IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal No. 7/15

In the matter between:

SWAZILAND BUILDING SOCIETY	Appellant
VS	
RODGERS BHOYANE DUPONT	1st Respondent
ROBERT NKAMBULE	2nd Respondent
REGISTRAR OF DEEDS	3rd Respondent
ATTORNEY GENERAL	4th Respondent

Neutral citation: Swaziland Building Society vs. Attorney General & 3 *Others (7/2015) [2016] SZSC 66 (30 June 2016)*

Coram: **SP. DLAMINI JA**
K. M. NXUMALO AJA
C. MAPHANGA AJA
Z. MAGAGULA AJA
M. LANGWENYA AJA

Heard: **23 JUNE 2016**

Delivered: **30 JUNE 2016**

Summary: ***Application to stay the final determination of the review and the handing down of the judgment of the Supreme Court on review pending the final determination of the review application instituted by the applicant at the High Court under case No. 929/16 - no judgment or order before the court - Section 148 (1) and 148 (2) of the Constitution of Swaziland not applicable case not made for the relief sought - application dismissed and no order as to costs.***

JUDGMENT

S.P. DLAMINI JA

[1] This is an application for the stay of the final determination of the review and handing down of the judgment of this Court on review, pending the final determination of the review application instituted by the applicant at the High Court under case No. 929/16.

[2] Briefly, the background to this application is as follows;

On 26 January 2016 and on subsequent dates, the Supreme Court heard argument in case No. 07/2015 where the first respondent filed an application

seeking to review the decisions of this Court delivered on 1st May 2013 under case No.66/2012.

The application under case No. 07/2015 is found at pages 213 to 218 of the record and the first respondent's prayers were stated as follows;

> **"4. Reviewing, correcting and / or setting aside the judgment of the above Honourable Court handed down on the 3rd May, 2013 in the matter between Rodgers Bhoyana DU Pont/ Swaziland Building Society and 3 others case No. 66/12, on the ground that the Supreme Court committed a gross irregularity in determining the appeal without affording the Appellant a right to a fair hearing as enshrined in the Constitution of Swaziland 2005 in that he was denied a right to legal representation.**
>
> **5. Reviewing, correcting and / or setting aside the judgment of the above Honourable Court handed down on the 4th November, 2015 and 11th November 2015 in the matter between Rodgers Bhoyana DU Pont/Robert Nkambule and 2 others case No. 7/15.**
>
> **6. Reversing the sale in execution of farm No. 769 situated at Croydon in the Manzini District on the basis that the sale was irregular.**
>
> **7. Ordering the Registrar of Deeds to deregister the registration of the farm being farm No. 769 situated at Croydon in the Manzini District in the name of Robert Nkambule.**

8. Staying the eviction of the Appellant and his family from farm No. 769 situate at Croydon in the Manzini District pending finalization of this application.

9. Directing that prayers 3, 4 and 5 operate as an interim order, and that a rule nisi do hereby issue returnable on a date to be determined by the above Honourable Court.

10. Costs of suit in the event the application is opposed.

11. Further and /or alternative relief.''

[3] The aforesaid application, was heard by the Supreme Court on review in January and February 2016. Four months after the matter was last heard, the judgment remains pending and reasons for the delay unknown. This is at odds with the well- known maxim that justice delayed is justice denied.

[4] In the meantime, applicant instituted review proceedings at the High Court. In terms of the notice of motion filed by the applicant at the High Court and the following relief is being sought therein:

"2.2 The first respondent's representation of the second respondent in the proceedings before the Supreme Court of Swaziland (under case number 07/15) is declared unlawful.

3.3 The decision referred to in paragraph 1 and the representations referred to in paragraph 2 are reviewed and set aside.

4.4 The first and second respondents are ordered to pay the applicant's costs at the attorney and own client scale, including the costs of two counsel.

5. 5 The applicant is granted further and /or alternative relief."

[5] Further, in paragraphs 10,11,12,13 and 14 of applicant's Head of argument, the relief sought at the High Court is recast as follows;

"10 In the High Court review, the applicant seeks to review and set aside the Attorney General's decision to represent Mr Du Pont, as well as the Attorney-General's representation of Mr Du Pont during the Supreme Court review.

