IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD IN MBABANE Appeal Case No. 71/2016

In the matter between:

WANDILE NXUMALO **Applicant**

And

SWAZI MTN LIMITED **Respondent**

Neutral Citation : *Wandile Nxumalo and Swazi MTN Limited* (71/2016) [2017] SZSC 10 (21 APRIL 2017

Coram : R. J CLOETE JA

For the Applicant : MR V. NHLABATSI

For the Respondent : MR B. GAMEDZE

Heard : 20 APRIL 2017

Delivered : 21 APRIL 2017

Summary : *Urgent Application for stay of execution on a High Court Judgment pending an Application for review of the Judgment of the Supreme Court in terms of Section 148 (2) of the Constitution – required to set out that Applicant has a sustainable bona fide defence to the claim of the Respondent – requirement not met - Application for stay dismissed with costs*

JUDGMENT

CLOETE – JA

PROCEDURAL MATTERS

[1] 1. I heard this matter in my chambers and the representatives of both parties appeared before me.

2. I explained to the parties that the only matter which was before me, as a single Judge, was an urgent Application for the stay of a Judgment granted in the High Court and confirmed by the Supreme Court and that I was not empowered at law to deal with or adjudicate on the merits of the matters which were canvassed in the High Court

and in the Supreme Court sitting in its Appeal Court jurisdiction.

3. I confirmed with the parties that the following documents were before me:

3.1 the record of proceedings in High Court Case No. 897/2016, duly certified by the Registrar of the High Court on 10 October 2016;

3.2 a Notice of Appeal by the Applicant against the Judgment handed down in Case No. 71/2016 by His Lordship Maphalala PJ (as he was then);

3.3 an amended Notice of Appeal in the same matter referred to in 3.2 above;

3.4 a Notice of Application for condonation for late filing of Heads of Arguments in the Supreme Court filed on 27 March 2017;

3.5 a Notice of Motion by the Applicant filed on 07 April 2017 (the sole matter before me) in terms of which the Applicant sort the following Orders:

1. Dispensing with the usual forms and proceduresrelating to the institution of proceedings and allowing this matter, to be heard as a matter of urgency;

2. Condoning Applicant's non compliance with the Rules and Procedures and time limits relating to institution of proceedings.

3. Staying implementation and execution of the Order of the Supreme Court contained in the Judgment dated 28 March 2017.

4. That Prayer 3 operate with immediate interim effect, pending the determination of the Application for review in terms of Section 148 of the Constitution.

5. Reviewing, correcting and setting aside the following orders of the Supreme

Court made in the Judgment dated 28 March 2017:

5.1 The Application for condonation is dismissed;

5.2 The Appeal is deemd to have been abandoned;

5.3 No order as to costs;

6. Directing the Supreme Court hears the Appeal on the merits and that the Appeal be enrolled in the next session of the Supreme Court.

7. The Respondent be ordered to pay costs of this Application in the event of opposition.

8. Granting such further and alternative relief as the Court may deem fit.

3.6 Respondent's Answering Affidavit filed on 18 April 2017;

3.7 A further purported record of the proceedings in Case No. 897/2016 duly certified by the Registrar

of the High Court and filed on 18 April 2017 which, it needs to be recorded, mysteriously included Defendant's Plea which was by all counts filed out of time.

4. I advised Mr Nhlabatsi that if he wanted me to grant the Order sort by him, he would have to prove to me that his Founding papers in this Application clearly set out a *bona fide* defence to the claim of the Respondent.

5. Mr Nhlabatsi, wisely and correctly, conceded that the Application before me had to stand or fall on his Founding papers alone as, as pointed out previously it was not within my purview to make any findings on the factual and legal issues which were canvassed in the other Courts.

BRIEF BACKGROUND

[2] 1. I set out hereunder the brief background to the matter by reference to the documentation before me relating to the matters heard by the High Court and the Supreme Court without comment or making any findings thereon and for

the purposes hereof the actual dates and times are not critical.

2. Respondent instituted proceedings against the Applicant in the High Court for payment of a substantial sum of money being E480,405.67 (“the claim”).

3. The Applicant entered an appearance to defend and the Respondent duly filed and served its Declaration.

4. I will mention here that there is a dispute between the parties relating to the calculation of the *dies* but in any event the Respondent served a Notice of Bar on the Applicant and obtained Default Judgment against the Applicant who then filed a Plea (ostensibly out of time) and brought an Application for rescission of the Default Judgment.

