IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No: 67/2014

In the appeal between:

SIBONISO CLEMENT DLAMINI NO	**APPELLANT**
VS	
PHINDILE NDZINISA	**FIRST RESPONDENT**
THE MASTER OF THE HIGH COURT	**SECOND RESPONDENT**
THE ATTORNEY GENERAL	**THIRD RESPONDENT**

Neutral citation: *Siboniso Clement Dlamini NO and Phindile Ndzinisa and Two Others (67/2014) [2014] SZSC08 (9th December 2015)*

CORAM: **M.C.B. MAPHALALA, CJ**
DR B. ODOKI, JA
N.J. HLOPHE, AJA
M. DLAMINI, AJA
M.J. MANZINI, AJA

Heard : 16th November 2015
Delivered : 9th December 2015

Summary

Civil Procedure – review application in terms of section 148 (2) of the Constitution of Swaziland – principles governing review proceedings by the Supreme Court of its own decisions considered – held that in exercising its discretion the Court is not bound by the principles of *res judicata* and *functus officio* – held further that the Court would review its previous decision made in its appellate jurisdiction only in exceptional

circumstances where a miscarriage of justice has occurred – held that the failure of the Court in its appellate jurisdiction to invite the applicant to address the Court prior to making an order for costs de *bonis propriis* was reviewable on the basis that the applicant was denied his right to natural justice, the *audi alteram partem* – held further that the order directing the applicant to pay monthly maintenance was not reviewable on the basis that the applicant had failed to account for his administration of the deceased estate over a considerable long period of time to the prejudice of the beneficiaries – application accordingly dismissed – no order as to costs.

JUDGMENT

M.C.B. MAPHALALA, CJ

[1] This application was lodged on the 11th August 2015 in terms of section 148 (2) of the Constitution seeking an order reviewing and setting aside a decision of this Court delivered on the 29th July 2015. The applicant further sought an order for costs of suit against the respondents jointly and severally.

[2] Section 148 of the Constitution provides the following:

> **"148. (1) The Supreme Court has supervisory jurisdiction over all courts of judicature and over any adjudicating authority and may, in the discharge of that jurisdiction, issue orders and**

directions for the purposes of enforcing or securing the enforcement of its supervisory power.

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

(3) In the exercise of its review jurisdiction, the Supreme Court shall sit as a full bench."

[3] The Supreme Court is the final court of appeal,[1] and, it is vested with appellate jurisdiction to hear and determine civil and criminal appeals from the High Court.[2] Decisions of the Court, on questions of law, are binding on the other courts inclusive of the High Court, subordinate courts, specialised courts, Swazi courts as well as tribunals exercising a judicial function.[3] However, the Supreme Court is not bound to follow the decisions of other courts save its own decision.[4] On the other hand, as the final court of appeal, the Supreme Court may depart from its own previous decision if it was wrongly decided.[5]

[4] Section 148 (2) of the Constitution provides that the Supreme Court may review its own decision on such grounds and subject to "such conditions

[1] Section 146 (1) of the Constitution.
[2] Section 146 (2) of the Constitution.
[3] Section 146 (5) of the Constitution.
[4] Section 146 (5)
[5] Ibid footnote 4.

as may be prescribed by an Act of Parliament or rules of court". It is common cause that Parliament has not yet prescribed the conditions governing the review process. Similarly, rules of court have not yet been made to deal with review proceedings under section 148 (2) of the Constitution. The Constitution provides that the review application should be heard by a full bench of the Court.[6]

[5] Public policy requires that there should be an end to litigation in accordance with the doctrine of *res judicatae*. The object of this doctrine is to provide legal certainty, the finality of court decisions, the proper administration of justice as well as to further prevent endless litigation between the same parties over the same cause of action.

[6] Section 148 (2) of the Constitution is intended to provide an exception to the doctrine of *res judicatae*; and, the review is only applicable in exceptional circumstances where justice and fairness requires. The Supreme Court should allow the review only in exceptional circumstances "where it appears that its previous decision was wrongly decided".

Section 146 (5) of the Constitution provides the following:

[6] Section 148 (3)

"146. (5) While it is not bound to follow the decision of other courts save its own, the Supreme Court may depart from its own previous decision when it appears to it that the previous decision was wrong. The decisions of the Supreme Court on questions of law are binding on other courts."

