IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE CIVIL APPEAL CASE NO: 68/2016

In the matter between:

M P SIMELANE ATTORNEYS APPLICANT

AND

BEAUTY BUILD CONSTRUCTION (PTY) LTD 1 ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

Neutral Citation: *M P Simelane Attorneys v.Beauty Build Construction (Pty) Ltd and Two Others (68/2016) [2017] SZSC 14 (15 May 2017)*

Coram: DR. B.J. ODOKI, JA
S.P. DLAMINI JA
M.J. DLAMINI, JA
S.B. MAPHALALA, JA
J.P. ANNANDALE JA

Date Heard: 6 April 2017

Date Delivered: 15 May 2017

Summary: *Review of judgment of Supreme Court under Section 148 of the Constitution−Consent judgment recorded by the Supreme Court − Application to review judgment based on grounds of bias coercion and non- existence of 1st Respondent − Applicant withdraws ground of bias and coercion − Applicant maintains that he cannot pay to 1st Respondent money collected on its behalf because the 1st Respondent is a non-existent entity in law − Ground addressed in the court* ***a quo*** *− No exceptional circumstances established warranting review of the consent judgment−Appeal dismissed with costs.*

JUDGMENT

DR. B.J. ODOKI J.A

[1] The Applicant brought this application in terms of Section 148 (2) of the Constitution to review and set aside a consent order rendered by the Supreme Court on 30 June 2016 between the parties.

[2] The application did not specify the grounds upon which it was based, but the grounds were contained in the Founding Affidavit of Muzi Simelane, a partner of the Applicant. The main ground seems to be stated in paragraph 9 of the affidavit in these terms;

> *"9. The decision of the Supreme Court is sought to be reviewed for a number of reasons, which if left unchallenged would distort the jurisprudence of the Kingdom. Mainly that fictitious entities (such as the 1st Respondent) or those lacking* ***locus standi in judicio*** *would be clothed with legal capacity by means of a Court Order in direct conflict with the existing law of the Kingdom on incorporation of companies."*

[3] The other grounds for review which were abandoned during the hearing of the review were that the Applicant was denied a fair hearing, that the presiding judge was biased, that the consent order was defective or invalid, and that the enforcement of the consent order was prejudicial to Swaziland Government, (Ministry of Home Affairs).

Therefore the only ground relied on for review was the one stated above in paragraph 9 of the Founding Affidavit of the Applicant.

[4] The 1st Respondent filed an answering affidavit sworn by Bongani Masango, Managing Director of the Respondent. Attorney Derrick Ndo Jele Attorney for the 1st Respondent swore to a confirmatory affidavit.

BACKGROUND

[5] The 1st Respondent instructed the Applicant (a firm of attorneys) to collect on its behalf a certain sum of money from the Swaziland Government and the money was actually paid to the Applicant who received it on behalf of its client, the Respondent. The Applicant failed to account to the 1ST Respondent and did not pay over all the moneys due to the 1st Respondent.

[6] Consequently, the 1st Respondent brought proceedings in the High Court against the Applicant seeking an order for the rendering of an account and the debate thereof.

[7] The High Court granted a consent order in terms of which the Applicant had to render an account to the 1st Respondent and ordered that the account had to be debated between the parties.

The matter was debated among the parties but they could not reach an agreement. The matter was then taken by the 1st Respondent to be debated in court.

[8] During October 2015, the matter came before Mlangeni J. for debatement of the account. After hearing arguments the learned judge granted an order on 10 November 2015 in terms of which the Appellant had to pay the Respondent an amount of **E387, 992.35,** plus interest and costs. It was this order which was the subject of the appeal when this Court heard the matter on 18th May 2016.

[9] It will be noted that although the Applicant had reached an agreement in court with the 1st Respondent, the Applicant's attorney, Ms. Noncedo Ndlangamandla advised the Court that if it was her way, the matter was going to be settled. The Court then stated, clearly she was being prevailed by her client - a clear case of the tail wagging the dog. The Applicant thereafter

filed an appeal even before the matter was heard by Mlangeni J. With regard to the filing of an appeal when the court had not issued any order, Mlangeni J. said in his judgment;

" This appeal is particularly worrisome because it is against an order or judgment that does not exist. At no point did I made an order on the merits of the matter other than direct the parties to reduce the agreement into writing., This ill-informed attempt to appeal demonstrates, in my view, the Respondent's obsession to delay the applicant's remedy for as long as possible. How else can one explain the filing of an appeal against an imaginary judgment or order? Some of the issues I have mentioned above are very untidy and they are not good for the legal profession. When I deal with the issue of legal costs I will revisit some of them"

[10] The Applicant noted an appeal in the Supreme Court against the decision of the High Court on twelve grounds of appeal. For the purposes of this review, I need only reproduce the remaining relevant ones:

"1. The learned Judge erred to grant judgment for payment of the sum of E387,992.35 in circumstances wherein it was not competent to do so as set out below;

1.1 By ignoring the substantive answering affidavits filed of record and insisting upon heads of arguments to thereby leaving Respondent's counsel with no option save to concede to the orders.