11. Briefly, the basis of the High Court review is that:

11.1 **the Attorney General exceeded his power in deciding to represent Mr Du Pont because Section 77 of the Constitution only empowers the Attorney General to represent the government;**

11.2 **the decision contravened section 77 (8) of the Constitution in that the Attorney General is not permitted to subject himself to the directions of any other persons, which he necessarily did by accepting a mandate to represent Mr Du Pont;**

11.3 **the decision placed the Attorney General in a conflicted position as he notionally represented Mr Du Pont and the fourth respondent, the Registrar of Deeds; and**

11.4 **the Attorney General acted irrationally because there was no rational connection between his decision to represent Mr Du Pont and a legitimate government arm.**

12. The applicant further contends in the High Court review that the Attorney General's decision to represent Mr Du Pont materially undermined the fairness of Supreme Court review. A central requirement for a fair hearing is the so-called equality of arms between litigants. That was distorted here because of the perception that is attached to the government directly advancing Mr Du Pont's case. The Attorney General's representation of Mr

Du Pont is that it was government that was advancing, and aligning with, Mr Du Pont's case. It is also manifestly unfair for one litigant to directly benefit from the resources available to the Attorney General.

13. The application in the High Court therefore seeks an order declaring unlawful and setting aside the Attorney General's decision to represent Mr Du Pont.

14. With respect the High Court's decision would materially impact on the lawfulness of the Supreme Court review. If the High Court grants the relief sought by the applicant, then the Attorney General's representation of Mr Du Pont before the Supreme Court would have been unlawful. It would have to be accepted that the Attorney General could not have lawfully performed his mandate to represent Mr Du Pont. The Supreme Court review could not have lawfully proceeded on that basis. The unlawfulness of the Attorney General's decision and conduct would taint the Supreme Court proceedings."

[6] On the 25th of May 2016, applicant launched the present proceedings under a certificate of urgency. The matter as per the notice of motion was set down for hearing on the 31st of May 2016 at 9.30 am. In the notice of motion, applicant inter alia seeks the following Orders;

"**1. That the rules relating to service and time frame be dispensed with and that this matter be enrolled and heard as one of urgency.**

2. That the above Honourable Court exercises its supervisory powers and stay the delivery of the judgment under case No. 7/2015 by this court pending the finalization of the Review Application filed by the Applicant before the High Court.

3. Costs of this application in the event that same is opposed. and

4. Further and /or alternative relief."

[7] Applicant relies on the founding Affidavit of Timothy Robert Thembinkosi Nhleko for the relief sought.

[8] The Attorney General (as 4th Respondent and also in his capacity as Counsel for the first and third Respondents) opposes the application. He has raised a series of preliminary legal points on the basis of which it urges this Court to dismiss the application at the threshold as it were.

[9] A key plank in the points of law he advances is that the very issue that the applicants have referred to the High Court regarding the legality of the Attorney General's decision to represent Mr du Pont, was exhaustively canvassed and argued before that Court and a definitive and final determination in the form of a ruling was made by the Supreme Court. It is

argued, consequently, that the Supreme Court is *functus officio* on that question and the matter *res judicata*.

[10] Put simply, the Attorney General maintains that the Supreme Court has pronounced on the constitutionality and relative legality of the Attorney General's authority to represent the said Mr du Pont and as such there is no pending decision or ruling to stay.

[11] To place the matter in proper context, it is important to briefly mention that it has emerged during the proceedings presently and upon examination of the voluminous record comprising of the formal notices and affidavits as well as a transcript of the proceedings when the matter was heard, that the issue pertaining to the status of the Attorney General's intervention in the proceedings had originally arisen at the instance of the Appellant and the second Respondent (Swaziland Building Society and Robert Nkambule) as an objection taken *in limine* against the Attorney General.

[12] It is common cause that extensive argument for and against the objection *in limine* were heard by the Court on the 18th January 2016 thus necessitating an adjournment of the proceedings until the 25th February 2016 for the Court retiring to consider the point. What is unclear to us is what exactly happened when the matter was recalled and the Court duly reconvened to resume the proceedings. There is a dispute on this question as between the parties.

[13] The Attorney General's *res iudicata* proposition, as already mentioned, is predicated on the assertion that the Court gave a ruling in his favour and dismissed the Applicant's objection to his audience. The Applicants maintain there was no ruling handed down on the point. It is for this reason that when the matter came before us we sought to enquire specifically as to the existence and the exact terms of that ruling or determination by the Court.

[14] When Counsel for the parties appeared before us we sought their assistance in locating evidence of the ruling or determination of the issue of the Attorney General's status on the right of audience question either in a form of an order of court or a ruling.

[15] In the absence of the production of a ruling or writ expressing the decision by the Court one way or the other (either dismissing or upholding the respondent's objection in *limine*) we invited the parties to address us on the matter and in that regard considered and examined the Court record as well as a transcript of the proceedings of the morning after the Supreme Court's adjournment.