[7] Theron AJ delivering a unanimous judgment of the South African Constitutional Court had this to say in the case of *Thembekile Molaudzi v. The State* (2015) ZACC 20 at para 37;

"37. . . . . The rule of law and legal certainty will be compromised if the finality of a court order is in doubt and can be revisited in a substantive way. The administration of justice will also be adversely affected if parties are free to continuously approach courts on multiple occasions in the same matter. However, legitimacy and confidence in a legal system demands that an effective remedy be provided in situations where the interests of justice cry out for one. There can be no legitimacy in a legal system where final judgments, which would result in substantial hardship or injustice, are allowed to stand merely for the sake of rigidly adhering to the principle of *res judicatae*."

[8] Lord Woolf CJ, the Lordship Chief Justice of England and Wales in *Taylor v. Lawrence* (2003) QB 528 (CA) at para 55 had this to say:

> **"55. . . . . The need to maintain confidence in the administration of justice makes it imperative that there should be a remedy. The need for an effective remedy in such a case may justify this court in taking the exceptional course of reopening proceedings which it has already heard and determined. What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations."**

[9] The Ghanaian Supreme Court has jurisdiction to review its previous decisions where exceptional circumstances exist which have resulted in the miscarriage of justice.[7] His Lordship Adade JSC, delivering a judgment of the Ghana Supreme Court in *Mechanical Lloyd v. Narty* (1987-88) 2 GLR 598 held that the review jurisdiction is a special jurisdiction to be exercised in exceptional circumstances where fundamental and basic error may have inadvertently been committed by the court and causing a gross miscarriage of justice.

[10] Articles 132 and 133 of the Ghana Constitution is worded in the same manner as section 148 (2) of the Swaziland Constitution. The emphasis in both Constitutions is to correct a wrong judgment which has resulted in

[7] Supreme Court Rules of Ghana 1996.

manifest injustice to one of the parties.[8] See also the Supreme Court case of *Vilane Simon and Another v. Lipney Investment (PTY) Ltd* Civil Appeal Case No. 78/2013 at para 6 where the learned Chief Justice Michael Ramodibedi stated that the review power given to the Supreme Court in terms of section 148 is not review in the ordinary meaning but "it is confined to reconsidering and correcting manifest injustice caused by an earlier order".

[11] His Lordship Majahenkhaba Dlamini AJA delivering a unanimous judgment of the full bench of the Supreme Court of Swaziland in the case of *President Street Properties (Pty) Ltd v. Maxwell Uchechukwu and Four Others* Civil Appeal Case No. 11/2014 at para 26 and 27 had this to say with regard to the review jurisdiction of the Supreme Court in terms of section 148 (2) of the Constitution:

> **"(26). In its appellate jurisdiction the role of this Supreme Court is to prevent injustice arising from the normal operation of the adjudicative system; and, in its newly endowed review jurisdiction, this Court has the purpose of preventing or ameliorating injustice arising from the operation of the rules regulating finality in litigation whether or not attributable to its own adjudication as the Supreme Court. Either way, the ultimate purpose and role of this Court is to avoid in practical**

[8] Ibid footnote 5

situations gross injustice to litigants in exceptional circumstances beyond ordinary adjudicative contemplation. This exceptional jurisdiction must, when properly employed, be conducive to and productive of a higher sense and degree or quality of justice. Thus, faced with a situation of manifest injustice, irremediable by normal court processes, this Court cannot sit back or rest on its laurels and disclaim all responsibility on the argument that it is *functus officio* or that the matter is *res judicata* or that finality stops it from further intervention. Surely, the quest for superior justice among fallible beings is a never ending pursuit for our courts of justice, in particular, the apex court with the advantage of being the court of the last resort.

27. It is true that a litigant should not ordinarily have a 'second bite at the cherry', in the sense of another opportunity of appeal or hearing as the court of last resort. The review jurisdiction must therefore be narrowly defined and be employed with due sensitivity if it is not to open a flood gate of reappraisal of cases otherwise res judicata. As such this review power is to be invoked in a rare and compelling or exceptional circumstance . . . . It is not review in the ordinary sense."

[12] It is common cause that the deceased, Martin Musa Ndzinisa, died on the 25th July, 2001. On the 27th March 2002, the Master of the High Court appointed the applicant as the co-executor to administer the estate of the deceased in terms of section 22 of the Administration of Estates Act

No. 28/1902. The other co-executor was Attorney Mzamo Moses Nxumalo who subsequently died.

