IN THE SUPREME

COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE Civil Appeal Case No.39/2014

In the matter between:

DALLAS BUSANI DLAMINI 1st Applicant

STANLEY SIFISO VILANE 2nd Applicant

And

THE NATIONAL COMMISSIONER OF POLICE 1st Respondent

THE ATTORNEY – GENERAL 2nd Respondent

Neutral citation: *Dallas Busani Dlamini and Another vs. The National Commissioner of Police and Another (39/2014) [2016] SZSC 35 (30 June 2016*

CORAM: **S.P. DLAMINI, JA**

C. MAPHANGA, AJA

Z. MAGAGULA, AJA

M.L LANGWENYA, AJA

M.J.M MANZINI, AJA

Head: 25th May 2016

Delivered: 30th June 2016

Summary: *Civil Procedure – Review of Decision of the Supreme Court under section 148(2) of the constitution- No Law or Rules Prescribing the grounds and conditions for review- a single review permissible-granting orders not pleaded and /or no submissions made-referral of matter to the High Court for determination of damages with a condition that a certain period be excluded High Court functus-officio-correction of the review and judgment of the Supreme Court on Appeal confirmed-, cost to be costs in the course.*

JUDGMENT

S. P. DLAMINI, JA

[1] This Application raises the issue as to whether the Supreme Court has power to review its previous decision delivered upon a review as per section 148(2), the Constitution.

[2] The Application for Review is as follows:

"1. Reviewing and correcting the judgment delivered by a full bench of the above Honorable Court on the 29th day of July 2015 in the Review Application (main matter) brought by the Respondents against, inter alia,

the Applicants on the basis that same is patently and obviously erroneous both in fact and in law.

2. Costs.''

[3] Other than to aver that the Judgment of the court is ***"patently and obviously erroneous both in fact and in law"***, the error complained of is not set out in the notice. Nothing may turn on this apparent lack of clarity of grounds upon which the review is sought. This point was never raised by the Respondent. In any event, both in the 1st Applicant founding affidavit and Heads of argument the alleged error is crystallized.

[4] The background of this matter is set out in the papers before Court and there is no need to repeat same. Briefly, Applicants were dismissed by the 1st Respondent following a disciplinary hearing. The Applicants challenged their dismissals at the High Court by way of review proceedings. The High Court dismissed the Applicant's case with costs. The thrust of the Judgment of the Court *a quo* was the conclusion that the applicable standard of proof in such matters is proof on a balance of probability as opposed to proof beyond a reasonable doubt. The Applicants appealed against this Judgment to the Supreme Court. The Supreme Court came to the conclusion that the applicable standard is proof beyond reasonable doubt and not proof on a balance of probabilities. Consequently, the Supreme Court concluded that the High Court ***"… should have set aside the dismissal and set aside the proceedings of the board. Accordingly, I allow the appeal, with costs."***

Thereafter, Respondents instituted proceedings to review the Judgment of the Supreme Court in terms of section 148 (2) of the Constitution. The issues raised on review were; *inter alia;*-

(i) Contrary to the finding of Supreme Court, section 13(2) of the Police act requires that proof on a balance of probabilities and not beyond reasonable doubt;

(ii) That the National Commissioner of Police has power to dismiss an officer below the rank of Inspector; and

(iii) Cost of Application.

[5] Upon hearing this matter the Supreme Court on review concluded and ordered that:-

"[21] **The proper construction of Section 22 is that the Legislature when amending the Police Act 1957 did omit by error to amend the word *"Minister"* in that section and replace it with the word *"Commissioner"*. It would certainly not be logical to say that the recommendation goes to the Minister who is under obligation in terms of section 30 to have transmitted to him any appeal lodged by an officer dismissed by the Commissioner in terms of Section 29.**

[22] I am in agreement that there is a solid basis for review of the finding of the Court in so far as prayer 4 as per the Notice of Motion is concerned. There is a patent error of law and fact in the judgment under review. Their justices, with due respect, should have seen the risibility and illogicality of the insistence that the word in the Act, i.e., *"Minister"* should be given its plain and ordinary meaning even if this leads to an *"anormally or rather ponderous procedure."* With respect to retain the word "Minister" as being intended so by the Legislature

would lead to absurdity and very well defeat the intention of the Legislature.

