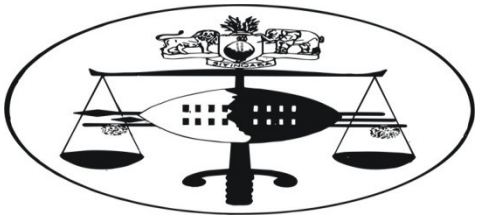

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

CIVIL APPEAL CASE NO: 35 /2013

In the matter between:

CHRISTOPHER VILAKATI	APPLICANT
AND	
PRIME MINISTER OF SWAZILAND	1ST RESPONDENT
THE NATIONAL COMMISSIONER OF POLICE	2ND RESPONDENT
THE ATTORNEY GENERAL	3RD RESPONDENT

Neutral Citation: *Christopher Vilakati vs. The Prime Minister of Swaziland and Two Others (35/2013) [2016] SZSC 15 (30th June 2016)*

Coram: **DR. B.J. ODOKI, JA**

S. P. DLAMINI, JA

R. CLOETE, AJA

C. MAPHANGA AJA

M.J. MANZINI, AJA

Heard: **06 May 2016**

Delivered: **30 June 2016**

Summary: *Civil Procedure – Review of decision of the Supreme Court under Section 148 (2) of the Constitution – Grounds and conditions upon which is conditions upon which is conducted – No law or Court Rules prescribing the grounds and conditions – Whether second review is permissible under Section 148 (2) – Conditions applicable thereof – Review court failing to conduct review but sitting on appeal not before it – Court has jurisdiction to review such matter where special and exceptional circumstances established to prevent gross and irreparable injustice – Application upheld.*

JUDGMENT

DR. B.J. ODOKI

[1] This Application for review raises an important and novel issue whether the Supreme Court has power to review its precious decision handed down upon review, in accordance with Section 148 (2) of the Constitution. If such review is authorised upon what grounds and conditions should it be exercised.

[2] This Application for review has been made praying for the following orders:-

> ***"1. The decision of the Supreme Court between the parties herein delivered on the 3rd day of December 2014 is hereby reviewed and set aside with costs;***
>
> ***2. The Supreme Court judgments delivered on the 30th November 2012 and 31st May 2013 are hereby confirmed;***
>
> ***3. The High Court's decision between the parties granted on the 30th day of April 2012 is hereby confirmed;***
>
> ***4. The Respondents are ordered to pay the costs of this Application.***
>
> ***5. Granting the Applicant further and/or alternative relief."***

[3] The Application was accompanied by a Founding Affidavit sworn by the Applicant, which sets out the background to his Application as well as the grounds for review.

[4] The Applicant sought an order in the High Court to review and set aside his dismissal from the Swaziland Police Service. He was employed as a Police Officer in February 1991 until dismissed by the 2nd Respondent on 30th August 2007.

[5] In paragraph 10 to 18, the Applicant gives the background to the Application as follows:-

> ***"10. The charges in terms of the Police Regulations, which led to my dismissal, were in a nutshell that I had bought a certain motor vehicle from Mr. Peace Mabuza ("Mr. Mabuza") knowing same to be stolen and I further sold it to an innocent person by the name of Mr. Nkosinathi Dlamini ("Mr. Dlamini) knowing it a was stolen motor vehicle. The other charge was that I had failed to arrest Mr. Mabuza and Mr. Mario Masuku who it was alleged I found them in possession of the motor vehicle.***
>
> ***11. I must mention at the outset that I never knew that the motor vehicle was stolen at the time I bought it from Mr. Mabuza, nor did I know that it was stolen when I sold it to Mr. Dlamini. At all material times thereto, I was of the honest view that it was not a stolen motor vehicle since it had a blue book. I later learnt that even that blue book had been forged. I learnt this from the special wing of the Royal Swaziland Police dealing with serious crimes and car theft in Swaziland called "Lukhozi"***
>
> ***12. I must also mention that, I was not trained to be able to verify if a motor vehicle is stolen or not and/or if a blue book is forged or not. I was an ordinary police officer dealing with common law offences on the ground.***
>
> ***13. I appeared before a disciplinary board. I pleaded not guilty to all the charges and evidence was led which in my view did not prove the commission of the offences I faced. I was, however, convicted for having failed to arrest Mr. Mabuza and Mr. Mario Masuku for being in possession of a stolen motor vehicle and for buying it***

know it to be stolen, I was also convicted for selling the motor vehicle knowing it to have been stolen.

