court.” (Emphasis supplied.)

[6] There can be no doubt in these circumstances that instead of “retrying the case so that all the issues, including the constitutional questions raised by the trial judge (MCB Maphalala J) and by the parties, could be fully ventilated and adjudicated upon” the learned judges *a quo*, with respect, decided to go on a frolic of their own in total defiance of an order of the highest court in the country. It boggles the mind. It is indeed foreign to the doctrine of binding precedent or stare decisis which we subscribe to in this jurisdiction, both in terms of the common law and the Constitution.

[7] If it will help, as I think it should, I discern the need to remind Judges and all the judicial officers in the lower divisions of the apposite remarks of Lord Hailsham of St. Marylebone in the case of Casell & Co. Ltd (No.2) v Broome [1972] AC 1027, namely:-

*“The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal (for us read the High Court), to accept loyally the decisions of the lower tiers. Where decisions manifestly conflict, the decision in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom...”*

[8] Faced with these difficulties, Adv Skinner SC for the 3rd, 8th and 9th Respondents submitted that it would have been preferable for the learned Judges of the High Court to have dealt with the constitutional issue in question. He argued however, that this Court did not bind the learned Judges to consider the constitutional issue. For reasons fully set out above, this submission is untenable. High Court Judges are not entitled to disregard or reverse orders handed down by the Supreme Court. On the contrary, they are duty bound “to accept loyally the decisions of the higher tier.”

[9] It follows from these considerations that the appeal must succeed. In my view, this is a fit case where costs must follow the event. Accordingly, the following order is made:-

- (1) The appeal is upheld with costs.
- (2) The order of the Full Bench of the High Court dated 30 September 2013 is set aside.
- (3) The order of this Court dated 31 May 2012 is hereby reinstated in *toto* as set out in paragraph [4] above.
- (4) The costs in the High Court shall be costs in the cause.

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

A. M. EBRAHIM
JUSTICE OF APPEAL

I agree

S.A. MOORE
JUSTICE OF APPEAL

I agree

DR S. TWUM
JUSTICE OF APPEAL

I agree

DR B.J. ODOKI
JUSTICE OF APPEAL

For Appellant : **Mr. S. Dlmaini**
Assisted by Mr B. Mndzebele

For 1st Respondent : **No appearance**

For 2nd Respondent : **Mr N. Manana**

For 3rd, 8th and 9th Respondents: **Adv B.L. Skinner SC**

For 7th Respondent : **Mr B. Ngcamphalala**