# IN THE SUPREME COURT OF SWAZILAND

Held at Mbabane Case No. 07/2015

In the matter between:

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| **ROGERS BHOYANA DU-PONT** | **Applicant** |
| **and** | |
| **ROBERT FANA NKAMBULE** | **1st Respondent** |
| **THE DEPUTY SHERIFF FOR THE DISTRICT OF MANZINI** | **2nd Respondent** |
| **SWAZILAND BUILDING SOCIETY** | **Third Party** |
| **In re:** | |
| **ROGERS BHOYANA DU-PONT** | **Appellant** |
| **And** | |
| **ROBERT FANA NKAMBULE** | **1st Respondent** |
| **THE DEPUTY SHERIFF FOR THE DISTRICT OF MANZINI** | **2nd Respondent** |
| **SWAZILAND BUILDING SOCIETY** | **Third Party** |

**Neutral citation:** *Rogers Boyana Du-Pont vs Robert Fana Nkambule & 2 Others (07/2015) 2015 SZSC 20 (04th November 2015)*

**Coram:** Hlophe AJA

**For the Applicant:** Mr. D. Manicah

**For the 1st & 2nd Respondents:** Miss. F. Ndlovu

**For the Third Party:** Mr. H. Mdladla

**Date Heard:** 30th October 2015

**Date Handed Down:** 04th November 2015

## Summary

**At its June-July 2015 sitting the Supreme Court on the 10th July 2015 heard an application for a postponement of an appeal enrolled to be heard during the said session to the next session in November 2015. Three judges of the court after considering several unfavorable issues to the Applicant came to the conclusion that the application be non-the less granted on certain specific conditions Chief among these was that the Applicant pays the costs occasioned by the postponement at attorney and client scale including the costs of counsel as certified in terms of the Rules of Court, by the 7th September 2015, failing which the appeal was to be deemed abandoned or withdrawn and was not to be re-enrolled.**

**The Applicant failed to pay the costs by the 7th September 2015 as ordered and on the 8th September 2015, there was filed in court and served on the parties an application for the stay of execution of the order of court aforesaid together with an order deferring the payment of the costs to a later date, preferably, the end of October 2015. The**

**application was never heard in court after its filing and no order was issued. The situation remained in this state until the date of the hearing of the matter several weeks.**

**The issues involved entails the question as to what the effect of the failure to pay the costs on the date ordered by the Supreme Court in granting the postponement of the said appeal was in law. In other words did the conditions put forth by the Supreme Court as going to happen if the costs were not paid take effect?**

**Whether such a deferment of the payment of the costs envisaged in the order in question feasible in law and in the particular circumstances of the matter. In other words is this court functus officio?**

**If such was feasible, whether a proper case has been made for the said relief, including the circumstances under which same should or would be granted.**

**Whether matter should be approached only from the point of view of the court being functus officio. In other words should it not be approached from the point of view of an extension of time prescribed by the court. Whether Applicant's conduct can be condoned in the circumstances. Whether good cause has been shown. That is whether a valid and justifiable reason why there was no compliance with the order of court given and whether a case made on why the non-compliance should be condoned.**

## JUDGMENT

[1] The Applicant in this interlocutory application to a matter pending before the Supreme Court is an Appellant in the said main matter. In that main matter the Appellant appealed against a decision of the High Court in which it had ordered inter alia that he be evicted from a certain property he had owned until such time that it was attached and sold in execution after he had allegedly failed to service the mortgage bond held over it by the third party herein. I say "allegedly failed to service the mortgage bond" deliberately owing to the fact that notwithstanding that the High Court and the Supreme Court had ruled against him on the judgments resulting in the sale of the property the Applicant has always maintained that he had not violated or breached the loan agreement between himself and the third party.

[2] It is not in dispute that after some time the property in question was sold to the first Respondent herein at a sale in execution with the applicant still remaining adamantly in occupation of same. The Applicant remains in such occupation todate.

[3] Following the sale in execution of the property to him, the first Respondent instituted proceedings for the eviction of the Applicant from the property in question. With the judgment of the High Court having favoured the first Respondent and ordered the eviction of the Applicant from the property, the latter noted an appeal to the Supreme Court.

