IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No. 30/2015

In the matter between:

DE BARRY ANITA BELINDA **Appellant**

And

A G THOMAS (PTY) LTD **Respondent**

Neutral citation: *De Barry Anita Belinda vs A G Thomas (Pty) Ltd (30/2015) [SZSC] [2017] 24 (31st May, 2017)*

Coram: **DR. BJ. ODOKI JA**
SP. DLAMINI JA
MJ. DLAMINI JA
SB. MAPHALALA JA
JP. ANNANDALE JA

Heard: 4th May, 2017

Delivered: 31st May, 2017

Summary: *Civil Procedure Review of the decision of the Supreme Court under section 148 (2) of the Constitution of Swaziland – Whether averments in the Founding Affidavit are sufficient to support the grounds for review – the Court finds that such averments do not support the grounds for review – Applicant does not identify any recognisable grounds of review – Court further rules that the punitive costs order granted against the Applicant in the Supreme Court ought to be set aside.*

JUDGMENT

S.B. MAPHALALA JA

[1] This is an Application for review of a judgment of the Supreme Court of Appeal dated 30 June, 2016. The review is brought in terms of section 148 of the Constitution of the Kingdom of Swaziland which empowers this court to review any decision made or given by itself on such grounds and subject to such conditions as prescribed by an Act of Parliament or by appropriate Rule both of which are yet to be promulgated.

[2] On the 30th September, 2016 the Applicant filed an Application under a certificate of urgency before this Court for orders in the following terms:

> **"1. Dispensing with the usual forms and procedures relating 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 30 June 2016.**

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 30 June 2016.

5.1 In the result the Application for Condonation is dismissed with costs on the ordinary party and party scale which shall include the certificate costs of Counsel under Rule 68(2) to be paid by the Appellant's attorneys *de bonis propriis;*

5.2 It follows that the appeal be deemed to have been abandoned in terms of Rule 30 (4) and the Judgment of the Court *a quo* is confirmed.

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

7. That 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] The Founding Affidavit of the Applicant, one Anita Belinda De Barry is filed outlining the background facts of the matter, and annexure "AD1" being the judgment of the Supreme Court. A supporting affidavit of Mr Zweli T. Shabangu an attorney who appeared on behalf of the Applicant before the Supreme Court is also filed. The grounds of review are outlined at paragraphs 18.1 to 18.2 of the Book of Pleadings.

[4] The Respondent opposes the above Application filing an Answering Affidavit of one Percy Thomas who is a Director of the Defendant's company addressing all the averments of the Applicant as stated above. Pertinent annexures are also filed in support of those contentions.

[5] The Applicant then filed a Replying Affidavit to the Answering Affidavit.

[6] The facts around this dispute are clearly outlined in the Respondent's introductory paragraph of its Heads of Arguments to be the following:

> **1. On 30 June, 2016, the Supreme Court heard and, in effect, dismissed an appeal by the Applicant, as Appellant against the Respondent. The reason for the dismissal of the appeal was on account of the fact that the Applicant had failed to prosecute the appeal timeously in accordance with the rules and in its application for condonation failed to made out a satisfactory case in explanation of its default, this resulted in the dismissal of the application for condonation and consequently, the appeal was deemed to have been abandoned in terms of Rule 30(4) of the Rules of Court.**
>
> **2. The Applicant applies for orders reviewing correcting and setting aside (sic) the above Orders of the Supreme Court in the appeal, and the Applicant seeks an order directing the Supreme Court together with costs.**
>
> **3. The Applicant also sought interdictory relief staying implementation and execution of the Order of the Supreme Court dated 30 June 2016, pending the outcome of the review proceedings. This urgent relief has been granted, and save for the question of costs, is not germane to this application.**

4. The Applicant relies upon the Supreme Court's appellate review jurisdiction referred to in section 148(2) of the Constitution of Swaziland, 2005 ("the Constitution").

5. The Respondent submits that:

5.1 There are no exceptional grounds for review of the decision of the Appeal Court in the Applicant's application.

5.2 The application for review should accordingly be dismissed with costs.

[7] On the 4th May, 2017 a Full Bench of this court heard the Review Application together with Condonation Application. The court heard arguments from the attorneys of the parties who filed Heads of Arguments and decided cases in support of those submissions.

(i) The Applicant's contentions

[8] The thrust of the arguments of the Applicant is around the **dictum** in the Supreme Court case of **President Properties (Pty) Ltd vs Maxwell Uchechukwe and Others Appeal No. 11/2014** which set out the procedural and substantive issues relating to the operation of section 148 of the Constitution. That court after a detailed analysis of comparative law made definitive procurements on when the jurisdiction in terms of section 148 can be invoked and stated authorities and that the jurisdiction would be invoked in exceptional circumstances to avoid irremediable harm to the Applicant.

[9] The Applicant contends that this review is one such case where there are compelling exceptional circumstances which justify the court's intervention to prevent irremediable harm from being occasioned to the Applicant. The Applicant's appeal against the decision of the High Court was deemed abandoned on for failure to provide a satisfactory explanation for non-compliance with the Court's Rules.