[13] It is not disputed that the applicant received a sum of E875, 477.14 (eight hundred and seventy five thousand four hundred and seventy seven emalangeni fourteen cents) from the Master on behalf of the estate. On the 19th June 2002 he received a further sum of E34, 541.85 (thirty four thousand five hundred and forty one emalangeni eighty five cents) from the Master of the High Court. However, the applicant did not wind up the estate in accordance with the provisions of the Administration of Estates Act.

[14] The first respondent lodged an application on the 13th October 2010 before the High Court calling upon the applicant to produce with the Master a detailed report and account of all statements, vouchers and receipts utilized on transactions of the estate funds of the deceased. She further sought an order for the removal and replacement of the applicant as the executor in terms of section 84 of the Administration of Estates Act in the event of his failure to account. She also sought an order directing the applicant to remit all moneys received on behalf of the estate to the new executor appointed by the court in terms of section 28 of the

Administration of Estates Act, in the event that the applicant is failing to account.

[15] On the 2nd October, 2012 the High Court issued a consent order directing the applicant to lodge the account not later than 7th December 2012. Notwithstanding the order aforesaid, the applicant did not comply with the order of court. Subsequently, on the 13th March, 2014 the first respondent lodged an urgent interlocutory application seeking an order directing the applicant to pay monthly maintenance of E8, 000.00 (eight thousand emalangeni) from her half-share inheritance of the estate pending finalization of the main application. The basis of the urgency was that she needed urgent medical treatment; and, that her diagnosis had revealed that she was suffering from renal stones and needed an operation for the management of the lower abdominal pains. She bitterly lamented the failure by the applicant to wind up the estate since 2001.

[16] It is not in dispute that the first respondent is unemployed, and, that she expects to receive financial assistance from her share of the estate funds. A *rule nisi* was issued by the court on the 14th March 2014 directing the applicant to pay monthly maintenance of E8, 000.00 (eight thousand emalangeni) to the first respondent from the half-share inheritance in the estate pending finalization of the main application. The rule was

returnable on the 28th March, 2014. The *rule nisi* further called upon the applicant to show cause on the 28th March 2015 why the rule should not be confirmed.

[17] The applicant in turn filed a Notice of Intention to Oppose as well as a Notice To Raise A Point of Law. His contention was that the application was fatally defective on account of misjoinder. He contended that he had resigned as the executor and that he had lodged the account with the Master of the High Court showing that the beneficiaries had utilized all the estate funds. Notwithstanding that he had been served with the application, the applicant did not attend the hearing, and, the court granted the *rule nisi* which was to operate with immediate effect as an interim order.

[18] On the 17th March 2014 the applicant lodged an interlocutory application seeking an order discharging the rule nisi issued by the court on the 14th March 2014. His contention was that the *rule nisi* had been issued contrary to the principle of the "*audi alteram partem*" since he had filed the Notice of Intention to Oppose as well as a Notice to Raise a Point of Law. He argued that the court should not have issued a *rule nisi* without giving him an opportunity to be heard. However, he conceded that he did not attend court during the hearing because of other prior commitments;

he further conceded that his Attorney did not attend court as well for reasons unknown to him.

[19] The applicant contends that the first respondent was not entitled to the *rule nisi* on the basis that he was no longer holding funds on behalf of the estate. He further contends that he had resigned as executor of the estate and that he could not be called upon to account. The resignation letter was addressed to the Master and dated 23rd January 2014. It reads in part as follows:

> **"....**
> **RE: ESTATE LATE: MARTIN MUSA NDZINISA L161/2001**
>
> **The executor's account of his administration of the estate was filed with your office.**
> **In order to avoid further harassment our Siboniso Clement Dlamini hereby forthwith resigns as executor of this estate.**
>
> **Yours faithfully,**
> **S.C. Dlamini & Company (signed)"**

[20] However, it is apparent from the evidence that the applicant did not lodge the account with the Master of the High Court as directed by the

Court on the 2nd October 2012; and, there is no evidence of a distribution account submitted by the applicant and endorsed by the Master. Similarly, the applicant could not lawfully resign from being an executor without giving an account of the estate funds. Furthermore, the Master of the High Court could not accept his resignation before he could account for the estate funds. In addition the Master could not appoint another executor when the applicant had not made an account. Accordingly, the Notice to Raise a Point of Law could not succeed, and, the applicant was properly joined in the proceedings.