[4] When the appeal was meant to be heard at the recent session of the Supreme Court, which was around June-July 2015; the Applicant applied for the postponement of the matter to the next session of the Supreme Court in November 2015. It is not in dispute that the application in question was vigorously opposed with numerous allegations being made against Applicant contending that he was merely abusing the court process with no case at all.

[5] It was after having considered all those allegations that the Supreme Court had the following to say:

> **"12. The potential prejudice to the first Respondent and third party was canvassed in court and debated in chambers. Even though there are concerns about the upkeep, maintenance and risks in respect of the property, there are remedies available in law, should the Building Society be so advised, which may assist in the preservation of the property. Also, there is a rental income from tenants in occupation to offset interim expenditures. We have also**

**considered the interest of fair and transparent justice in the current era of the administration of justice in the Kingdom and the attendant public interest in this matter, and our decision would obviously impact on the perceptions of the manner in which the Supreme Court operates. The restoration of public confidence in our courts is a delicate process.**

13. **In consideration of the aforesaid aspects, we decided to indeed order a postponement, but on specific terms. It does not require imaginative skills of interpretation to appreciate that in the event of granting the Appellant a postponement, the Appellant does not perform his obligations to the letter, <u>the appeal shall be deemed to have been abandoned, or that it has been withdrawn, and that it shall not be re-enrolled</u>.**

14. **The order made on the 10th July 2015 is hereby reiterated:-**
**The appeal herein is postponed for hearing to the November 2015 session of the Supreme Court. Costs of the postponement are ordered against the Applicant/Appellant, on the scale of attorney and client inclusive of the certified costs of counsel (under rule 68 (2) which costs are ordered to be paid on or before the 7th day of September 2015."**

[6] It is not in dispute that the first Respondent and the third party prepared and had taxed the Bills of Costs for the costs order granted by the Supreme Court, which were allowed at E134, 152.00 in total. The Applicant however failed to comply with the foregoing order of the Supreme Court as he did not pay the costs in question by the 7th September 2015, notwithstanding that the said Bills of Costs were taxed and allowed at the said amounts some twenty or so days before the 7th September 2015.

[7] It was in apparent realization that the order concerned had not been complied with when on the 8th September 2015, the Applicant instituted the current application proceedings and served same on the same day with the Notice of Motion rather curiously indicating on the face of it that same was to be heard the previous day, the 7th September 2015 at a time not indicated thereon. Taken innocently one would see this as an error or an indicator that were the application not delayed in being registered in court it was meant to be heard on the said date. Whatever the case the real reason is only known to the applicant why it had to reflect such a date without the time when it was itself filed and served on the next day. In the Notice of Motion the reliefs sought are couched in the following manner:-

**“1. Dispensing with the procedures and manner of service pertaining to form and time limits prescribed by the Rules of the Honourable Court and directing that the matter be heard as one of urgency.**

**2. Condoning the Applicant for the non-compliance with the said rules of court.**

**3. Deferring the date of payment of the costs of the Judgment of their Honourable s (sic) Justices of the above Honourable Court handed down on the 10th July 2015, in this matter on the ground that the Applicant Appellant is still gathering funds and has not abandoned his appeal.**

**4. Staying the execution of the order of the 10th July 2015, pending the finalization and determination of an appeal to be heard on the November 2015 session of the Supreme Court sitting.**

**5. Directing that prayer 3, 4 and 5 operate as an interim order, and that a *rule nisi* do hereby issue returnable on a date to be determined by the above Honourable court;**

**6. Costs of suit in the event the application is opposed;**

**7. Further and/or alternative relief.**

[8] It is noteworthy that although the prayers set out above indicate that a rule nisi operating with immediate effect in terms of prayers 3, 4 and 5 was sought, there is no indication that the court was ever asked to consider whether or not the rule sought could be granted. It is however clear that there was never at any stage granted an interim order to operate in Applicants so as to maintain the status quo as operated until the 7th September 2015 when the conditions as regard the failure to comply with the order of court were ordered to automatically take effect. This is despite an apparent acknowledgment as at the time the application was made that the status quo as created by the order of the Supreme Court vis-à-vis the extension of the dies towards the payment of the costs beyond the 7th September 2015, could only be achieved through the grant of an interim order in that regard, strictly speaking. As it is, it should not be in dispute that legally, the consequences mentioned by the Supreme Court at the time it granted the order, that failure to pay the costs (as taxed by the Respondents) would result in the appeal being deemed abandoned and/or withdrawn and not capable of being re-enrolled kicked in at close of business on the 7th September 2015. No doubt the Applicant was trying to contend with this legal reality when he moved the application he did, without consummating the process on the 8th September 2015.

