IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Case No.74/2014

In the matter between:

THE UNIVERSITY OF SWAZILAND **Appellant**

vs

DUDUZILE DLAMINI-NHLENGETHWA **Respondent**

Neutral citation: *The University of Swaziland v Duduzile Dlamini-Nhlengethwa (74/2014) [2015] SZSC 32 (29 July 2015)*

Coram: **S.B. MAPHALALA AJA, Q.M. MABUZA AJA and M.D. MAMBA AJA**

Heard: 03 July 2015

Delivered: 29 July 2015

Practice and Procedure – Appellant appealing against order compelling it to register the Respondent as a student. When appeal called respondent had already completed her course with the appellant. Order sought would have no practical effect or impact on the relationship between the parties. Where there is no dispute or lis or live issue between the parties, there is no appeal to be heard. Matter struck off the roll.

JUDGEMENT

MAMBA AJA

[1] The appellant as its name or appellation shows, is an academic institution operating in Swaziland. It offers and awards certificates, diplomas and degrees to its students or graduands. It was the respondent in the court *a quo* wherein the respondent herein, as the applicant in that court sought *inter alia*, the following orders: that

> '2. The decision of the respondent refusing the applicant to register for the 2013/2014 academic year is hereby received and or set aside;
>
> 3. The respondent is ordered to register the applicant for the 2013/2014 academic year and allow her to sit for her examination;
>
> 4. Pending finalisation of the matter, the respondent is ordered provisionally register the applicant and allow the applicant to sit for her examinations commencing on the 2nd day of December, 2014.'

[2] The respondent had been enrolled at the University for a three-year Diploma Course in Law and was on her final year of study at the relevant time.

[3] It is common cause that the respondent had failed to pay for amongst others, her tuition fees for her final year. There was also a balance due by her of her fees for the past or previous year. Because of the non-payment of her fees, she was unable to register as a student in August 2014, when the 2014/2015 academic year began. Her failure to pay, she stated, had been due to the fact that the Swaziland Government had failed to pay her in time for her work as a full time member of the Industrial Court of Swaziland. She informed the Appellant that this was an issue beyond her control and therefore it was excusable. She stated that she was therefore entitled, in terms of the Financial Regulations of the appellant, for an extension of the time within which to register and pay her dues. She referred in particular to clause 2.12 of the regulations. This regulation states that:

> '2.12 Late registration is permitted for up to seven (7) working days after the commencement of lectures as stipulated in the University Calendar. Registration beyond this grace period may be permitted by the Vice Chancellor for a period of up

> to seven (7) working days, provided evidence of official delay beyond the control of the student is produced.'

[4] It is common cause that lectures commenced on 18 August 2014, whilst registration commenced on 11 August 2014 and ended on the 15th day of that month. A simple calculation of the grace period is that it ended on 26 August 2014. The seven days 'beyond this grace period' within which the Vice Chancellor had a discretion to permit or extend late registration, expired on 04 September, 2014; as the 01st day of September 2014 was a public Holiday in Swaziland and therefore not a 'working day'. I emphasise this point as I think the appellant misconstrued this regulation. The total period provided by the regulation is 14 working days after the commencement of lectures. I do not know or understand how Counsel for the Appellant determined that the Vice Chancellor's discretion expired on 05 September 2014. However, nothing turns on this issue in this appeal.

[5] It is common course further that the respondent petitioned the Vice-Chancellor for an extension of time by letter dated 15 September 2014. As stated above, the Vice-Chancellor had no power to extend the registration on this date. He declined the respondent's request; 'on account of it being late, in terms of regulation 2.14.' (See page 28 of the

record. This correspondence is dated 17 April 2014 and refers to a letter by the respondent dated 11 April 2014. I think though that this annexure is in respect of another issue). The Vice-Chancellor's decision was orally or verbally communicated to the respondent.

[6] The respondent then appealed to the Council of the University. This appeal was again rejected and this decision was communicated to the respondent by letter dated 28 November 2014. Not satisfied with this decision she then filed the application referred to in paragraph 1 above. Her application was opposed by the appellant but was eventually granted by the Court *a quo.* It is this order of the court below that the appellant has appealed against.

[7] The grounds of appeal are numerous but may legitimately be consolidated into three; namely that, first, the court *a quo* erred in granting an order for provisional registration of the respondent as this was not provided for within the statute governing the appellant, and secondly, the court *a quo* in effect usurped the administrative powers of the respondent and thirdly, that the court erred in holding that the respondent had a legitimate expectation that she would be allowed to sit the examination based on the fact that she had paid her outstanding fees and had been allowed to attend lectures and also permitted to write and submit assignments.