It is apparent from the evidence that the applicant still hold monies on behalf of the estate, and, that he has failed to distribute the monies to the lawful beneficiaries. The attempt by the applicant to resign before he could account constitutes a serious derelection of his duties as an executor of a deceased estate.

[21] The contention by the applicant that the distribution account was handed to the Master's Secretary Ntombi Sithole by Sincedzile Sibandze was disputed by the Master's Secretary in an affidavit deposed on the 23rd April, 2014. At paragraphs 3 and 3.1 of her affidavit, she had this to say:

> **"3. I deny that I received the Distribution Account from Sincendzile Sibandze on the 7th December 2012. I state so**

due to the fact that every document I would receive I would register same for redistribution to the relevant Assistant Master's Office within the various regions of Swaziland. Upon receipt of documents, I would thereafter advise the driver that there would be documents to be redistributed amongst the regions.

3.1 Upon receipt of a document I would register the date of receipt; hence, I never received any purported Distribution Account from Sincendzile Sibandze on the 7th December 2012 or ever at any point in time. Such is not true and an attempt by the First Respondent to avert liability. Lastly, may I see where I have signed that I have received the distribution account."

[22] The applicant was lawfully appointed by the Master as the executor of the deceased estate[9] and further granted Letters of Administration. However, there is no evidence that the applicant gave security to the satisfaction of the Master for the due and faithful administration of the estate to which he was appointed.[10] The law provides that every executor dative shall before being permitted to administer an estate of the deceased provide security to the satisfaction of the Master for the due and faithful administration of the estate to which he has been appointed.[11] The

[9] Section 22 of the Administration of Estates Act.
[10] Section 30 of the Administration of Estates Act.
[11] Ibid footnote 10

underlying object of the security is to pay the beneficiaries the monies due to them in the unfortunate event that the executor has squandered estate funds.

[23] The executor is further required by law to make an inventory showing the value of all property, goods and effects, movable and immovable belonging to the estate.[12] If the executor finds further property belonging to the estate, he is required to file a further inventory with the Master in respect of the subsequent property.[13] It is not disputed that the applicant, in this matter, only disclosed the amount of E875, 477.14 (eight hundred and seventy five thousand four hundred and seventy seven emalangeni fourteen cents) received from the Master; however, he did not disclose the additional amount of E34, 541.85 (thirty four thousand five hundred and forty one emalangeni eighty five cents) which he received from the Master of the High Court. The applicant did not dispute the evidence that he failed to disclose this amount of money; such conduct by the applicant does not constitute "due and faithful administration of the estate".

[24] The executor is enjoined by law to frame and lodge with the Master a full and true account supported by vouchers of the administration and distribution of the estate within six months of the issuing of Letters of

[12] Section 37 Administration of Estates Act.
[13] Ibid footnote 12.

Administration.[14] In addition the executor is legally enjoined to render periodical accounts as the Master may direct of his administration and distribution until the estate is finally liquidated.[15]

[25] The deceased died on the 25th July 2001, and, the applicant was issued with Letters of Administration on the 27th March 2002 upon his appointment as the executor. According to the Master's Report dated 17th March 2005, the applicant was invited by the Master, in terms of section 52 of the Administration of Estates Act to submit the final account within thirty days; however, the applicant failed to do so. Similarly, no periodical account was ever submitted to the Master by the applicant ever since he was issued with the Letters of Administration in 2002.

[26] In addition the applicant has never applied for an extension of time to submit the account as required by law. The law requires the executor to apply for such an extension if he is unable to comply with the statutory six months period required to submit the account.[16] In the event that the Master refuses to grant the extension, the executor has the right to approach the High Court to review the Master's decision.[17] It is not in dispute that the applicant did not apply for an extension of time to submit

[14] Section 51 of the Administration of Estates.
[15] Ibid footnote.
[16] Section 51 (1) of the Administration of Estates Act.
[17] Section 52, third proviso.

the account until the first respondent lodged an application against him on the 13th October, 2010 compelling him to produce the account failing which to be removed as the executor.