[16] After a careful and painstaking examination of the record, it became evident and common cause that the only relevant passages in that transcript in reference to the Court's decision on the objection *in limine* do not contain an unequivocal statement in the form of a ruling on the point.

[17] What is clear is that upon the recall of the matter on the 25th February 2016, the Court only seems to indicate it had made a decision to proceed and hear the matter on the merits *(albeit with the court (including Counsel and their representative capacities) as originally constituted).* This is what appears in

the reconstruction of a transcript of the audio recording of the proceedings that morning (although obviously incomplete in some aspects):

"(T)he court has reserved its judgement, and we have concluded…..that this Court will hear the matter on its merits with Counsel as currently (*missing words (presumably due to the recording being inaudible*)…….. **(T)he reasons for this ruling is to be incorporated in the judgment ultimately to follow…."**

(*Added parenthesis*)

[18] Without any evidence as to the exact ruling made by the Court on the reserved question, the above remarks of the honourable Court give rise to two assumptions: Either that the Court did make a ruling, whose exact terms are not articulated anywhere, or that it presumably determined it was not necessary for purposes of the advancement of the proceedings on the merits to give a definitive ruling on the objection but rather considered it appropriate to grant the Attorney General due audience but reserve and defer a ruling on the point *in limine* (as to his jurisdictional powers) to be delivered with the main judgment in due course.

[19] We are mindful also, as it is our view, that in any event the *onus* presently falls on the Attorney General to demonstrate that indeed there exists a ruling in which the objection *in limine* is disposed of and as to the terms thereof, as a party putting up that proposition before this Court. That *onus*, in our view, has not been discharged. In any event we are not persuaded that a definitive ruling on the status of the Attorney General in the review proceedings has been handed down in the absence of evidence *ipsissima verba* of the ruling.

[20] All said, either there was a ruling with the reasons therefore reserved for delivery with the final judgment or there was no ruling; in the latter instance the ruling being reserved until final determination with the merits. The latter would still be a reasonable and viable approach by the Court; preferring to deal with the matter in a comprehensive rather than piecemeal fashion. In any event it is the considered view of this court that as matters stand it is inclined to regard the matter as one that is pending and on which judgment is awaited.

[21] There is therefore no merit in the *res iudicata* argument contended by the Attorney General. All indications are that the Court's ruling on the matter is pending. Until the judgment of the Court has issued we have no insight as to the Court's decision and ratio for that decision on the points of law and on the merits has been determined.

[22] This leaves the question as to whether it is competent for this court to pre-empt the judgment of the court and forestall it as it were by way of an order staying the Courts pending judgment.

[23] The Second Respondent stated in the papers before this Court that he is in support of the application and his submission are essentially the same as those of the applicant. Therefore, it is not necessary to deal with his position separately from the applicant.

[24] After hearing the submission on behalf of the parties and having perused the record, we have come to the conclusion that the application has no merit and ought to be dismissed on the following grounds:

(a) Section 148 (1) does not empower the Supreme Court to supervise itself. Section 148 (1) states;

> **"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."**

(b) There is no decision before the Court to consider and /or review as envisaged by Section 148 (2). Therefore, it is not apparent what the mischief is that the application for the stay of the delivery of the judgment intends to prevent and/or address. In the absence of the judgment, one is forced into the dangerous realm of speculation;

(c) We are also not persuaded that the Supreme Court has power to stay deliberation and delivery of judgment in matters before it. To do so, would amount to improper interference with the operations of the Court; and

(d) Applicant relied on the case of the **Ministry of Natural Resources and Energy v Johannes Nkwanyane case 2942/2000 and appeal court case No.36/2004 and the Minister of Public Works v MXN Development Construction CC case No 7015/2006** in support of the relief sought.

[25] Firstly the **Ministry of Natural Resources V Johannes Nkwanyane** case is distinguishable in that it dealt with the issue of execution of the judgment already delivered whereas in the present case the application seeks to prevent the delivery of a judgment of the Court. Therefore, we agree with the arguments advanced by the Deputy Attorney General that the case cannot be authority to support the relief sought by applicant in the instant case.

