IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No. 37/2014

In the matter between:

MNTJINTJWA MAMBA	**1st Applicant**
MTHININI DLAMINI	**2nd Applicant**
DUMISA DLAMINI	**3rd Applicant**
And	
MADLENYA IRRIGATION SCHEME	**Respondent**

Neutral citation: *Mntjintjwa Mamba and Two Others vs Madlenya Irrigation Scheme (37/2014) [2015] SZSC 22 (9th December 2015)*

Coram: **DR. B.J. ODOKI JA, S.B. MAPHALALA AJA, J.P. ANNANDALE AJA, R. CLOETE AJA and M. J. MANZINI AJA**

Heard: 9th November 2015

Delivered: 9th December 2015

Summary: **Review in terms of section 148 (2) of the Constitution of a Supreme Court judgment. Respondent contends that this is an Appeal, in the guise of section 148 (2) – this Court finds in favour of the Respondent's contentions – dismisses the Review with costs.**

JUDGMENT

MAPHALALA AJA

Introduction

[1] The review before this court of the judgment of this court of the 29th July, 2015 of an order in the following terms:

> **1. Reviewing correcting and/or setting aside the judgment of this Honourable Court granted under Appeal Case No. 37/2014 on the ground of a failure of justice.**
>
> **2. Directing the Respondent to pay the costs of this application such costs to include the costs of Counsel duly certified in terms of rule 68 (2) of the High Court Rules.**
>
> **3. Further and/or alternative relief.**

[2] The above Application is based on the provisions of the Constitution being section 148 (2) thereof.

The Parties

[3] The three Applicants are adult Swazi males of Siphofaneni in the Lubombo Region.

[4] The Respondent is Madlenya Farmers Irrigation Scheme, a Co-operative Society established in terms of the laws of Swaziland having power to sue and be sued in its own name, carrying on business at Siphofaneni area in the Lubombo Region.

B**rief background facts**

[5] The High Court found against the Applicants in a judgment handed down on the 28th May, 2014 where the Applicants noted an appeal against the whole of that judgment as they were dissatisfied therewith. The appeal was heard on the 7th and 26th July, 2015 and the judgment was delivered against them on the 29th July, 2015.

[6] On or about the 4th October, 2001 the Respondent who was Applicant in the High Court instituted an Application against the Applicants who were the First to Third Respondents in the court **a quo** in terms of which it sought the following:

11.1 Interdicting and restraining the Respondents from blocking and / or preventing any easy access for members of Applicant's co-operative in and out of the Applicant's fields at Siphofaneni in the District of Lubombo.

11.2 Restraining and/or restricting the Respondents from unlawfully interfering with the equipment belonging to the Applicant co-operative including but not limited to the irrigation pump, main entrance to the irrigation fields and any other equipments.

11.3 Restraining and/or restricting the Respondents from entering and/or remaining within the premises of the field belonging to the Applicant;

11.4 The Station Commander of the Siphofaneni area is ordered to assist in carrying out compliance.

[7] The Application by the Applicants was opposed by the First to Third Respondents, through the offices of Vilakazi and Company. The Applicant obtained an interim order on the first hearing of the Application which was extended up until the finalization of the matter. The pleadings were exchanged between the parties in relation to this matter.

[8] Further facts are outlined in paragraphs 13 to 22 of the Book of Pleadings and I shall revert to pertinent portions of the said facts as I proceed with my analysis and conclusions later on.

[9] The attorneys of the parties advanced their arguments before this court in 9th November, 2015. The attorney for the Respondent filed brief Heads of Argument. The attorney for the Appellants **Advocate Maziya** filed his Heads of Argument later on. I shall in brief outline the salient features of each party's arguments in the following paragraphs. I must also state that **Advocate Maziya** had not filed his Heads of Argument in the hearing of the 9th November, 2015 and in view of the important constitutional question that attaches to this matter we allowed him to make submissions from the Bar.