14. I was found not guilty for selling the motor vehicle knowing it to have been stolen.

15. I must mention further that the disciplinary board fined me E100.00 for failing to arrest Mr. Mabuza and Mr. Mabuza for being in possession of a stolen motor vehicle and fine E200.00 for having sold a motor vehicle to Mr. Dlamini knowing it to have been stolen. Strangely, the Board then recommended that I be dismissed from the police service. A true copy of the board of proceedings for my disciplinary hearing will be filed in Court with this application.

16. I was then dismissed by the second respondent on the 28th day of August 2007.

17. I appealed my dismissal to the First Respondent. No appeal hearing was held. My appeal was dismissed by the First Respondent without having afforded me the right to be heard.

18. I was not happy with my dismissal and filed an application for review in the High Court under Case No. 464/2009."

[6] The High Court held that the Applicant had been unlawfully dismissed by the 2nd Respondent. It set aside the dismissal and ordered the Respondents to reinstate him from the date of dismissal being 30 August 2007. The court also ordered that the Applicant be paid arrears of salaries and costs.

[7] The Respondents appealed to the Supreme Court on 20 May 2012. The Respondents failed to file a complete record that the Supreme Court in June and when it was filed, it was found incomplete and illegible,

[8] The Respondents then filed an Application for late filing of the court record on 19 September 2012 which was dismissed by the Supreme Court on 30 November 2012.

[9] The Respondents further filed another Application for the reinstatement of the matter on the Supreme Court Roll, condoning the Respondents for not filing the record in time and allowing the Respondents to amend their grounds of appeal. The Supreme Court on 31 May 2013 dismissed all the prayers the Respondents sought in their notice of motion.

[10] On the 8th July 2014, the Respondents moved yet another Application in the Supreme Court seeking an order reviewing and setting aside judgment of the Supreme Court in the following terms:

> ***"(1) Reviewing and/or setting aside the judgment granted by the 2nd, 3rd and 4th Respondents in this court delivered on***

31 May 2013, confirming the order of the High Court that the 1st Respondent be reinstated as a police officer forthwith with effect from his date of dismissal.

(2) Reviewing and/or setting aside the judgment by the 2nd, 3rd and 4th Respondents delivered on 31 May 2013, confirming the order of the High Court that the present 1st Respondent be paid all his arrear salaries from the date of his dismissal.

(3) Reviewing and/or setting aside the judgment granted by the 2nd , 3rd and 4th Respondents on 31 May 2013, confirming the decision of the High Court that Section 13 (2) of The Police Act required that proof be beyond reasonable doubt for an officer to be found guilty of an offence in terms of the Police Act."

[11] On the 3rd December 2014 the Supreme Court sitting as a full bench (Ramodibedi CJ, Ebrahim JA, Moore JA, Ota JA and Levinson JA) allowed the Application for review, and made the following orders:

(1) The order of the High Court dated 30 April 2012 directing the present applicant to reinstate the Respondent as a police officer forthwith with effect from the date of dismissal on 30 August 2007 is hereby set aside.

(2) The order of the High Court dated 30 April 2012 that the Respondent be paid all his salary arrears from the date of his dismissal is hereby set aside.

(3) The order of the High Court dated 30 April 2012 that Section 13 (2) of The Police Act requires that proof be beyond reasonable doubt for an officer to be found guilty of an offence in terms of the Act is hereby set aside. All that is required under this Section is proof on balance of probabilities.

(4) The High Court's orders are replaced with the following order:-

"***The application is dismissed with costs.***"

(5) The Respondent shall bear the costs of the present application in this court

[12] In his Application to this court the Applicant has raised several grounds for review, which can be summarized as follows:

1. The composition of the Supreme Court was irregular as three of the judges who sat in the previous application also sat in the review panel:

2. The review court misdirected itself in law when it dismissed the entire application when that has not been sought by the Respondents since there was no order sought to set aside the Applicant's dismissal.

3. The court misdirected itself in law and misinterpreted the order of the High Court since by setting aside the Applicant's dismissal meant that he would be reinstated in his post.

4. The Supreme Court misdirected itself of the standard of proof in The Police Act which is on balance of probabilities.

[13] Before I go further with this Application, it is necessary to consider first the law that is applicable since there is the issue of the jurisdiction of this court on second review.