[8] When the appeal was called, Counsel for the respondent informed the court that the respondent had, since that day, received her academic results and therefore had no further interest in the matter. He submitted that the appeal was now moot or academic only. Counsel for the appellant insisted though that the appeal should be argued and that this court should make a judgment thereon for the guidance of the appellant in its future dealings with its students who find themselves in conditions similar to the respondent. He argued further that the judgment appealed against was contrary to the decision of this court in *The University of Swaziland v Queeneth Ncobile Dlamini (75/2013) [2014] SZSC 36 (30 May 2014).* I shall return to this issues presently.

[9] It is important to record that the respondent was not the only student who failed to register on time and within the grace period provided. In order to cater for these students, the appellant by public notice in the local print media, extended the registration period to the 26th day of September, 2014. Respondent was only able to pay or settle her debt for the previous academic year and make part payment for the relevant current academic year on 04 November 2014. At the time of hearing of her application she had not paid her fees in full. She was still owing the institution.

[10] The fact that the respondent was allowed to attend lectures and write assignments did not give her a legitimate expectation that she would be registered or allowed to sit for the examinations. General Regulations 030.37 specifically provides that:

> 'A person who is not registered in accordance with the Registration procedures prescribed by the University shall not be entitled to attend lectures, tutorials, write tests and assignments and/or partake in any other academic and extra-curricular activities of the University.'

And regulation 030.38 stipulates:

> 'Any assignments and tests submitted by an unregistered person shall be declared null and void, nor shall he/she be entitled to register and/or to write the examinations. The University shall upon discovering that any person who is not properly registered attends lectures, require the person to leave the University.'

The court a quo nonetheless found that she had such legitimate expectation That was, however, not the case pleaded by her. The court *a quo* was thus in error on this issue and no assurance express or implied had been given to her. (see *Queeneth* (supra).

[11] As stated above, whatever the outcome of this appeal, neither of the parties herein would be affected by the result. The respondent has set for

her final year examinations and she received her results on 10 July, 2015. She no longer has any interest in the matter. Therefore there is now no dispute or *lis* between the parties. Apart from this, the appellant informed this Court that it was its policy not to apply for costs on such issues and it would not seek for such costs in this appeal either. The appeal by this academic institution is thus academic. The question that arises then is whether this court should hear this appeal in view of the fact that it is now moot or will have no practical effect between the parties?

[12] Prior to 12 August 2013, In South Africa, the answer to the above question was provided by the provisions of section 21A(1) of the Supreme Court Act 59 of 1959.

[13] In *ABSA BANK Ltd v Van Rensburg (228/13) [2014] ZASCA 34 (28 March 2014)*, Maya JA said:

> '[7] According to s21A(1), if the issues in an appeal 'are of such a nature that the judgement or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.' These provisions set a direct and positive test: whether the judgment or order will have a practical effect or result and not whether it might be of importance in a hypothetical future case. As a result, this court will not

'make determinations on issues that are otherwise moot merely because the parties believe that, although the decision or order will have no practical result between them, a practical result could be achieved in other respects.'

[8] But the section confers a discretion on this court. Thus, in *The Merak S: Sea Melody Enterprises SA v Bulktrans*, this court found that allowing the appeal would have no practical effect but nonetheless decided the merits of appeal. The court reasoned as follows:

'In view of the importance of the questions of law which arise in this matter, the frequency with which they arise and the fact that at the time of the decision in the Court *a quo* and of the granting of leave to appeal those questions were … "live issues", I am satisfied that this is an appropriate matter for the exercise of this Court's discretion to allow the appeal to proceed: *Coin Security Group (Pty) Ltd v SA National Union for Security Officers and Others* 2001 (2) SA 872 (SCA) at 875 (para [8]) and *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA)'.

In *Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie*, this court once more decided the merits of an appeal – whether the termination of the right of residence of

an occupier was just and equitable within the meaning of the s 8(1) of the Extension of Security of Tenure Act 62 of 1997 – where the occupier had vacated the property by the time the appeal was heard and had no interest in its outcome, which would have no practical effect for the parties *inter se*. The court considered the question of law involved, which arose frequently, important. It further took into account that the judgment appealed against, which was found wrong, had already been followed in a reported judgment.

So, depending on the facts of each case, while the parties may have resolved all their differences, a court of appeal may nevertheless entertain the merits of the appeal if, for example, important questions of law which are likely to arise frequently are at issue and their determination may benefit others.

[9] Elsewhere, utmost caution in exercising that discretion has been advocated. In an English decision, *R v Secretary of State for the Home Department, Ex Parte Salem*, which has been considered by this court albeit without pronouncing a final view on its dictum, as here, the discretion to adjudicate an appeal, where there is no longer a dispute between the

parties, was strictly limited to the area of public law. And that court further circumscribed the discretion as follows:

'the discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.'