[27] The application was brought in terms of section 52 of the Administration of Estates Act. According to this legislative provision, when an executor fails to lodge an account with the Master within six months of being issued with Letters of Administration, the Master or any other interested person may institute legal proceedings before the High Court calling upon the executor to show cause why he should not be compelled to produce the account.[18]

The law requires the Master and any other interested person to write a letter of demand to the executor a month earlier before instituting the legal proceedings.[19] It is evident in the preceding paragraphs that the Master as well as the first respondent had previously made a demand to the applicant to account but to no avail.

[28] On the 30th November, 2009, the Assistant Master, Lucia Lukhele, wrote a letter to the applicant requesting him to submit a detailed report of the estate funds received by him in the amount of E944, 560.84 (nine hundred and forty four thousand five hundred and sixty emalangeni

[18] Ibid footnote 17.
[19] Section 52 first proviso.

eighty four cents) with all vouchers, statements and all relevant documentation on or before 11th December 2009.[20]

[29] On the 17th April, 2010, the first respondent's attorneys S.V. Mdladla & Associates wrote a letter to the applicant calling upon him to account for the amount of E E875, 477.14 (eight hundred and seventy five thousand four hundred and seventy seven emalangeni fourteen cents) received from the Master on behalf of the estate.[21] It was mentioned in the letter that numerous other letters had previously been written to the applicant by Dunseith Attorneys who represented the first respondent as well as the Master calling upon him to account. In terms of the demand the applicant was given fourteen days to account to the first respondent. However, the applicant did not lodge the account as demanded.

[30] It is against this background that the first respondent instituted legal proceedings before the High Court on the 13th October 2010 calling upon the applicant to account failing which to be removed as the executor. The applicant filed papers opposing the application, and, on the 2nd October 2012, a consent order was made directing the applicant to lodge the account with the Master not later than 7th December 2012. Despite the order the account has not been lodged.

[20] Annexure "E", page 20 of the record of proceedings.
[21] Annexure "F", page 21 of the Record of proceedings.

[31] An executor who is called upon to account before the High Court is entitled to provide an affidavit setting out in full the grounds for failing to lodge the account.[22] The executor is liable for costs of suit in the event the order to account is granted and the grounds advanced by the applicant for his failure to account are not legally justifiable.[23]

[32] Generally, when an account has been lodged with the Master, he would acknowledge receipt thereof and stamp it. Thereafter, the Master is enjoined by law to examine the account, and, if approved, the account will lie open at the Master's office for a period not less than twenty-one days for inspection by any person interested in the estate.[24] The executor is required by law to give notice that the account would be open for inspection by advertisement in the Gazette as well as in a newspaper circulating in the country and approved by the Master; the notice will state the place and period during which the account will lie open for inspection.[25]

Any person with an interest in the account is entitled to lodge an objection with the Master stating fully the basis of the objection; and, the

[22] Section 52 of the Act second proviso.
[23] Section 53 of the Act.
[24] Section 53 of the Act.
[25] Section 51bis(1) of the Act

Master is obliged to transmit a copy of the objection to the executor for his consideration.[26] The executor has fourteen days within which to file his reply with the Master to the objection.[27] After considering the reply, the Master may either dismiss or sustain the objection if it is well-founded.[28] In certain instances he may direct the executor to amend the account if he is of the opinion that it is incorrect.[29] A person aggrieved by the decision of the Master in sustaining or dismissing the objection or for making any other order may review the Master's decision within thirty days at the High Court by motion proceedings.[30] .

[33] On the 2nd September, 2014 His Lordship Justice Stanley Maphalala who heard the matter in the court *a quo* confirmed the *rule nisi* with costs, and, he directed the applicant to pay a monthly maintenance of E8, 000.00 (eight thousand emalangeni) to the first respondent. The court further found that the applicant had not been formally discharged by the Master from carrying out his duties under the Administration of Estates Act; hence, he could not resign from being an executor of the estate without having lodged the account to be examined and possibly approved by the Master if it is in order.