5. That Application was heard by Maphalala PJ (as he was then) who dealt with all of the issues raised by the parties and at Page 61 of his Judgment he analysed the points in *limine* and at Page 63 he found that the point in *limine*

raised by the Respondent should succeed on the basis that **"…I am not persuaded by the Applicant's answer reflected in their Replying Affidavit and the feeble attempts by Mr Nhlabatsi to fight against such glaring acts of disobedience of this Court. Therefore the point in *limine* of the doctrine of 'clean hands' or to succeed"**.

6. The second point in *limine* was that relating to urgency which is not relevant here.

7. At Page 64 at Paragraph 33 the Learned Judge stated that **"However, I shall comment obiter dictum on the merits of the case. The Applicant could not succeed on either Application for rescission in terms of Rule 41 (1) (a) and Rule 31 and the Common Law. Applicant has dismally failed to fulfil requirements in the dictum in the High Court case of Nhlanhla Phakati vs Swaziland Television Authority (supra) cited at Paragraph [13] of this Judgment therefore, even on the merits the Application ought to fail"**.

8. At Page 64 on Paragraph 34 the Learned Judge stated that **"In the result, for the aforegoing reasons the points in limine raised by the Respondent ought to succeed and the Application dismissed with costs on the Attorney and own client scale. The conduct of the Attorney for the Applicant is suspect in this case"**.

9. Not being satisfied with the said Judgment, the Applicant then noted an Appeal to this Court in the following terms:

1. The Court a quo erred in law and in fact in holding that the Appellant was approaching the Court with dirty hands.

2. The Court a quo erred in law and in fact in simply disregarding the Appellant's constitutional right by straight away shutting the doors of the Court against the litigant <u>when there could have been other less drastic measures or alternatives such as;</u>

(i) <u>Allowing the Appellant to purge his contempt;</u>

(ii) <u>Making an enquiry into his property;</u>

(iii) <u>Garnishee;</u>

(iv) <u>Rule 45.</u>

(my underlining for purposes referred to below)

Shutting the doors against a litigant should be a measure of last resort in so far as this is a limitation of a constitutional right enshrined in Chapter 3 of the Constitution.

3. The Court a quo erred in law and in fact in benefiting the Respondent from its own wrongs when there was clear evidence that Respondent short circuited the Rules by filing a Notice of Bar when the dies had not lapsed.

- **<u>Deprived the Appellant the opportunity of filing Rule 30.</u>**

(my underlining)

4. The Court a quo erred in law and in fact in not finding the Order obtained by the Respondent

to have not been erroneously obtained. The Respondent having flouted the Rules pertaining Default Judgments. Out of illegality arise no right.

5. The Court a quo erred in law and in fact in not determining that benefiting the Respondent from its wrong doing amounts to a serious miscarriage of justice as the Appellant is ordered to pay such a substantial amount without its defence having been heard. Its merits have been disregarded".

10. This Court, when the matter was called heard an Application for condonation by the Applicant for non-compliance with the Rules of this Court and after having heard both parties dismissed the Application for condonation, ordered that the Appeal of the Applicant be deemed to have been abandoned and made no order as to costs.

11. Hence the current Application before me.

ARGUMENTS

[3] 1. I was on a few occasions at pains to point out to the parties that I was not in a position to deal with or adjudicate on the merits of the matter and that my sole mandate was to consider whether to grant an Order of stay of a Judgment as prayed for by the Applicant.

2. It is recorded that both of the parties engaged in debate over factual and other issues but again, for the purposes of this Judgment I will not deal with same.

3. I accordingly invited Mr Nhlabatsi who had, as pointed out above, conceded that the only Application before me had to stand or fall on his Founding papers filed on 07 April 2017 and nothing else, to show me in those Founding papers where his client had set out the necessary standard of detail setting out the fact that he had a *bona fide* defence to the claim of the Respondent and that as such he had prospects of success in a proposed review Application of this Court's Judgment in terms of Section 148 (2) of the Constitution.