[9] This application is therefore more about whether this the failure to pay on the 7th September 2015 as ordered, signalled the end of the matter hitherto pending before the Supreme Court or whether the order on the payment of costs could still be extended and whether if the latter was possible, what it is, that needed to be established by the applicant in his papers to ensure such extension. The first Respondent and the Third Party sought to suggest that that signaled the end of the matter pending on appeal as the court had become functus officio when the Applicant on the other end suggested that the order for payment and the consequences as ordered by the court could be deferred. This seems the gravamen of this application to which I shall have to revert later on

[10] It suffices for me to point out that with the appeal having been allocated a hearing date which I was informed by the parties' counsel is the 10th November 2015, I was on the 26th October 2015, appointed an Acting Supreme Court Judge by the Acting Chief Justice to deal with the current interlocutory application to the appeal matter pending before the Supreme Court. I was advised this application needed to be dealt with and finalized prior to the main appeal matter meant to proceed on the 10th November 2014. It was brought to my attention that the issue of an appointment of an Acting Supreme Court Judge to deal with this aspect of the matter, had been discussed and agreed upon in a meeting held in the chambers of the

Acting Chief Justice on the same day of my appointment referred to above; the 26th October 2015.

[11] I must mention for the completeness of this picture that following my said appointment including my having understood the urgency entailed in the matter, I called the parties to my chambers on the 27th October 2015, whereat I brought to their attention my having been appointed an Acting Supreme Court Judge to deal with the matter and that I was advised the matter was urgent when at least viewed from the pending appeal which was meant to proceed on the 10th November 2015 as stated above, and needed to be dealt with prior to the Supreme Court sitting aforesaid. It merits mention that despite a specific invitation from myself on whether anyone of the parties had a problem with that arrangement none indicated any. In fact counsel for the Respondents and Third Party indicated there and then that they welcomed the move with Miss Mazibuko for the Applicant indicating she was to take instructions and avert in due course. A date for the hearing of the matter was therefore set as the 30th October 2015.

[12] Of course it is true that before we could even deal with the question whether any of the parties had any objection to my hearing the matter and setting the date, Mr. Mdladla for the Third Party had openly reminded me

that I had dealt with the application for rescission of the default judgment between the Applicant and the current Third Party in an earlier version of the matter. I indicated my awareness of that aspect of the matter including the fact that it did not make me feel conflicted at all, and that besides, the judgment I had issued then dismissing the rescission application, had been upheld by the Supreme Court and was no longer part of the one being challenged. Therefore none of the parties indicated unhappiness with my hearing the matter, which was set down for hearing accordingly.

[13] Although she had initially indicated that she was to take instructions on whether or not there was an objection to my hearing the matter on the 30th October 2015, Applicant's counsel Miss Mazibuko, who appeared for the Applicant in court together with Mr. Manicah, never raised any objection but instead were in court ready to argue the matter as arranged, which then happened.

[14] As indicated above the starting point is the question whether this court is functus officio to deal with this matter, as contended by the first Respondent's counsel who, in view of the point in limine she had raised was the first one to address me. She contended this court was functus officio because it had no power to correct, amend or alter the order it had

made, because according to her, that order was final. The matter was approached with this point being the only one raised in limine.

[15] I agree that the functus officio doctrine or principle is one of the mechanisms through which the law gives expression to finality in matters. It espouses that once a court pronounces a final judgment or order, it no longer itself has authority to correct, alter or supplement it. Put differently once it has fully and finally exercised its jurisdiction its authority over a subject matter ceases. In ***Retail Motor Industry Organization and Another vs Minister of Water and Environmental Affairs Supreme Court of Appeal (RSA) Case No. 145/2013 (unreported),*** there is cited the following excerpt from the article by Daniel Malan Pretorius, titled, "**The Origins of The Functus Officio Doctrine with Specific Reference to its Application in Administrative Law"; (2005) 122 SALJ 832 at 832;** which is instructive:-

> **"The functus officio doctrine is one of the mechanisms by means of which the Law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter…The result is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker?"**