[14] It is now well settled that this court has review powers over its decisions granted to it by Section 148 (2) of the Constitution which provides,

> ***"(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."***

[15] The composition of the Supreme Court is provided for under Section 145 of the Constitution and a full bench is prescribed in subsection (3) thereof as follows:-

> ***"(3) A full bench of the Supreme Court shall consist of five justices of that court"***

[16] It is common knowledge that neither an Act of Parliament nor rules of court have been made to prescribe the grounds and conditions upon which the review jurisdiction may be exercised. Suffice it to point out that several decisions of this court have attempted to lay down some of the grounds or conditions upon which such review may be made, in the absence of the law or rules.

[17] Some of the decisions include **COMMISSIONER OF POLICE AND ANOTHER vs. DALLAS BUSANE AND FOUR OTHERS [2015] SZSC 39** (29 July 2015) **VILANE N.O. AND ANOTHER vs. LIPNEY INVESTMENTS (PTY) LTD. [2014] SZSC 62** (3 December 2014) **PRESIDENT STREET PROPERTIES (PTY) LTD vs. UCHECHUKIRU AND FOUR OTHERS [2015] SZSC 11** (29 July 2015) **SWAZILAND REVENUE AUTHORITY VS. IMPUNZI WHOLESALERS (PTY) LTD. [2015] SZSC 06** (09 December 2015) **NUR & SAM (PTY) LTD. vs.**

GALP SWAZILAND (PTY) LTD. (13/2015) [2015] SZSC 04 (09 December 2015)

[18] In the often quoted dicta of Dlamini AJA the **PRESIDENT STREET PROPERTIES (PTY) LTD.** case (*supra*) the Learned Justice of Appeal stated,

> ***"[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 a Supreme Court. Either way, the ultimate purpose and role of this court is to avoid in practical situations gross injustice to litigants in exceptional circumstances beyond ordinary adjudicative contemplation. The exceptional jurisdiction must be properly employed, be conducive to and productive of 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 the matter is res fudicata, or that finality in litigation 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 last resort."***

[19] After citing authorities from various jurisdictions, Dlamini AJA identified some of the conditions which might justify review as follows:

> ***"[15] From the above authorities some of the situations already identified as calling for judicial intervention are exceptional circumstances, fraud, patent error , bias, presence of some most unusual element, new facts, significant injustice, or absence of effective remedy"***

[20] In **SWAZILAND REVENUE AUTHORITY vs. IMPUNZI WHOLESALERS (PTY) LTD**. (*Supra*). This court identified a number of important principles that can be distilled from the court judgments cited above. These principles were summarized in paragraph [32] as follows:

> ***"1. In order to maintain certain in cases already decided, the courts must be cautious against allowing a party to bring a matter back to court or the same cause of action simply because he is dissatisfied with the outcome.***
>
> ***2. Section 148 (2) was not promulgated to permit litigants limitless chances to have cases previously adjudicated to finality reheard simply because they are disappointed with the result.***
>
> ***3. The Court's review jurisdiction can only be exercised where there is a patent and obvious error of fact of law.***
>
> ***4. There is a distinction between an appeal and review so that review jurisdiction is not an appeal "and is not meant to be resorted to as an emotional reaction to an unfavourable judgment".***

5. ***Not every decision will be impugned because it is wrong and not every misdirection or error of law will be a ground of review but will rather amount to a ground of appeal.***

6. ***Only exceptional circumstances justify the application of Section 148 92) including fraud, patent error, bias, new facts, significant injustice or the absence of an alternative remedy.***

7. ***The jurisdiction of the Supreme Court under Section 148 (2) is exceptional, and is to be invoked not to allow a litigant a second bite at the cherry, in the sense of another opportunity of appeal or hearing at Court of last resort, but to address only a situation of manifest injustice irremediable by normal Court process.***

8. ***The Court's review jurisdiction must be narrowly defined and employed with due sensitivity, to avoid opening a flood gate or reappraisals of cases otherwise finally disposed of, in accordance with the res judicata doctrine."***

[21] It is common ground that in none of the cases cited above was the Supreme Court called upon to undertake a second review of a matter that had been reviewed by a full bench.

[22] The first question that arises to consider is whether a second or subsequent reviews are envisaged under Section 148 (2) of the Constitution. On the face of it, the Supreme Court has jurisdiction to

"review any decision made by it" on such grounds and subject to such conditions as may be prescribed by an Act of Parliament or rules of court. Those conditions are what this court has been endeavouring to evolve in respect of first reviews. Until the relevant law or rules are made, the power appears not defined. In my view the question still remains open.