[23] **However, in so far as the review succeeds on the point of interpretation, how does the fact that the Court was correct insofar as adjudging that the standard of proof is that of a criminal charge; being proof of the commission of the offence beyond reasonable doubt.**

[24] **It seems that the first ground of review, having fallen away and the second ground succeeding does not affect the final outcome of the judgment of the Court by Ebrahim J.A. It may be that the Commissioner, as per this ruling, does have the power to dismiss an officer below the rank of Inspector in terms of Section 22 as read together with Section 23.**

[25] **However the point still remains that in terms of the law the wrong standard of proof was utilized by the Board in finding that the 1st and 2nd Respondents be recommended for dismissal. For this reason I consider that this Court cannot allow the dismissal of the 1st and 2nd Respondents to stand as it was premised on a faulty rule of procedure as it were. It would certainly be intolerable to the parties for the Court to order that the matter revert to the Board to proceed de novo on the applicable standard of proof. Too much water has flowed under the bridge, so as to say. The end result is that a just and equitable final decision must be given by this Court. In review proceedings the court may go beyond the prayers sought by the Applicant and issue a ruling that it acceptable morally to the society at large.**

[26] **It is up to the Court *a quo* to find a suitable remedy of compensating the first and second Respondents as it is clear from the record that the Applicant cannot work with the two officers any longer.**

[27] **This Court cannot however order the Applicant to pay the first and Second Respondents salaries from the date of discharge to today's date. It was submitted that this would be paying them for services which were not performed. I agree.**

I thus make the following orders:

"1. That the matter is referred back to the High Court for a determination of compensation to be paid by the Applicants to the 1st and 2nd Respondents in terms of the law.

2. That the issue of costs be determined by the High Court taking into consideration that the second ground for review has succeeded."

[6] It is the above judgment of the honourable Court that the Applicants now seek to have reviewed in these proceedings as per the Notice of Motion herein. At this stage it is important to deal with the issue of review of powers of this court as per Section 148 (2) of the Constitution, the elephant in the room.

[7] It is now accepted that the Supreme Court has review powers over its decisions as per 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"***

[8] Parliament has not promulgated any law and there are no rules of court as envisaged by Section 148 of the Constitution. More than ten (10) years have lapsed since the Constitution came into operation yet legislation envisaged under it such as this one is yet to be promulgated. In the meantime, the courts have been faced with litigants who wish to benefit from and exercise their rights under Section 148 of the Constitution. As a result, the Supreme Court has been placed in the invidious position of entertaining these matters without the benefit of an Act of Parliament and/or the Rules of Court. In the circumstances, the Supreme Court has attempted to lay down some of the grounds and/or conditions upon which such review may be made. This very case before court and the **PRESIDENT STREET PROPERTIES (PTY) LTD V MAXWELL UCHECHUKWU AND FOUR OTHERS (11/2014) [2015] SC 11** have been relied upon extensively as a leading authorities on the issue of reviews under Section 148 (2) of the Constitution.

[9] The Learned Justice of Appeal Dlamini AJA in the **PRESIDENT STREET PROPERTIES (PTY) LTD.** Case stated the following;

> ***"[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 judicata, 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."

[10] After considering authorities from various jurisdictions, Dlamini AJA sought to identify some of the conditions which might justify a 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"

[11] In **SWAZILAND REVENUE AUTHORITY vs. IMPUNZI WHOLESALERS (PTY) LTD** Supreme Court Case No. 6/2015. This Court identified a number of

important principles that can be distilled from the court judgment 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."