[26] Section 51bis (5).
[27] Section 51bis (6)
[28] Section 51bis (7)
[29] Ibid footnote 28.
[30] Section 51bis (8)

[34] The applicant lodged an appeal on the 30th October, 2014 before the Supreme Court on two grounds: Firstly, that the learned Judge erred by ordering that the applicant should pay monthly maintenance to the first respondent when he had made it clear that he did not hold any funds on behalf of the Estate. Secondly, that the learned Judge erred by making an order which has the effect of granting judgment against him without affording him an opportunity to be heard whether the estate had funds to satisfy the maintenance order. However, the Supreme Court in its appellate jurisdiction dismissed the appeal on the basis that the applicant had for many years failed to account. The appellate court found that the court *a quo* had not misdirected itself by issuing the order that the applicant should pay monthly maintenance to the first respondent.

[35] The appellate court acknowledged the pending main application in which the first respondent is seeking an order directing the applicant to account failing which to be removed as the executor; hence, the court came to the conclusion that the applicant was in the circumstances not entitled to the unilateral resignation without the account. The court further ordered the applicant to pay costs *de bonis propriis* in light of his conduct of failing to account over many years. The court felt that it would not be proper to burden the deceased estate with costs of suit for a futile appeal. The court further ordered the matter to be remitted to the High Court to

determine the main application calling upon the applicant to account failing which to be removed as the executor.

[36] The basis of the present review application in terms of section 148 (2) of the Constitution is that the Supreme Court misdirected itself by confirming the order that the applicant should pay maintenance to the first respondent at the rate of E8, 000.00 (eight thousand emalangeni) per month when the liability to do so had not been established. It is well-settled in this country that reviews by the Supreme Court under section 148 (2) of the Constitution are exercised only in exceptional circumstances, and, the object is to prevent or ameliorate manifest and gross injustice to a litigant. In the present matter it is the applicant who is causing inherent hardship and manifest injustice to the first respondent by failing to account for the estate funds since 2002 when he was issued with Letters of Administration by the Master.

[37] It is not in dispute that the Master has called upon the applicant on several occasions to account but he has failed to do so. It is further not disputed that the first respondent is very sickly and requires urgent medical assistance but she is unemployed and cannot afford medical expenses. On the other hand the applicant is refusing to account for the estate funds

in which the first respondent is a beneficiary. Accordingly, the order by the appellate court directing the applicant to pay a monthly maintenance of E8, 000.00 (eight thousand emalangeni) to the first respondent is not reviewable in terms of section 148 (2) of the Constitution. The said order cannot be said to have resulted in manifest injustice to the applicant.

[38] The applicant further contends that the decision of the Supreme Court when making the order of costs de *bonis propriis* is reviewable on the basis that it is in breach of the principle of the *audi alteram partem.* He contends that the Court did not afford him an opportunity to be heard before making the order for costs *de bonis propriis.*

[39] It is apparent from the evidence that the deceased estate was grossly and recklessly administered by the applicant to the serious prejudice of the first respondent as the beneficiary. The applicant's conduct in administering the estate is reprehensible, lacks bona fides and unscrupulous. However, he was entitled to be heard before the order for costs *de bonis propriis* was issued against him. The court was legally enjoined to hear him before issuing an adverse order against him to pay costs *de bonis propriis*.

[40] There is no doubt that the appeal as well as the present review application brought by the applicant are both frivolous, vexatious, scandalous and highly prejudicial to the first respondent. The court should frown upon such conduct as a mark of its disapproval by imposing punitive costs. However, it is trite that the party against whom punitive costs would be imposed should be heard before the order for costs is made.

[41] The Supreme Court in the case of *Jomas Construction (Pty) Ltd v. Kukhanya (Pty) Ltd* Civil Appeal Case No. 48/2011 at para 16-18 had this to say with regard to punitive costs:

> **"16. Now, the law on attorney and client costs as well as costs *de bonis propriis* is well-settled in this jurisdiction. In the first place an award of costs lies within the inherent discretion of the Court. Such a discretion must not, however, be exercised arbitrarily, capriciously, *mala fide* or upon a consideration of irrelevant factors or upon any wrong principle. It is a judicial discretion. 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 page 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 its discretion to award costs on attorney and client scale against such person in order, for example, to mark the Court's displeasure.

17. There are several grounds upon which the Court may grant an award of costs on attorney and client scale. The list is certainly not exhaustive. It includes dishonesty, fraud, conduct which is vexatious, reckless and malicious, abuse of court process, trifling with the court, dilatory conduct, grave misconduct such as conduct which is insulting to the court or to counsel and the other parties. As to authorities see the leading case of *Nel v. Waterberg Landbouwers Ko-operatieve Vereeniging* 1946 AD 597 at 607.