[16] The functus officio principle is however subject to various exceptions which are to the effect that in certain instances the court may correct, alter or supplement its order provided the application seeking that is made within a reasonable time. This will happen where:-

> “**1. The principal judgment or order is in respect of accessory or consequential matters; for example costs that a court inadvertently failed to grant.**
>
> **2. The meaning of the judgment or order on a proper interpretation remains obscure or ambiguous provided the alteration does not alter the sense and substance of the judgment or order.**
>
> **3. There is a clerical or arithmetical error in the judgment and the idea is to give effect to its true meaning.**
>
> **4. Counsel in the matter has argued the merits but not the costs and the court, in its judgment also makes an order relating to costs.**

In these situations the court may alter or supplement its order without offending the functus officio principle. See in this regard Herbstein and Van Winsen’s; **The Civil Practice of the The Supreme Court of South Africa, 4th Edition, Juta and Company at page 686”.**

[17] It seems to me that the present matter falls within one of the exceptions to the functus officio doctrine which is that the judgment or order complained of was in relation to an accessory or consequential matter

which it could alter without affecting or changing the sense or substance of the judgment. The question to ask therefore being in reality whether in the circumstances of the matter there has been made a case for altering the earlier order made. Whether or not this has been done is a question I shall deal with later on in this judgment.

[18] It seems to me that there are even more plausible grounds on which the court may alter an order it previously made. This would happen where the earlier order was an interlocutory one and where the order in question concerned the question of costs. An order is interlocutory where its grant, and by extension its alteration, does not affect the order in the main matter. See Paragraph 20 herein below and the authorities cited thereat. In this matter what is challenged is the order for costs granted in completely interlocutory matter having no bearing in the issues pending in the appeal before the Supreme Court. At page 686 of Herbstein and van Winsen's, **<u>The Civil Practice of The Supreme Court of South Africa (Supra),</u>** this position is put in the following words:-

> **"The courts have frequently corrected or supplemented their orders on costs. The general rule that a court may not alter its own judgment does not apply to interlocutory orders, which are subject to variation".**

[19] The order complained of was a preparatory one which was granted in the course of an interlocutory matter. To this extent it was not a final order and the functus officio principle may have to be extended on this ground alone. It also related to costs. I therefore cannot agree that this court is for these reasons functus officio and that it can no longer deal with this matter. The real question is simply whether a case has been made for the reliefs sought; that is for the alteration or variation of the manner in which the costs were ordered as having to be paid. In other words, the order *a quo* can only be interfered with if good cause for the reliefs prayed for can be shown to have been made.

[20] In ***Duncan N.O. v Minister of law And Order 1985 (4) SA 1*** at page a, the position was put as follows with regards the variation of an order granted in an interlocutory application:-

> **"An order made by a Provincial or Local Division of the Supreme Court that the Appellant, in an appeal against a judgment of that Division, give security for the costs of the Respondent on appeal does not bear directly upon the issue to be decided in the appeal. It cannot affect that decision. It is therefore a simple interlocutory order and is accordingly; open to reconsideration, variation or rescission, by the court which granted it, on good cause shown"**

[21] The summary of the facts in the ***Duncan N. O. v Minister of Law And Order*** (Supra) are that at the time the court granted the Applicant leave to appeal a judgment dismissing his claim for damages, it had; at the behest of both counsel, ordered that the leave concerned was subject to the Applicant providing security for the Respondent's costs. This latter aspect of the matter was later challenged in a subsequent application and a conclusion was reached that same was erroneous and should not have been granted and made to attach to the order for leave to appeal. The order that had directed that security for costs be provided was interlocutory and could be altered without there being a direct effect on the matter pending before the Court of Appeal. Explaining its nature and the circumstances under which same could be varied the court had the following to say which is apposite herein:-

> **"The order made by me that the Applicant give security for the costs of the Respondent on appeal does not bear directly upon the issue to be decided in the appeal. It cannot affect that decision. It is therefore a simple interlocutory order. It is open to reconsideration, variation or rescission on good cause shown".**

[22] I am therefore convinced it cannot be said that this court is functus officio and cannot entertain an application vis-à-vis the question of costs which were merely accessory in nature and were a simple interlocutory order which does not bear directly upon the issue to be decided in the

appeal pending before the Supreme Court. This means that this court can therefore vary or rescind the order by this court that costs be paid by the 7th September 2015 provided good cause can be shown.