[12] The Supreme Court previously has never been called upon to undertake a second review of a matter that had been reviewed by a full bench.

[13] Therefore, the question arises as to whether a second or subsequent review is covered by Section 148 (2) of the Constitution. On the face of it, Section 148 (2) appears to provide for a single review: 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.

[14] The question as to how many reviews are permitted under the Constitution in order to ensure that a sense of gross injustice and unfairness is important one. Needless to say, 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.

[15] It is the position of this Court that Section 148 (2) entitles litigants to a single review. In this matter only the Respondents exercised the right of review before the Supreme Court. Does it follow, therefore, that the Applicants herein may be entitled to a review as well subject to meeting the established criteria? This Court is of the view that only one review is permissible under Section 148 (2) when given a plain interpretation, and the view of this Court is that it is the correct interpretation to adopt. Therefore, in view of the single review position under Section 148 (2) this should be the end of the matter. However, as it appears more fully below, this Court is faced with an entirely separate situation altogether. This Court is of the view that this is not a review per-se. The Court herein has to essentially address itself to the challenges regarding the compatibility and enforceability of the two judgments of the Supreme Court, the first one on appeal and the second on review. It is one of the paramount principles of law that judgments or orders of the Court must be lawful and capable of being enforced.

[16] Appellants contended that this matter is no longer pending before the High Court hence it is not alive, as it were, before that Court for the enforcement and/or compliance with the additional orders of the Supreme Court on review. The Learned Counsel for respondents completely failed to show this Court how this matter was alive before the High Court. This Court agrees with appellant's contention that this matter is not alive at the High Court. The High Court having

dealt with the only issue before it namely the review proceedings and its decision having been set aside in whole by the Supreme Court on appeal, it cannot be said to be ceased with the matter in whatever shape or form. The Supreme Court on review essentially confirmed the judgment of the Supreme Court on appeal hence the question of enforceability or implementation of the additional Orders arises?

[17] Unenforceability alone as not a sufficient ground to challenge the judgment of the Court. There ought to be some wrongfulness with the judgment. In the present case, the wrongfulness is rooted in the incompatibility resulting from the additional Orders granted by the Supreme Court on review.

[18] The locus of this application for review lies in the ultimate orders made by the Court, which follow the substantive determination in the judgment of the Supreme Court in the first review. From the argument of Counsel it is common cause that it is those orders that have given rise to this application. It is in regard to those orders that this court is being urged to consider and rectify the judgment of the 29th July 2015.

[19] The material ruling in the determination in the earlier review is unequivocal and clear in its content and effect. Foremost and critical was the Court's determination on the first ground of review that is found not fault the correctness of Supreme Court decision on the question of the appropriate standard of proof in the

disciplinary proceedings regime under the Police Act to be on the criminal standard 'beyond reasonable doubt'. That in our view was the tipping point to the dismissal of the first review application.

[20] The salient aspects of the Court's judgment, however, bear repeating if to highlight its key points. They pertain the outcome on the merits on the one hand, and the subsequent orders at the conclusion of the judgment on the other.

[21] ***The Outcome of the Review***

20.1 After an analysis of the issues, the court firmly pronounced on the outcome as it appears at paragraphs 14, 24-25 of the judgment (here we abstract the pertinent passages):

> **"[14] It seems to me that in so far as the matter of the standard of proof is concerned the Applicant has not made out a case for review''**.