4. Mr Nhlabatsi finally referred me to Paragraph 12 of the Applicant's Founding Affidavit at which Applicant deposed as follows:

> **12. The High Court granted the Respondent Judgment against me in the sum of E480,405.67 (Four Hundred and Eighty Thousand Four Hundred and Five Emalangeni Sixty Seven Cents) <u>despite the fact that Respondent had not filed anything to justify its case or proof thereof of my indebtedness to it for the above mentioned amount</u>. <u>The Respondent only filed a report during the hearing of the rescission Application which itself does not in anyway prove my indebtedness to the Respondent.</u> The report filed by the Respondent shows that I am indebted to it in the sum of E87,771.67 (Eight Seven Thousand Seven Hundred and Seventy One Emalangeni Sixty Seven Cents) <u>which amount I do not know and I had not been given an opportunity to state my case, I would have informed the Court that I am not</u>**

<u>indebted to the Respondent in the said amount or any amount at all</u>. It is therefore very disturbing and prejudicial to myself how the Respondent can obtain an Order without having justified its Application for the said Court Order or tendered any evidential proof against me. It is also worth mentioning that the report in as much as it does not prove anything against me, was prepared by the Respondent itself not by any independent party or organization. The Supreme Court refused to hear the matter despite the fact that I had established reasonable prospects of success in the merits". (the underlining mine)

5. Mr Nhlabatsi relied solely on the underlined provisions above as his assertion that his client had a *bona fide* defence to the claim of the Respondent and as such his prospects of success in a review Application were very good.

6. In brief summary Mr Gamedze stated that:

6.1 The Applicant was trying to mislead the Court as regards the alleged report set out at Paragraph 12 of the Founding papers as this report was never handed in to any of the prior Court hearings or filed of record and in any event, the Applicant failed to even annex the alleged report to its Founding papers;

6.2 That this was nothing but a third bite at the cherry so to speak and that the Applicant had not satisfied the requirement of setting out a *bona fide* defence to the action instituted by the Respondent.

JUDGEMENT

[4] 1. As regards the requirement of establishing that the Applicant had a *bona fide* defence to the claim of the Respondent, the Applicant has failed dismally to convince me that it has any defence let alone a good sustainable *bona fide* defence.

2. The only apparent allegation appearing in the Founding papers on which the Application must stand or fall are those set out in Paragraph 12 of the Founding Affidavit, discredited by Counsel for the Respondent and in my view a bald unsubstantiated statement stating **"I would have informed the Court that I am not indebted to the Respondent in the said amount or any amount at all"**. This clearly does not remotely attain the standard required to set out a defence giving rise to good prospects of success.

3. Of particular importance and interest to me was what I underlined in the Applicant's Notice of Appeal referred to in Paragraph [2] 9 above namely that the doors were being shut against a litigant when there could have been other less drastic measures or alternatives such as making an enquiry into his property, Garnishee or Rule 45. Those procedures only apply to a person who is indebted to another and after a Judgment has been granted. By extension the Notice of Appeal clearly seems to envisage a debt and was suggesting ways in which the settlement

of the debt should be dealt with and in effect almost tantamount to an admission of liability.

4. Without commenting on any of the merits of any of the matters, it must be stated that this matter has been inadequately dealt with and poorly presented at all levels and Maphalala PJ (as he was then) in fact made an adverse finding in Paragraph 34 of his Judgment referred above.

5. For those reasons, I have no alternative but to find that the Applicant has failed dismally to convince me that it has a *bona fide* defence to the claim of the Respondent and as such has no prospects of success in any ill-advised review proceeding.

6. I can do no better than quote the now often dictum found in **Salojee vs The Minister of Community Development 1965 92) SA 135 at 141, *"there is a limit beyond which a litigant cannot escape the results of his Attorney's lack of diligence"*. Accordingly matters may well be struck from the roll where there is a**

flagrant disregard of the Rules even though this may be due exclusively to the negligence of the legal practitioner concerned. It follows therefore that if clients engage the services of practitioners who fail to observe the required standards associated with the sound practice of the law, they may find themselves non-suited. At the same time the practitioners concerned may be subjected to orders prohibiting them from recovering costs from the clients and having to disburse these themselves."

7. Accordingly at the conclusion of the hearing I, after obtaining an undertaking from the Counsel for the Respondent to the effect that it would not execute on its Judgment before a period of four (4) Court days after the delivery of these written reasons for my *ex tempore* Judgment in which I made the following order:

ORDER OF COURT

1. The Application set out in the Notice of Motion of the Applicant filed on 07 April 2017 is dismissed with costs.

2. The Respondent shall not execute on the Judgment in its favour granted by the High Court of Swaziland before a period of four (4) Court days after the delivery of these reasons for my Judgment.

R. J. CLOETE
JUSTICE OF APPEAL