(i) Appellants' Arguments

[10] The gravamen of the arguments for the Applicants is that the present Applicants (who were the Appellants in the appeal heard and determined in July, 2015) never had the opportunity to exercise their right to a fair hearing as envisaged not only by the Common law rules of natural justice but also by section 21 as read with section 38 of the Constitution. That the conduct of **Nkosi AJA** in that court constituted a gross irregularity which destroyed the fairness and therefore also the validity of the entire proceedings in as much as his frequent interjections coupled with the remarks quoted created a reasonable

perception that he had pre-judged the very issues which the appeal court had been called upon to determine.

[11] In support of this argument the court was referred to what is stated by the learned author Baxter: Administrative Law at page 567, to the following:

> **"---- Real or apparent pre-judgment of the issues to be decided by the decision maker gives rise to disqualification on grounds of bias. Prejudice usually arises as a result of the decision maker's past activities, past relationship with the affected individual, current external commitments, <u>or his manner of conduct during the decision – making process."</u>** (my emphasis)

[12] **<u>Advocate Maziya</u>** went further to outline the conduct of **Nkosi AJA** in paragraphs 3 to 12 of his Heads of Arguments that at paragraph 8 that a lot has been said not to have been challenged was in fact challenged. For example the supposed invasion of the field by the Applicants carrying weapons and **"ordering Applicants workers to go away from the field."** (paragraph 58 of the judgment at page 257) was challenged at page 178 paragraph 8.

(ii) The Respondent's Arguments

[13] The main argument advanced for the Respondent is that section 148 (2) of the Constitution does not apply in the circumstances where an Applicant simply seeks to reargue or to raise fresh arguments that were initially available to it but which it did not raise in the appeal itself. This would amount to nothing more than an attempt again to appeal the judgment in question and obtain **"a second bite at the cherry".** This is manifestly not the purpose for which the Supreme Court is granted powers of review under section 148 (2) of the Constitution.

[14] Various arguments are canvassed in paragraphs 6 to 35 of the Heads of Argument of Mr Jele for the Respondent. Finally, that the appeal ought to be dismissed with costs.

The Court's analysis and conclusions thereon

[15] The Applicants rely on section 148 (2) of the Constitution as the real basis for their Application to review and set aside the judgment of the Supreme Court.

[16] Section 148 (2) of the Constitution provides that **"the Supreme Court may review any decision made or given by it on such ground and subject to such conditions as may be prescribed by an Act of Parliament or rules of court".** As yet, no statute or rules of court have been enacted to regulate reviews under section 148 (2) of the Constitution.

[17] The Common Law provides for a special form of review, which is an exception to the generally applicable principle of **res judicata** and the need for finality in litigation. As such, it allows for a review in exceptional circumstances only where necessary to correct a manifest significant injustice caused by an earlier order for which there is no alternative remedy. The fact that a party to an appeal is dissatisfied with the result does not suffice.

[18] The essence of the Application, therefore is whether the grounds filed by the Appellant in the present case fall within the **perview** of section 148 (2) of the Constitution and are not what the Respondent contends as being **"a second bite at the cherry".** This is the issue for decision by this court.

[19] I shall consider the grounds of appeal **ad seriatim** as stated in 1st Respondent Heads of Argument.

(i) The complaint that one of the Justices, S.A Nkosi AJA was biased against the Appellants and therefore they were not afforded a fair hearing.

[20] In this regard it contended for the Appellants that the conduct of **Nkosi AJA** constituted a gross irregularity which dissuaded fairness and therefore also the validity of the entire proceedings in as much as his frequent interjection coupled with remarks created a reasonable perception that he had pre-judged the very issues which the appeal court has been called upon to determine. In this regard **Advocate Maziya** cited the legal authority in **Baxter, Administrative law** (supra) cited at paragraph 12 of this judgment to support his contentions. The court was further referred to a plethora of decided cases on the subject at paragraph 31 of his Heads of Arguments.

[21] The Respondent on the other hand had taken the position that is not so that a Judge in hearing a matter does not sit as a silent umpire. That a Judge may come to court sometimes having read the papers and having formed his / her **prime facie** views on the matter as it is up to the litigant's attorney to persuade the Judge to move from his / her position. In support of this arguments the attorney for the Respondent cited a number of cases for this legal proposition

[22] In my assessment of all the arguments of the learned Counsel to and fro I am inclined to agree with the contentions by the attorney for the Respondent for the following reasons.