Further, the court goes on to say:

> **[24] <u>It seems that the first ground of the review, having fallen away (dismissed) and the second ground succeeding does not affect the final outcome of the judgment of the court by Ebrahim J.A</u>. It maybe that the commissioner, as per this ruling, does have the power to dismiss an officer below the rank of Inspector in terms of Section 22 as read together with Section 23.**

[25] However <u>the point still remains that in terms of the law the wrong standard of proof was utilized by the Board in finding that the 1st and 2nd Respondents be recommended for dismissal. For this reason I consider that this Court cannot allow the dismissal of the 1st and 2nd Respondents</u> <u>to stand as it was premised on a faulty rule of procedure as it were''.</u>

(Parenthesis and emphasis added)

20.2 Having so determined the matter on the merits, it follows in our respectful view, that ultimately the finding of the Court was that the judgment of the Supreme Court, sitting in its appellant instance, should stand; in effect the review decision did not ipse dixit "**affect the final outcome'' of the judgment.** That 'final outcome' of the judgment of the Ebrahim JA was set out tersely in the judgment of Court (on appeal), which for clarity and convenience, we quote word for word as it appears:

"…I consider the learned acting Judge <u>should have set aside the dismissal and set aside the proceedings of the</u> <u>board</u>. I allow the appeal, with costs" (c.f. the final paragraph in the judgment of the learned Ebrahim JA at page 9 of that judgment (SC Case No.39/2014).

20.3 That in our view should be the nature, if logical effect of the body of the decision of the Court in the review as it served before it at that time. It is an outcome compatible with the reasoning and the findings that the court itself makes as gleaned from the body judgment and conclusive remarks it makes on the review application.

[22] *The Orders*

22.1 Standing in contrast, however are the orders in the final passages of the judgment. Having substantially dismissed the review application and allowed the judgment on appeal to stand, it is these orders *meru motu* directing the 'remission to the High Court of:

(a) The motion of compensation to the 1st and 2nd Respondent; and

(b) Costs award (of the review proceedings) subject to the specific directives that the Court makes in that regard.

22.2 In light of the above, there seems little scope for doubt that these orders are at odds or even incompatible with the rest of the judgment of the Court. We say this in light of the fact that as indicated earlier, in the final analysis, sans the final orders, the substantial decision the Court in the review was not sustainable and as such dismissible in the circumstances. It permits of no other conclusion. That is

the nub of the matter. The incompatibility is the first basis for the wrongfulness of the orders.

22.3 That makes the orders in the latter part of the court judgment in the review to stand in contradiction and to be repugnant to the rest of the judgment. There is thus a jarring effect which creates extreme exceptional circumstances warranting the intervention of this Court in the form of correction of its judgment dated 29th July 2015.

22.4 The second basis for the wrongfulness of the judgment is that it is unenforceable. It is regard to this orders that we are being urged to review and correct the judgment of this court of the 29th July 2015. However this is not, given the degree and extent of the 'correction or rectification' sought in effect an application to make a variation of the judgment to the extent it is argued the orders are at variance with the rest of the judgment under review?

22.5 This Court has in the case of **The Swaziland Motor Vehicle Accident Fund V Senzo Gondwe (SZSC Case No. 66/2010)** found itself faced squarely with considering similar question in light of the established principles on permissible exception to the *functus officio* rule ("the Firestone rule"). Having considered the definitive case law on the subject ***(see Firestone S.A (Pty) Ltd v Gentiruco A.G. 1977 (4) 298 (A) and the now quotable dictum of Trollip JA; West Rand Estate Ltd v New Zealand Insurance Co. Ltd 1926 A.D 173 at pp 176,178,186-7 and 192; Estate Garlick v commissioner of Inland Revenue1934 A.D 499 at 502)*** the

Court takes an 'expanded view of what the correction of an error ex facie the judgment of a court may entail in giving effect to the true intention of the court.