[25] Secondly, the **Minister of Public Works Case** is a South African case and applicant relied on the dictum of his Lordship Yekiso J at paragraphs [10] and [11] of the judgment wherein it is stated;

> **"10. Herbstein & Van Winsen, *supra*, at p248 cite certain special circumstances in which the assistance of the court may be invoked to stay proceedings temporarily over and above the stay of proceedings on account of being vexatious or being the abuse of the court process. The instances cited by the authors are *lis pendens*; pending criminal proceedings; unpaid costs; arbitration and other special matters. Under heading 'Special Matters,' the authors cite numerous instances where an order of stay of proceedings could be granted, ranging from companies in liquidation up to stay of proceedings pending payment of security costs. It is arguable if this list is exhaustive, particularly in view of the advent of constitutionalism in this country. Various provisions in the Constitution of the Republic of South Africa, 1996 enjoin the**

courts, whenever it is in the interest of justice to do so, to develop the rules of common law and, in so doing, remedies unheard of before, may evolve which, either substantively, or under the heading 'special matters' may justify a stay of proceedings, either temporarily or permanently. A person who may have been a fugitive of justice under the cloud of a charge of sodomy in the apartheid era may, as and when arrested, apply for a permanent stay of proceedings on the basis that sodomy is no longer a criminal offence, a remedy previously unheard of prior to the advent of constitutionalism.

11. In my view a stay of proceedings, either permanently or temporarily in the interest of justice, is such remedy which may evolve. After all, section 173 of the Constitution of South Africa states that the Constitutional Court, the Supreme Court of Appeal and the High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interest of justice.''

[26] There are two important points that arise from the judgment of the learned Judge Yekiso:

First, the learned Judge relied almost wholly for his judgment on Section 173 of the South African Constitution. Section 173 of the South Africa Constitution provides that:

> **"The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice." (my own underlining).**

[27] Second, the judgment suggests that a new event such a change in the law and/or new material information which was not in existence or was unknown may be a basis for "stay of proceedings, either permanently or temporarily in the interest of justice…". This does not help applicant's case in anyway. The issue of the representation of 1st respondent by the Attorney General was done before the Supreme Court on review and is also subjected to the proceedings at the High Court. Therefore, the matter is of the representation is not based on a new event and/or resulting from a new law. The present case is distinguishable from the **Minister of Public Works/ MXN Development CC** judgment in that the learned Judge Yekiso stayed the proceedings in a matter in which he was presiding, the converse is true in the matter before this Court. This is just an observation and nothing turns on it in view of what is already stated as the basis for rejecting applicant's reliance on the dictum. We do not have in our jurisdiction a provision equivalent to Section 173 of the South African Constitution, be it the Constitution of Swaziland of 2005, the Court of Appeal Act or the High Court Act.

[28] The closest provision we have to Section 173 of the South African Constitution is Section 142 of the Constitution. Section 142 provides;

> **"142. Subject to the provisions of this Constitution or any other law, the Chief Justice as head of the judiciary may make rules for regulating the practice and procedure of the superior and subordinate courts, including the specialized and local courts as well as powers of judicial officers."**

[29] The Applicant did not seek to rely on section 142 and even if it did, Section 142 does not give the same power to the Chief Justice as Section 173 of the South African Constitution gives to the South African Courts. Section 142 is also instructive in understanding that Section 148 (1), on which applicant relied for the relief sought, does not give this Court any administrative powers over itself.

[30] A perception may be created from the application that applicant is merely further delaying the outstanding judgment in matter that has already been heard. The Principle "Justice delayed is justice denied'' is apposite.

[31] In light of the above, it is not necessary to deal with the other points in *limine*. In any event, the points in *limine* were inextricably intertwined with the points as well as the merits of the matter.

[32] Regarding Costs, this Court is alive to the unfortunate background and circumstances of this case. This matter started with a Mortgagor seeking to enforce its rights against the mortgagee in 2012. With several court judgments and Orders down the line, the finality of the matter remains elusive and the end not in sight. This Court is not inclined to make an order as to costs.

[33] For the foregoing reasons, this application in the view of this Court has no merit and is accordingly dismissed. Accordingly, the Court makes the following order;

[34] **ORDER**

(a) The application be and is hereby dismissed; and

(b) No order as to costs is made.

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S.P. DLAMINI

JUSTICE OF APPEAL

I agree _____

K. M. NXUMALO

ACTING JUSTICE OF APPEAL

I agree _____

C. MAPHANGA

ACTING JUSTICE OF APPEAL

I agree _____

Z. MAGAGULA

ACTING JUSTCE OF APPEAL

I agree _____

M. LANGWENYA

ACTING JUSTICE OF APPEAL

For Applicant:	Mr S. Mdladla
For 1st, 3rd, 4th Respondents:	Mr S. Khumalo
	(Deputy Attorney General) with
	Mr Kunene
For 2nd Respondent:	Mr L Mamba