[23] This aspect of the matter should be viewed against the common cause position that when it granted Applicant the postponement of the appeal in the previous session of the appeal sitting, the Supreme Court granted Applicant an indulgence on the terms that he pays the costs occasioned by the postponement by the 7th September 2015. The Supreme Court had even gone to clarify what would happen in the event of none payment of the said costs which is that, the appeal will be deemed to have been abandoned or withdrawn and would not be reinstated. I must clarify that although during the argument of the matter Mr. Manicah submitted, contrary to the contents of Applicants papers, that the conditions for the postponement of the appeal was not the payment of costs by the 7th September 2015, I cannot agree. The Applicant in his own, words moved this application to extend the time for the payment of the costs ordered by the Supreme Court in its last sitting in order to avoid the above stated consequences. It was a result instituted on the 8th September 2015 in an attempt to comply with the date fixed by the Supreme Court for the payment of costs, in order to avoid the above consequences.

[24] It seems to me that there are several fundamental problems with the Applicant's application, who in law is required to show good cause in order to succeed as indicated in the ***Duncan N.O. v Minister of Law and Order*** Judgment (Supra) referred to above. Firstly, the Applicant moved the application for the variation of the order complained of, after the expiry of the time set by the court with the consequences of the failure to comply as set by the same court having already kicked in. In other words, after the 7th September 2015 had come and gone, with the result that the appeal was by law now deemed abandoned or withdrawn without it being capeable of re-enrolment, according to the court order.

[25] As this application is moved out of time, there is no application for condonation on the failure to comply with the court order granted by the court per its judgment. Notwithstanding that the application was eventually sued out of court on the 8th September 2015, there is no indication that the Applicant did anything to have it heard after registering it in court at least so as to have guidance on whether the interim orders sought were being granted or not. Legally, that an application to have the order for the payment of costs by a certain date was challenged after the lapse of the date in question can only mean that the conditions on what was bound to happen in the event of failure to pay the costs by such date did happen, and the application concerned had no

automatic legal effect on the result as previously pronounced by that court.

[26] It is with these conditions in mind that one is now required to determine whether or not the Applicant's application does meet the requirements of good cause. I did not hear the Applicants' counsel to be arguing that their application did meet this crucial requirement. In law good cause has been defined as comprising two requirements namely the reasonable and acceptable explanation for the failure to act as required or the default and a valid defence (if the Respondent seeks the relief) or the prospects of success (if the Applicant seeks the order).

[27] In his application the Applicant says the following as a basis for his application:

> **"10. I submit that I have prospects of success on appeal as such I do not want to be deemed to have abandoned the appeal. I have been together with my family running from pillar to post securing the sum of E134, 152.00 (One Hundred and Thirty Four Thousand One Hundred and Fifty Two Emalangeni) being the sum of the taxed bill of costs by both the 1st and 3rd Party herein. I enclose the taxed bills and they are marked Annexure "RBD1 and 2" respectively.**

**11.** **I am further advised that I should apply for the stay of the execution of the order of the 10th July 2015 delivered in open court on the 29th July 2015. The stay of the order is pending the payment of the costs. I submit that being unemployed and no source of income (sic) I have struggled to gather the sum of or the costs since they are on a high and steep. I further submit that I have roped in my children to assist me gather and compound the sum of E134, 152.00 so that by November my appeal will proceed as stated".**

**12.** **I submit that such stay is discretionary and the court will not exercise that discretion in such a way as to bar me from pursuing my appeal. I submit that I am not escaping from paying the costs but I am still putting together the funds. <u>I submit that I didn't incur the costs by abuse of the process of the court but by reason of the court not allowing me all my procedural time limits in terms of the Rules of this Honourable Court thus I was granted</u>.**

**13.** **I further submit that my failure to meet the deadline of the 7th September is not deliberate and I have not contumaciously refused to pay the costs awarded against me and I am not vexetiously withholding them. I wish to reiterate that I wish to severe (sic) my payment in order for my appeal to proceed in November 2015. However given the importance of this matter, to myself I am wish (sic) to pursue the appeal to enable myself to have full access to justice.**