22.6 In the **Gondwe Case** this court seems to have now adopted a more liberal depature to the strict application of the exception to the Firestone Rule. This it did by considering the more enlightened stance in the case of ***S v Wells 1990 (1) SA (A)*** taken from the judgment of the learned ***Joubert JA*** in that case at pages 819-820:-

> **' According to the strict approach a judicial official is *functus officio* upon having pronounced his judgment which is sentential stricti iuris and as such incaple of alteration, correction, amendment or addition by him in any manner at all.** ***See D. 42.1.55 (ulpianus), D 42.1.62, Gail (1526-1587) Practicarum Observatiotionum ; on 1 and 116 nrs 1 et 3, Huber (1936) and other Roman Dutch authorities cited] in the case of In re: Appeal: SV stofile and others 1989 (2) SA 629 (Ck) at 6301 Pickard CJ would seems to prefer this strict approach. A variant to this strict approach permits a judicial officer to effect linguistic or other minor corrections to his pronounced judgment without changing the substance thereof. See Damhouder practycke in Civile Saecken CAP 220 NR1 Merula (15558-1607 Manier van Procederen titel 90vsp1 nr 2, Wassenaar (1589-1664) Practcyk Judicieel cap 21 nr 21.)***
>
> **<u>The more enlightened approach, however permits a judicial officer to change, amend or supplement his pronounced judgment, provided that</u>**

the sense or substance of his judgment is not affected thereby ***(tenore substantiate perseverante)***

Iam mainly attracted by the more enlightened approach which permits a judicial officer to change , amend or supplement his pronounced judgment or order provided he does not change its sense or substance . I consider that this approach should guide this Court as to enable it to do justice according to the circumstances of each case. This is such a case''

[23] Applying the above principles this Court found itself persuaded to hold that certain orders made by the court at the tail end of its earlier judgment that is had determined incompatible and 'in contradistinction to' the rest of that judgment, ought to be altered and amended by inserting appropriate alternative orders in keeping 'with the spirit and body' of the judgment itself. In so doing this Court in ***Gondwe*** considered this a necessary revision of its judgment **'so as to give effect to the Court's true intention'** and **' do justice according to the circumstances' of the case.** The Court always retains the residual powers to ensure that, inter alia, its orders or judgments are capable of enforcement and do not lead to absurdities so gross as to offend its principal responsibility namely to dispense justice. Therefore this is not a departure from the single review position under Section 148 (2) of the Constitution.

[24] In our view the excision of the incompatible and unenforceable orders and substitution thereof with appropriate fitting orders would have the effect of correcting or amending the judgment under review presently whilst preserving the integrity and express effect of the substance of the judgment as set out in the body thereof. The circumstances of this case are, in our opinion as analogous as they are equally compelling to incline this court towards amending and correcting the orders under review.

[25] Finally, it is our considered view that the correct orders in the application would be that the application for review as it presented before that court be dismissed with costs; and accordingly (for the sake of avoidance of doubt) the orders of the Supreme Court in allowing the appeal with costs should be maintained and made to stand. To achieve the result the final orders would have to be accordingly excised and altered. This Court is no way derogating from the single review position. However, in view of the compatibility and enforceability challenges arising as a result of the additional Orders, the Orders of the Supreme Court on review are not unassailable on the *functus officio* principle. To allow the Orders in question to remain unaltered, in our view, would amount to a serious miscarriage of justice.

[26] Accordingly, it is ordered that the Judgment of this Court dated 29th July 2015 is altered and corrected by expunging the section of the judgment from the

penultimate sentences of the text at paragraph 25 (commencing with the words **"it would be intolerable…"** including the orders that follow).

ORDER;

In the premise, the Court makes the following order;

a) The judgment of this Court on appeal is upheld with costs; and

b) The Application before this Court is granted with costs.

_____

S.P DLAMINI

JUSTICE OF APPEAL

I agree

_____

C. MAPHANGA

ACT. JUSTICE OF APPEAL

I agree

_____

Z. MAGAGULA

ACT. JUSTICE OF APPEAL

I agree

M.L. LANGWENYA

ACT. JUSTICE OF APPEAL

I agree

M.J.M MANZINI

ACT. JUSTICE OF APPEAL

For Applicant: Advocate Mabila

For Respondent: Mr. V. Kunene
(Instructed by Mabila Attorneys)