[23] Firstly, it would appear to me it quite elementary, that even if a Judge was biased, it would be open to the Appellants at that very hearing to apply for a recusal of the relevant Judge and they cannot wait until the matter is finalized against them to contend that the Judge was biased. (See **S v Roberts 1999 (2) SA SACR 243, South African Commercial Catering & Allied Workers Union vs Johnson Ltd 2000 (3) SA 705 (C).**

[24] Secondly, at paragraph 12 of the Founding Affidavit the Appellants state that the other two Judges in the panel were not influenced by **Nkosi AJA** and making a concession to that effect.

[25] It is my considered view after an assessment of the facts and arguments in this regard that the other two Judges **Mabuza AJA** and **Mamba AJA** were not influenced by **Nkosi AJA** and therefore the Appellants had a fair hearing. It is also clear on the papers that **Nkosi AJA** did not write the judgment complained of and there is no evidence that he influenced the other Judges to rule against the Appellants.

[26] It would appear to me that they received a fair hearing. The Appellants are simply appealing the judgment under the guise of a review. Therefore the arguments of the Appellants ought to fail under this ground.

(ii) The complaint that the Supreme Court made pronouncements on matters of Swazi Law and Custom without the benefit of legal arguments and assessors.

[27] In this regard I have considered the affidavits filed by the parties and the arguments of the attorneys of the parties and also I find that the Appellants have not disclosed to this court which finding they are complaining of. One is left to assume that the Appellants are complaining that the court had regard to what was stated by Chief Mgwagwa Gamedze in his Affidavit on matters of Swazi Law and Custom.

[28] In the circumstances this ground of appeal ought to fail.

(iii) Complaint that the court ignored evidence and that is why it came to a wrong conclusion.

[29] The Appellants' conclusions in this regard is that some other people might have caused the damage to the Respondent's property and not them. The Appellants contend that therefore the court should have accepted their defence and not dismiss it.

[30] In my assessment of the arguments of the attorneys of the parties it would appear to me that the Appellants' arguments ought to fail. I say so because this is essentially the same argument that was raised before the court **a quo** and the Supreme Court at the previous hearing. It was an argument fully ventilated in the Heads of Argument for both the Appellants and the Respondent in the Supreme Court in advance of the previous hearing. It would appear to me again under this head that the Appellants are seeking to review issues that were fully argued before and carefully considered by the Supreme Court on the previous occasion. It appears that the Appellants are in truth seeking to appeal the Supreme Court's findings under the rubric of section 148 (2) of the Constitution of Swaziland. This ground of appeal also fails.

[31] I wish to comment **en passant** that consideration of public policy and sound administration of justice militate against allowing a dissatisfied party to an appeal to re argue issues by bringing a review. In this regard I cite what was stated by the full Constitutional Court of South Africa in the case of **Van Wyk vs Unitas Hospital and Others 2008 (2) SA 472 (CC) para 31** to the following:

> **"A litigant is entitled to have closure on litigation. The principle of finality in litigation is intended to allow parties to get on with their lives"**

[32] In the result, for the aforegoing reasons this court makes the following orders:

(a) The Application to review the Supreme Court's July judgment is dismissed; and

(b) The Applicants are directed to pay the costs of the Application on the party and party scale.

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S.B. MAPHALALA

JUSTICE OF APPEAL

I AGREE

_____

DR. B.J. ODOKI

JUSTICE OF APPEAL

I AGREE _____

J.P. ANNANDALE

ACTING JUSTICE OF APPEAL

I AGREE _____

R. CLOETE

ACTING JUSTICE OF APPEAL

I ALSO AGREE _____

M. J. MANZINI

ACTING JUSTICE OF APPEAL

For the Appellants: Advocate L. Maziya
(instructed by S.K. Dlamini & Company)

For the Respondent: M. D. Jele
(of Robinson Bertram)