[10] The Applicant's attorney in his Heads of Arguments outlined the facts giving rise to the dispute at paragraphs 5.1 to 5.12 and I shall revert to such arguments as I proceed with my analysis and conclusions later on.

[11] Further arguments are canvassed by the Applicant on a number of points first being the denial of the Applicant of a hearing citing the case of the **House of Lords Judgment In Re Pinochet (No 2) 1999 1 All ER 577 (HL),** secondly, that a litigant must not suffer for the actions of his attorney relying on the Appeal Court **dictum i**n the case of **Ginindza vs Msibi Civil Appeal No. 29/2013,** thirdly, an argument that a further ground of review is the irregularity arising from the court awarding costs to **de bonis propriis** without affording the attorneys the right to **audi alteram partem** before making the order for **de bonis propriis** citing the Supreme Court case of **Siboniso Clement Dlamini N.O. vs Phindile Ndzinisa and Others Case No. 67/2014.**

[12] Finally, the Applicant prays that this court reviews and sets aside the Supreme Court order refusing to hear the appeal on the grounds that it is irregular to judge a litigant without hearing him except where the circumstances are such that he be deemed to have abandoned his right. **In casu**, it cannot be said that the Applicant abandoned her rights. It is in the interests of justice to have the order of the Supreme Court set aside, according to the Applicant.

(ii) The Respondent's contentions

[13] Counsel for the Respondent advanced arguments for his client filing Heads of Arguments which I have adopted at paragraph [6] in the introductory paragraph.

[14] In paragraph 6 of the said Heads of Arguments dealt with the Supreme Court's review jurisdiction as established by section 148 (2) of the Constitution citing a number of decided cases before this court on the operations of the said section. In paragraph 9 thereof cited the Supreme Court case of **Swaziland Revenue**

Authority vs Impuzi Wholesalers (Pty) Ltd [2015] SZSC 06 where the court in that case distilled 8 principles from the decided cases to be the following:

9.1 In order to maintain certainty in cases already decided, the courts must be cautious against allowing a party to bring a matter back to court on the same cause of action simply because he or she is dissatisfied with the outcome.

9.2 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.

9.3 The Court's review jurisdiction can only be exercised where there is a patent and obvious error of fact or law.

9.4 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".

9.5 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.

9.6 Only exceptional circumstances justify the application of Section 148 (2) including fraud, patent error, bias, new facts, significant injures or the absence of an alternative remedy.

9.7 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.

9.8 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.

[15] On the issue at hand, being an Application in terms of Rule 148 (2) of the Constitution the Respondent contends that no exceptional circumstances in support of the review have been canvassed by the Applicant. That it is not in dispute that the Applicant failed to present her appeal in accordance with the Rules of court. That those shortcomings of the Applicant are set out in the summary of evidence in the decision of the Appeal Court. Given that the Applicant timeously filed her Notice of Appeal on the 5th June, 2015 the matter ought to have been ready for hearing during the November 2015 session of appeals.

[16] It is contended for the Respondent that the matter was ultimately only set down for the May 2016 Appeals Session, and the Applicant's failure to comply with the Rules of court included the following:

12.1 The failure timeously to have applied for condonation as soon as her inability to comply with the rules became manifest, including the failure to have taken any steps in connection with the November Session.

12.2 The late filing of the Record of Appeal on 4 February 2016.

12.3 The late bringing of the application for condonation on 29 April 2016, only 4 working days before the hearing of the appeal; and

12.4 The filing of the Heads of Arguments on Friday 6 May, 2016 when the matter was to have been heard on Monday 9 May 2016.

[17] Further arguments are canvassed by the Respondent in paragraphs 13, and 14 regarding the Applicant's failing to comply to the Rules.

[18] The attorney for the Respondent then dealt with the grounds of review as stated in paragraphs 15 to 17 of the Founding Affidavit of the Applicant at page 10 of the Book of Pleadings being the following:

> **"15. The grounds for reviewing the decision in summary, are that, the Supreme Court inadvertently committed a fundamental and basic error by denying me my constitutional protected right to a hearing.... in circumstances where no blame can be attributed to me."**

[19] At paragraph 17 where the Applicant contends the following:

> **The applicant goes on to state that this was unfair under the circumstances, "grossly unfair and prejudicial to me" and that there was a serious miscarriage of justice" a "gross injustice", "a gross miscarriage of justice" and "manifest injustice."**

[20] The attorney for the Respondent then posed a rhetorical question as to what are the facts in support of these contentions in the Founding Affidavit. It appears to me that this is the real crux of the matter. Whether Applicant has made the appropriate averments in support thereto. If it is found that Applicant had not done so, then the Application stand to be dismissed without any further ado. If, however, I find in favour of the Applicant to deal with the dispute on the merits.

[21] On the other hand the Respondent contends otherwise that the Applicant's complaint is incorrect on several levels outlined at paragraphs 18 to 24 of the

said Heads of Arguments. I shall revert to the various arguments in my analysis and conclusions.