*1.2 The court **a quo** by passing judgment in favour of non-existent, unregistered entity, Beauty Build Construction (Pty) Ltd, with no trading licence in 2008, lacking locus **standi in judicio.***

1.3 In the main proceedings, the real Respondent was sought to be changed from Beauty Build Construction (Pty) Ltd to Real Ocean Res Investments (Pty) Ltd. There was a dispute of fact as to the real party before the court.

*1.4 By not taking into account the fact that the prayers sought by the Applicant had become **res judicata,** as per court order of 31st January 2014.*

2. The learned judge erred by not dismissing the Application as it was apparent that there were a series of disputes of fact, ranging from whether the Applicant was actually engaged by the Respondent in a professional capacity to invoke the application of provisions of the Legal Practioners Act, bye-laws. The matter indeed ought to be referred to trial.

3. The court ***a quo*** *erred in granting judgment on an account that was subject to proper debatement provided that it be established in the first place that the Appellant was engaged by the Respondent and secondly in its professional capacity.*

7. The learned judge erred by concluding that the Appellant's attorney (Ms. Ndlangamandla) was being prevailed upon by her client, when there is clearly nothing on the record to draw such an inference. The learned judge ignored that the attorney has a duty to always act in the best interest of her client.

11. The learned judge erred in ordering costs to be at a punitive scale.

12. In the event that it is found that the Appellant has to pay any amount to the Respondent, the Appellant tenders such payment to the Swaziland Government…."

[11] When the appeal was about to be heard, the court suggested to the parties that this was a matter that should be settled out of court and gave the parties an hour to consider the matter. After the break, the Applicant's counsel informed the court as follows:

" Pursuant to what your Lordships had said earlier, the parties did meet and it is not without delight that I advise the court that a settlement has been reached in this matter. Due to the constraints it was not typed. If your Lordships would bear with my handwriting and I will beg leave to then hand up the handwritten notes. My Lords, if I may read it to the record;

1. ***The Appellant being the Applicant now will make payment to the Respondent in the Sum of E547,992.35 as follows;***

1.1 Capital sum E487,992.35

1.2 Costs in the court a quo in the sum of E68,000.00

2. ***Interest on the above capital sum at the rate of 9% per annum as from the 2nd November 2011 to date of final payment.***

3. ***The respondent's costs of the appeal including the certified costs of counsel for settling the respondent's heads of argument to be paid by the Applicant, subject to the approval and acceptance by the Honorable court, that it is what the parties have agreed."***

[12] The consent order which was read out in Court was then endorsed by the Court in those terms and made an order of the Court, dated 30 June 2016.

ARGUMENTS OF THE PARTIES

[13] Both parties addressed the court on the principles governing review jurisdiction under Section 148 (2) of the Constitution. The parties also cited relevant case law touching on the subject.

The cases cited included **The Commissioner of Police and Another v. Dallas Busani Dlamini** and Appeal No. 39/2014, **President Street Properties (Pty) Ltd v. Ras well Uchechukwa and 4 others** (2015 SZSC 11(29 July 2015) **Swaziland Revenue Authority v. Impunzi Wholesalers (Pty) Ltd)** (06/2015) [2015) SZSC 06 (09 December 2015) v. **Vilane N. 0 and Another v. Lipney Investment (Pty) Ltd** [2014] SZSC 62, and **Sboniso Clement Dlamini N.O v. Phindile Ndzinisa and Two Others** [2014] SZSC 08 (9 December 2016).

[14] As already noted, the Applicant abandoned the bulk of the grounds that were contained in the application. These grounds included bias, coersion, denial of fair hearing, defective or invalid consent order, and order being prejudicial to the Swaziland Government. The only remaining ground for review was therefore one challenging the legal status of the 1st Respondent.

[15] The Applicant submitted that the 1st Respondent is a fictitious entity and has no capacity to effect juristic acts. It was the contention of the Applicant that the 1st Respondent had not attached to its answering papers, proof of registration in form of certificate of registration and therefore the 1st Respondent remained a non existent entity.