18. So, too, an award of costs *de bonis propriis* (out of his/her pocket) is a matter which lies within the court's discretion. Here the punishment is directed at the representative and not the litigant. As a general rule, the court will not grant an award of costs *de bonis propriis* unless the representative acted maliciously, negligently or unreasonably. . . . Once again, the list is not exhaustive. Thus, for example, flagrant disregard of

the Rules of Court may attract costs *de bonis propriis* against the representative within the inherent discretion of the court."

See also the judgment of *Silence Gamedze and Two Others v. Thabiso Fakudze* Civil Appeal Case No. 14/2012.

[42] Her Ladyship Justice Ota JA delivering the unanimous judgment of the Supreme Court in the case of *Silence Gamedze and Two Others v. Thabiso Fakudze* Civil Appeal No. 14/2012 quoted with approval the principle of law as stated in *Jomas Construction (Pty) Ltd v. Kukhanya (Pty) Ltd* (supra) at para 16.

Thereafter, at para 28, her Ladyship emphasized the following:

"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 its 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 disfavour, 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 its approach in awarding such costs only subscribing to

same where there are compelling circumstances warranting it to do so."

[43] The Supreme Court sitting as a full bench in the case of *Siphamandla Ginindza v. Mangaliso Clinton Msibi and Four Others* Civil Appeal case No. 29/2013 dealt with the review jurisdiction of the Supreme Court in terms of section 148 (2) of the Constitution. The applicant sought to review the decision of the Supreme Court in its appellate jurisdiction where it had refused condonation on the basis of gross non-compliance and flagrant disregard of the Rules of Court and a failure to tender a satisfactory explanation. After dismissing the application, the Court had this to say:

"We must warn, as we hereby do, that in future litigants who pursue frivolous and scandalous applications such as the present matter shows may expect to pay punitive costs. Similarly, legal practitioners involved in such cases may themselves expect to pay costs *de bonis propriis*. We point out for completeness that the applicant and his attorney escaped punitive costs in this matter primarily because they had not, in all fairness to them, been given prior warning to argue the point."

[44] Zietsman JA in *OKH Farms (Pty) Ltd v Cecil John Littler NO* Civil Appeal No. 29/2006 at page 7 delivered a unanimous judgment of this Court as follows:

> **"An order that a person acting in a representative capacity, or an attorney or counsel pay the costs of an action or application *de bonis propriis* is not lightly granted. The object of such an order is to penalize the person or legal practitioner who through gross negligence or a disregard of the rules of court prejudices his client or whose conduct of an action or application is such as to warrant a stern censure from the court."**

[45] In conclusion, it is trite that an order for costs *de bonis propriis* can only be issued where the court has afforded the parties an opportunity to be heard on that issue. Failure to do so constitutes a manifest injustice and becomes reviewable in terms of section 148 (2) of the Constitution. In the present matter the attorneys for the respondents also confirmed that the applicant was never given an opportunity to be heard before the order for costs *de bonis propriis* was granted.

See *Fakudze Attorneys v. Chainsaw and Forestry Suppliers (Pty) Ltd* Civil case No. 47/2014 as well as *Siphamandla Ginindza v. Mangaliso Clinton Msibi and Four Others* Civil Appeal No. 29/2013 para 22.

[46] Accordingly, the following order is made:

(a) The review application challenging the order to pay maintenance in the amount of E8, 000.00 (eight thousand emalangeni) per month to the first respondent is hereby dismissed.

(b) The order directing the applicant to pay costs *de bonis propriis* is reviewable in terms of section 148 (2) of the Constitution, and, it is accordingly set aside.

(c) No order as to costs.

M.C.B. MAPHALALA
CHIEF JUSTICE

I agree

DR. B. ODOKI
JUSTICE OF APPEAL

I agree

N.J. HLOPHE
ACTING JUSTICE OF APPEAL

I agree

M. DLAMINI
ACTING JUSTICE OF APPEAL

I agree

M.J. MANZINI
ACTING JUSTICE OF APPEAL

For Applicant	Attorney Siboniso Dlamini
For First Respondent	Attorney Hlomendlini Mdladla
For Second and Third Respondents	Principal Crown Counsel Vusi Kunene

DELIVERED IN OPEN COURT ON 9 DECEMBER 2015