[23] The second issue is whether the principles which this court has evolved can be applied to the subsequent reviews. In my opinion they can be applied with extreme caution and with necessary modification.

[24] The third issue is whether a full bench is competent to review a decision of another full bench. This appears problematic in view of the express provision of the Constitution that a review is conducted by a full bench of five justices. Should the same number of justices on the full bench be the same or different when the Supreme Court sits to review its decision on second review? It seems to me that the number of the full bench remains five Justices but the Justices who sat in the previous review should be excluded.

[25] How many reviews are then permitted by the Constitution in order to ensure that a sense of gross injustice and unfairness is eliminated? Clearly endless litigation goes against the principles of *res judicata, functus officio* and finality of decisions of the Supreme Court as the final court of Appeal.

[26] There is also the procedural issue of delay in filing review applications. In the absence of the relevant law or rules reasonable time may be permitted in making such applications, depending on the grounds for review including discovery of new matters which could have affected the decisions. Unreasonable delay is a question of fact, but must be strongly discouraged.

[27] The above issues emphasize the need for an Act of Parliament or rules to prescribe under what circumstances a litigant may apply for review and what powers the Supreme Court has on review.

[28] In the meantime, the question is whether all subsequent reviews should be put on hold until the relevant laws or rules are made. In view of the fact that the court had permitted reviews to be filed without necessary legislation to guide the courts, it seems to me that it would not be in the public interest or in the interest of justice to shut

out the door completely against such reviews as there may be special cases of extremely exceptional circumstances where review may be the only remedy available to the litigant and the only weapon in the armoury of the courts to remove gross injustice.

[29] There may be cases where the Supreme Court did not actually conduct a review or carried it out without affording a litigant a fair hearing or where the decision is challenged on grounds such as bias, or fraud. Again the law or rules should prescribe such grounds.

[30] Until the relevant law or rules are made, this court should ordinarily permit one review only except in the clearest of cases where extremely exceptional circumstances exist, for instance, where the previous judgment is proved to be null and void or unenforceable after it has been passed or cause a substantial miscarriage of justice which cannot be redressed otherwise.

[31] In the present case, the Applicant has alleged that the court was biased or not properly constituted because three of the justices who sat in the previous application which were to be reviewed also sat on the full bench. There is a dispute as to whether this was raised at the

hearing of the matter. Although allegations of bias were not established, the apprehension of bias existed to an ordinary observer, because a judge who has made a decision which is being reviewed should not have been a member of the full bench. Again this matter requires clarification by law or rules.

[32] The full bench did not review the applications which had been dealt with by the Supreme Court but it ***"reviewed"*** the decision of the High Court instead. The Applicants had not applied for review of the decision of the High Court, because the appeal had not been heard on merits, but it had been dismissed as having been filed out of time and its reinstatement refused. Therefore there was no appeal against the decision of the High Court. In view of this conclusion I do not find it necessary to discuss what other errors were committed by the full bench when reviewing the decision of the High Court as that decision still stands valid until set aside.

[33] In my view, the above grave errors caused gross injustice which constitutes a very high degree of extremely exceptional circumstances required by this court to review its decision of 3rd December 2014.

[34] For these reasons, this Application must succeed. Accordingly I make the following orders:

(1) The Application for review is upheld.

(2) The decision of the Supreme Court dated 3rd December 2014 is set aside.

(3) The orders made by the Supreme Court are substituted with the following orders made by the High Court:

"(a) The application to review and set aside the decision of the Respondents dismissing the Applicant as a Police Officer pursuant to his disciplinary hearing is hereby granted.

(b) The Respondents are directed to reinstate the Applicant as a Police Officer forthwith with effect from the date of his dismissal on the 30th August 2007.

(c) The Respondents are directed to pay the Applicant his arrear salary from the date of his dismissal on the 30th August 2007.

(d) The second Respondent is directed to pay the costs of suit to the Applicant on the ordinary scale."

(4) The Applicant is granted costs of this application.

_____

DR. B.J. ODOKI

JUSTICE OF APPEAL

I agree _____

S.P. DLAMINI

JUSTICE OF APPEAL

I agree _____

R. CLOETE

ACTING JUSTICE OF APPEAL

I agree _____

C. MAPHANGA

ACTING JUSTICE OF APPEAL

I agree _____

M.J. MANZINI

ACTING JUSTICE OF APPEAL

FOR THE APPELLANT: **MR. N.D. JELE**

FOR THE RESPONDENT: **MR. V. KUNENE**