> **14. There is no prejudice that the first, second Respondent and Third Party will suffer if the stay of the payment of costs is deferred to another date by this court. There is no prejudice being suffered by the first Respondent since all rentals are paid over to the Swaziland Building Society. The first Respondent has access to those funds. In any event if I had been able to secure the funds the matter was to proceed in November 2015.**

[28] It is difficult to appreciate the Applicant's case with ease particularly as concerns the requirements of good cause which is the case an Applicant for the relief sought by the Applicant is required to make. In a nutshell all the Applicant says in the foregoing paragraphs is that; he has prospects of success in the matter (without saying what they are) and that he has tried hard to raise the amount of money comprising the costs as taxed, but has been unable to raise it and has since roped in his children to assist. No prejudice will be suffered by the Third Party because it is still benefitting from the rentals it receives from the tenants of the property.

[29] I have no doubt that the Applicants' application does not meet the requirements of good cause as necessitated by the reliefs he seeks. I am not convinced a justifiable reason has been given why there was failure to

comply with the order put forth by the Supreme Court when it granted Applicant a postponement. The Applicant seems to be suggesting that he is unable to raise the amount required for the taxed costs. By making such a bare assertion, the Applicant seems to be losing sight of fact that when postponing the matter to the November session; the Supreme Court was granting him an indulgence which it felt had to be granted subject to the above stated terms. It cannot in my view avail the Applicant to say he cannot afford the amount for costs and then content himself that he has since satisfied the requirement of a reasonable and acceptable explanation or a reasonable justification on his failure to comply.

[30] The Applicants' position is complicated by his contending himself with a bare assertion on whether or not he has prospects of success which he does not set out. For him to succeed he needs to allege and proves that he has the prospects of success including what they are. To this point the court has not been informed what these prospects of success in the appeal itself are and does not see any when considering the fact that the Applicant's eviction has been proceeded by several judgments of the courts in Swaziland against him. I have no doubt when it postponed the matter on the condition he has to pay the costs by that date failing which the appeal was to be deemed abandoned or withdrawn and was not to be reinstated; it was alive to the fact that he had no prospects of success.

[31] To ensure that the possibility of reaching a prejudicial judgment when he perhaps does have any such, I enquired from counsel during the hearing of the matter what the Applicants' prospects of success were. It is a fact that I was not given any such with counsel saying they were going to raise them during the appeal which unfortunately not what the law says as it requires such to be made at this point if an application of this nature is made. I am convinced therefore that no prospects of success have been shown to exist in the matter, which by the way is now an appeal against an order for the eviction of the Applicant from a property which the courts have repeatedly found he could not legally keep following its having been sold to a new party who now seeks an order allowing him the right occupy same as the law provides.

[32] I should mention that when postponing the matter to the November session, the Supreme Court did indicate it was not influenced to make the order it did because of any findings there were prospects of success but mainly because it wanted to give the Applicant a chance and dispel any perception it was dealing harshly with the Applicant. It gave him the chance it said as part of trying to gain the public confidence following the negative publicity it had just received.

[33] It was otherwise aware of the Applicants conduct previously which it described as unbecoming. Unfortunately the image of the Judiciary is a very delicate item. Whereas to maintain it during the hearing of the postponement made in July 2015 the Supreme Court had to indulge Applicant in a matter where he did not meet the requirements, the same thing the court was trying to avoid will be there if it keeps yielding to the Applicant's actions outside law from those who are deserving. It is for this reason I cannot agree that even this time the court could still grant Applicant the relief he wants outside law. I must say I find it strange that notwithstanding the court having made it clear it was granting the postponement to try and quell the perceptions of harshness the Applicant found it still plausible for it to say that the costs it was being made to pay were a result of the court having not afforded it all of its rights of appeal, a contention that is completely preposterous in the circumstances of this matter.

[34] In as much as the Applicant has not taken advantage of the indulgence given him by the Supreme Court and in so far as there are no prospects of success whatsoever mentioned by Applicant and in so far as there is no indication he is able to comply with the order made by the court, and pay the costs before the appeal hearing, it is clear the Applicant has not made out a case for the relief sought. I am therefore convinced that the

Applicants' application cannot succeed and same is dismissed with costs. For the sake of clarity the conditions put forth by the Supreme Court at the time it postponed the main matter to the November session have since kicked in and the matter is to be viewed in that light.

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**N. J. HLOPHE**

**JUDGE - HIGH COURT**