The Conclusion

[22] Having considered the affidavits of the parties and the arguments of the attorneys appearing in this matter it is important to first establish whether the Applicant has made averments in her Founding Affidavit which supports the grounds for review. It appears to me that this a threshold issue that needs to be thoroughly examined to established the effect of the Application in terms of section 148 of the Constitution of Swaziland. This being the real foundation of the Application. I ought to carefully scrutinise the Applicant's Founding Affidavit against the backdrop of the court's jurisdiction under the section. I say all this because of the caution given by the court in the Supreme Court case of **President Properties (supra)** that such jurisdiction ought to be invoked in exceptional circumstances to avoid irremediable harm to the Applicant.

[23] According to the Applicant at page 10 of the Book of Pleadings the following are the grounds of review:

> **"15. The grounds for reviewing the decision in summary, are that, the Supreme Court inadvertently committed a fundamental and basic error by denying me my constitutionally protected right to a hearing ..... in circumstances where no blame can be attributed to me."**

[24] The Applicant proceeds to state that this was **"unfair under the circumstances", "grossly unfair and prejudicial to me"** and that there was **"a serious miscarriage of justice", "a gross injustice", "a gross miscarriage of justice"** and **"manifest injustice".** These are extracted from pages 11 to 14 of the Book of Pleadings.

[25] The grounds of review by the Applicant are outlined in Applicant's Founding Affidavit at paragraphs **18 to 20** thereof. In my assessment of these averments I cannot say that they support the grounds of review as stated above in paragraph [24] and [25].

[26] In this regard the Respondent's contentions in its Answering Affidavit states that this Application does not satisfy any of the grounds that would justify an exercise of the review jurisdiction vesting in this court. Thus, the Founding Affidavit does not even state, let alone identify:

(i) Any alleged **misconduct** in relation to the duties of the presiding officers as Judges the Supreme Court;
(ii) Any gross **irregularity** in the conduct of the hearing before the Supreme Court;
(iii) Any instance where the Supreme Court **exceeded its power**, or
(iv) Any facts and circumstances that would suggest that the decision had been **improperly obtained.**

[27] In my assessment of the facts, the Applicant does not identify any recognised justifiable grounds of review, bearing in mind that it is the exercise of the Appeal's Court discretion in an Application for condonation that is challenged.

[28] It appears to me further, that the Replying Affidavit constitute an attempt to have a new hearing of the matter having regard to the new material that is being attempted to be placed before this court, making allegations that were made before the Court of Appeal. In doing so, the Applicant failed to make a case for the introduction of new evidence.

[29] In this regard the learned authors Herbstein Van Winsen, **The Civil Practice of the Supreme Court of South Africa 4the Edition at page 366** put the legal position this way:

> **The general rule which has been laid downp repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged in it, and that although sometime it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated there, because those are the facts that the respondent is called upon either to affirm or to deny. The Applicant division has held that it is not permissible to make out new grounds for an application in a replying affidavit. If the applicant merely set out a skeleton case in his supporting affidavit, any fortifying paragraphs in his replying affidavit will be struck out.**

[30] In my assessment of the Replying Affidavit filed by the Applicant, fortifying paragraphs are evident to a new matter being brought forth. See the South African case of **De Aguiar vs Real People Housing (Pty) Ltd 2011 (1) S.A 16 SCA paragraph 12.**

[31] It is clear from the above that the Applicant has failed to pass the threshold test stated above such that this court cannot determine the issues raised on the merits of the Review Application and the Application ought to be dismissed forthwith.

[32] However, there remains the issue of costs issued by the Appeal Court against the Applicant to be costs **de bonis propriis**. In this regard the Applicant contends that a further ground of review is the irregularity arising from the court awarding costs **de bonis propriis** without affording the attorney the right to **audi alteram partem** before making the order. It is settled law that the failure to afford the attorney the opportunity to be heard before making such an order is reviewable in terms of Rule 148 of the Constitution. In support of these arguments the court was referred to the Supreme Court case of **Siboniso Clement Dlamini N.O. vs Phindile Ndzinisa and Others Case No. 67/2014.**

[33] On the other hand the Respondent contends that given that the Application for review seemed to be in the interests of the Applicant's attorney as in her own, these costs should be paid **de bonis propriis** by the attorney, jointly and severally with the Applicant.

[34] In my assessment of these arguments on costs it appears to me that the Applicant's contentions are correct that the Applicant ought to have been heard by that court to satisfy the requirements of the **audi alteram partem** principles in the circumstances of the case. Therefore the order of the Supreme Court in that regard is altered on review to be costs on the normal scale.

[35] In the result, for the aforegoing reasons the Application for review in terms of section 148 of the Constitution is dismissed and that the issue of costs **de bonis propriis** by that court is set aside and replaced with an order of costs on the ordinary scale. Further, costs of the review Application is levied against the Applicant to include costs of Senior Counsel in accordance with the Rules.

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SB.MAPHALALA JA

I AGREE

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DR. BJ. ODOKI JA

I AGREE

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SP. DLAMINI JA

I AGREE

MJ. DLAMINI JA

I ALSO AGREE

JP. ANNANDALE JA

For the Appellant:	Mr. M. Magagula (of Magagula and Hlophe Attorneys)
For the Respondents:	Senior Advocate Vettel (Instructed by Waring Attorneys)