[16] The Applicant argued that had the Supreme Court considered the appeal on the merits, it would have found that as a non - existent entity, the 1st Respondent had no ***locus standi*** to institute any legal proceedings. It was the submission of the Applicant that the legal proceedings instituted by the 1st Respondent were a nullity and therefore reviewable, as there was a gross error of law.

[17] On the other hand, the 1st Respondent submitted that this Application for review was a classic case of an abuse of the court process by an Applicant who was an attorney of this Honorable Court. It was the contention of the 1st Respondent that the conduct of the Applicant from the time he received the money from the Government on 2nd November 2011 to date has been to use the process of the court to frustrate the 1st Respondent to get payment.

The 1st Respondent submitted that such conduct by the Applicant was reprehensible and should be frowned upon by this court by dismissing the application with costs at attorney and client scale.

[18] With regard to the ground that the 1st Respondent was a non-existent entity, the 1st Respondent submitted that the ground is opportunistic and shows the **mala fides** of the Applicant in handling this matter. It was the contention of the 1st Respondent that it was the Applicant who cited the 1st Respondent as Beauty Build Construction (Pty) Ltd and yet he now makes attempts to make capital from the alleged incorrect description.

[19] The 1st Respondent submitted further that if the 1st Respondent does not exist, who did the Applicant act for in the litigation against the Swaziland Government, and to whom did the Applicant account when it did render the account? Furthermore, who should receive payment of the monies the Applicant had received for Swaziland Government? It was the contention of the 1st Respondent that there is no doubt that the actual creditor of the Applicant in whose favour judgment had been granted in the court ***a quo*** was the 1st Respondent.

[20] The 1st Respondent maintained that the 1st Respondent was an existing entity as it had a trading licence issued by the Ministry of Commerce and Industry, and was operating under an incorporated company, Pearl Ocean Res Investment (Pty) Ltd. It was the 1st Respondents contention that this issue had been canvassed in the court ***a quo*** where both the Certificate of Incorporation and the Trading Licence had been exhibited as Annexures BM8 and BM9 respectively.

[21] With regard to the consent order, the 1st Respondent submitted that the order was not reviewable under Section 148 (2) of the constitution because it was not a decision made by the Supreme Court, but by the parties themselves, and was merely endorsed by the court.

[22] On the ground complaining about the order against the Appellant to pay costs at attorney and own client scale, the 1st Respondent submitted that the order was justified because the conduct of the Appellant in pursuing a dishonest defence that the 1st Respondent does not exist and making unfounded allegations of bias against the presiding judge, was made solely to abuse the process of the court and to delay the 1st Respondent from enjoying the fruits of its judgment. It was the contention of the 1st Respondent that such conduct is appauling, reprehensible and disgraceful, especially by a legal practitioner.

The 1st Respondent relied on the case of **MTN Ltd and Three Others v. SPTC and another** (58/2013) [2013] SZSC 46 (29 November 2013).

CONSIDERATION OF THE LAW AND GROUNDS FOR REVIEW

[23] It is now well settled that the Supreme court has jurisdiction to review any of its decisions given by it as provided by Section 148 (2)of the Constitution which states;

> *"2. The Supreme court may review any decision made or given by it on such grounds and subject to such condition as may be prescribed by an Act of Parliament or rules of court"*

[24] It is also common cause that neither Parliament nor the court has prescribed the grounds or conditions upon which the review may be conducted. However in a number of cases, the Supreme Court has explained the scope of its review jurisdiction and conditions under which it may be exercised. These cases include: **Nur and Sam (Pty) Ltd t/a Big Tree Filling Station and Another v. Galp Swaziland (Pty) Ltd**(13/2005) [2015] SZSC 41 (09 December 2015) **Mntjintjwa Mamba and Others v. Madlenya Irrigation Scheme** (37/2014) [2015] SZSC 22 (9TH December 2015) and **African Echo (Pty) Ltd t/a Times of Swaziland and**

Others v. Inkhosatana Gelane Zwane (77/2013) [2016] SZSC 20 (30 June 2016) and **Vilakati v. Prime Minister of Swaziland and Others** (35/2013) [2016] SZSC 15 (30 June 2016).

[25] It is important to observe at the outset that the review jurisdiction, while it is an exception to the doctrines of **res judicata** and of and **functus officio**, it is not intended to provide another avenue for a second appeal.

The jurisdiction is intended to deal with situations where there is a need to correct a gross injustice where there is no other remedy available. It is for this reason that there is a need for the Applicant to establish exceptional circumstances before an order for review can be granted. Exceptional circumstances have not been defined but may include fraud, patent error, bias, new facts, significant injustice or absence of an alternative remedy.