[10] Notably, the decisions in which our courts exercised their discretion in the appellants' favour and considered the merits of the appeals invariably concerned frequently arising questions of statutory construction and application. In *Sebola v Standard Bank*, upon which Absa relied, the Constitutional Court was requested to interpret and assess the constitutional impact of a statutory provision about which there had long been uncertainty which resulted in many conflicting high court decisions. The court came to the decision that it was in the interests of justice to hear the appeal on its merits. In

> reaching that decision, the court noted that the appellants' costs incurred in resisting the sale of their home, the subject of the dispute, which the bank did not tender, and the bank's own costs in the Constitutional Court which it threatened to recover if they persisted with the appeal, remained a live issue for them. But the court reiterated that a dispute about costs alone is insufficient reason to hear an appeal whose issues have gone dead. What it considered pivotal in the enquiry was the meaning it would assign to the statutory provisions, which would have a significant practical impact. And the court took into account that the Supreme Court of Appeal, whose controversial decision was appealed against, had not had the benefit of the wide-ranging submissions made to it on the constitutional impact of the various interpretations contended for. These factors vastly distinguish the case from the present one.'

[14] I have not been able to find a similar provision in our statute governing this Court. The issue is thus to be determined based on practice and the common law. In ABSA (supra) Leach JA in his minority judgment determined the issue as follows:

‘[17] However, the appeal was overtaken by events when the parties settled the action. In my view, that was the end of the matter and, in truth, the issue whether leave to appeal ought or ought not to have been granted in itself became moot.

[18] In reaching that conclusion, I found the reasoning of this court in *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA) to be most persuasive. In that matter the appellant had been sued by the respondent for damages suffered as a result of injuries sustained by her when she fell into a manhole. The respondent succeeded both in a magistrate’s court as well as on appeal to the high court. After leave to appeal further to this court had been granted, the parties concluded a settlement agreement that effectively resolved all their differences resulting in there being no longer any dispute or *lis* between them. The preliminary question which then arose before this court was whether the appeal should be entertained at all. In regard to that question and the provisions of s 21A(1) of the Supreme Court Act 59 of 1959, Brand JA, in delivering the unanimous judgment of this court, stated the following:

‘It can be argued, I think, that s 21A is premised upon the existence of an *issue* subsisting between the parties to the litigation which requires to be decided. According to this argument s 21A would only afford this Court a discretion not to entertain an appeal when there is still a subsisting *issue* or *lis* between the parties the resolution of which, for some or other reason, has become academic or hypothetical. When there is no longer any *issue* between the parties, for instance because all issues that formerly existed were resolved by agreement, there is no “appeal” that this Court has any discretion or power to deal with. This argument appears to be supported by what Viscount Simon said in *Sun Life Assurance Company of Canada v Jervis* [1944] AC 111 (HL) at 114, when he said, with reference to facts very similar to those under present consideration:

“. . . I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.”

Consequently, he found that in a matter where there was no existing *lis* between the parties the appeal should be dismissed on that ground alone (at 115). (See also *Ainsbury*

v Millington [1987] WLR 379 (HL) at 381.) More recently, however, it was said by Lord Slynn of Hadley in *R v Secretary of State for the Home Department, Ex parte Salem* [1999] 2 WLR 483 (HL) at 487H ([1999] 2 All ER 42 at 47*c*) that:

". . . I accept . . . that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a *lis* to be decided which will directly affect the rights and obligations of the parties *inter se*."

It is true that Lord Slynn immediately proceeded to confine this discretion to entertain an appeal, where there is no longer a *lis* between the parties, to the area of public law and added that the decisions in the *Sun Life* case and *Ainsbury v Millington* must accordingly be read as limited to disputes concerning private law rights between the parties to the case (at 487H - 488A (WLR) and 47*c* - *d* (All ER)).'

See also the decision of this Court in *The Director of Public Prosecutions v Themba Macilongo Ndlovu and Another (15/2015) [2015] SZSC 21 (29 July 2015)*. One should caution, however, that in this case the Court dealt with the merits of the appeal as there was still a lis in the form of the

issue of costs sought by the respondents. In the instant case, there are no live issues between the parties. The dispute between them has been extinguished by the effluxion of time. Their relationship, which was the cause of the friction between them has been terminated.

[13] For the above reasons, I would decline to hear this matter and remove the matter form the roll and I so order.

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M.D. MAMBA AJA

I agree.

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S.B. MAPHALALA AJA

I also agree.

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Q.M. MABUZA AJA

For the Appellant: **Mr. Z. Shabangu**

For the Respondent: **Mr. N.D. Jele**