[26] In **Siboniso Clement Dlamini** No **vs Phindile Ndzinisa and Two Others** [2014] SZSC 08 (6 December 2015 Maphalala CJ observed,

> *"[5] Public policy requires that there should be an end to litigation in accordance with the doctrine of **res Judicata**.*

The object of this doctrine is to provide legal certainty, the finality of court decisions, the proper administration of justice as well as to further prevent endless litigation between the same parties over the same cause of action.

[6] Section 148 (2) of the Constitution is intended to provide an exception to the doctrine of ***res judicata*** *and the review is only applicable in exceptional circumstances where justice and fairness requires.*

The Supreme Court should allow the review only in exceptional circumstances where it appears that its previous decision was wrongly decided.

[27] The 1st Respondent submitted that the consent order made by the Supreme Court is not reviewable because it was basically made by the parties and merely endorsed by the court. This argument is not without merit given the fact that normally there is no appeal against consent judgments except in exceptional circumstances. Otherwise, the proper procedure is to apply to set aside the consent judgment on specified grounds.

[28] The consent order in this matter was arrived at by the parties themselves and is like a compromise. The parties would normally be estopped from challenging the compromise, again except on certain grounds. In the present case, the ground for challenging the consent order is that the 1st Respondent is a fictious entity incapable of signing such consent. However, the evidence on record is clear that the 1st Respondent is a trade name for the incorporated company, Real Ocean Res Investments (Pty) Ltd. Therefore the 1st Respondent is an existing entity.

[29] The Applicant was duly instructed by a resolution of the Board of Directors of Real Ocean Res Investment (Pty) Ltd, and the Applicant carried out the instructions and obtained monies from the Government of Swaziland on behalf of the 1st Respondent. The Applicant is estopped from claiming that the 1st Respondent does not exist, and must pay the 1st Respondent monies obtained on its behalf.

[30] Moreover, the allegation by the Applicant that the 1st Respondent was a fictious entity was ventilated in the court ***a quo,*** and dismissed. There was an appeal against this decision of the court ***a quo,*** but the appeal was not heard on the merits, and instead a consent order was entered.

Therefore, having entered into a compromise and not pursued the issue on appeal in the Supreme Court, the Applicant is estopped from raising it on review. In any case, it does not constitute_ exceptional circumstances justifying an order of review by this Court.

[31] With regard to complaint about the order for costs against the Applicant at Attorney and own client scale, it is clear that the matter was not argued in the Supreme Court and is deemed to have been abandoned in view of the consent order which was reached.

If the Applicant had wanted this order by the court ***a quo*** to be set aside, it should have been included in the consent order. Instead the court order merely stated;

> *" 2.3 Respondent's costs on appeal including the certified costs of counsel for settling the Respondents Heads of Argument to be paid by the Appellant"*

[32] However, as the 1st Respondent submitted, the conduct of the Applicant justified the award of costs at attorney and own client scale against the Applicant.

In **MTN Ltd and Three Others v. SPTC and Another** (58/2013) [2013] SZSC 46, Ramodibedi CJ stated,

"[17] There are several grounds upon which the court may grant an award of costs on attorney and client scale. The list is certainly not exhaustive. It includes dishonesty, fraud, conduct which is vexations, reckless and malicious, abuse of court process, trifling with the court, dilatory conduct, grave misconduct, such as conduct which is insulting to the court and other parties."

[33] As the 1st Respondent submitted, the conduct of the Appellant in presenting a dishonest defence that its client was fictitious and in delaying to pay to the 1st Respondent money collected on its behalf from the Government of Swaziland for several years, is dishonorable and disgraceful conduct which is an abuse of the court process and therefore deserved the order of costs at attorney and own client scale. In view of this conclusion by the Court, the Registrar of the Supreme Court is directed to deliver a copy of this judgment to the Law Society of the Kingdom of Swaziland.

DECISION AND ORDER

[34] For the foregoing reasons, this application is dismissed. I make the following order:

(a) The application for review is dismissed.

(b) The Applicant is to pay costs of this Application.

DR. B.J. ODOKI
JUSTICE OF APPEAL

I agree **S.P.DLAMINI**
JUSTICE OF APPEAL

I agree **M.J. DLAMINI**
JUSTICE OF APPEAL

I agree **J.P. ANNANDALE**
JUSTICE OF APPEAL

I agree **S.B MAPHALALA**
JUSTICE OF APPEAL

FOR THE APPELLANT: **O. NZIMA**

FOR THE RESPONDENT: **N.D. JELE**