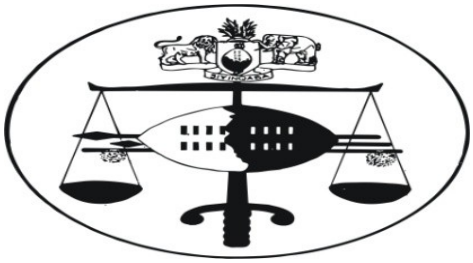


IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE Civil Appeal No. 20/2013

In the matter between:

SWAZILAND REVENUE AUTHORITY	**APPLICANT**

AND

CIC (PTY) LTD	**1ST RESPONDENT**
FIRST NATIONAL BANK OF SWAZILAND LTD	**2ND RESPONDENT**

In re:

CIC (PTY) LTD	**APPELLANT**

And

SWAZILAND REVENUE AUTHORITY	**1ST RESPONDENT**
FIRST NATIONAL BANK OF SWAZILAND LTD	**2ND RESPONDENT**

Neutral Citation: *Swaziland Revenue Authourity and CIC (Pty) Ltd, First National Bank of Swaziland Ltd in re: CIC (Pty) Ltd Swaziland Revenue Authourity and First National Bank of Swaziland Ltd (20/2013) [2017] SZSC49 (25 October, 2017)*

Coram: **JACOBUS P. ANNANDALE JA**

Date Heard: 30th August 2017
Date of Judgment: 25th October 2017

Summary

Appeal against High Court Judgment upheld in favour of a local liquor export distributor. Swaziland Revenue Authority assessment of VAT levy set aside on appeal. Judgment of Supreme Court sought to be reviewed and set aside. Full court struck review application from the Roll and held that it was not to be reinstated without leave of Court – ratio being that application for condonation of late filing of replying affidavit, book of pleadings and heads of arguments be dismissed in absence of viable stated prospects of success on review. Current application seeks to cure deficiencies and to obtain leave for re-instatement of review application. Leave granted to re-instate Section 148 proceedings on review. Costs ordered in favour of Respondents.

JUDGMENT

Annandale JA

[1] This application is one for leave to re- instate proceedings on review by the Supreme Court, following an earlier order wherein the review was struck from the roll due to the dismissal of an application to condone the late filing of the record, heads of argument and a replying affidavit. The *ratio* behind the order was that the applicant did not address the prospects of success on review. The Court further ordered that the review proceedings were not to be reinstated for hearing unless prior leave to do so was obtained from the Court.

[2] The aim of the application is to have the review application by the Swaziland Revenue Authority of a judgment by the Supreme Court, which review did not occur, in exercise of their constitutional right to seek redress on review, to be re-instated, fully argued, heard and pronounced upon by the full bench of the Supreme Court.

[3] If I, sitting as a single judge of the Supreme Court, was to now enumerate, list, quote, refer to, accept, reject, distinguish and subject each of the authorities and arguments separately in order to decide the application, this issue will not come to rest anytime soon. Also, the inevitable outcome of the application is firm and

clear. Having said that, it still requires judicial consideration to avoid coming to a wrong conclusion. Must leave be granted, or should it rather be refused?

[4] It is patently obvious that this decision is devoid of the usual phletora of references to diverse authorities. Court cases on the point are numerous and in exhaustive. To quote, distinguish or accept, refer to the writings of learned authors and judges in order to come to a determination of this application for leave to re-enroll a review under Section 148 of the Constitution, will not take the matter much further anytime soon. The golden thread which interweaves all of the numerous authorities that I have been referred to by learned counsel on both sides is that each and every case must be individualized and that the merits and demerits of leave to reinstate involve a critical analysis and balancing of the particular divergent issues at stake. One of the decisive areas is the catalyst which initially caused the matter to be struck off the roll. The reasons why the review was not heard in the first place must now come to be considered, alongside with the reasons why the door must remain shut or is to be opened again.

[5] This matter has been resting heavily on my mind since it was first allocated to myself. From the outset, I must make it clear that I

have sincere empathy with both parties. On the one hand, closure and finality to have a matter laid to rest, not to risk the opening of a Pandora's Box if the review is to be heard, and on the other hand, an aggrieved litigant who fell short of the yardstick to enter the arena of review by the Supreme Court of its own previous judgment in the same matter, now wants to rectify and attend to the shortcomings in its review application.

[6] It is in the latter application where the applicant filed an "application for condonation" in then pending review. It prayed for condonation of its late filing of the replying affidavit, book of pleadings and heads of argument out of the time as prescribed under the Rules. As is required, the condonation application was motivated in a supporting affidavit, deposed to by the attorney of record for the Swaziland Revenue Authority, Mr Manzini.

[7] He chronicled in some detail a host of calamities which culminated in the need to be excused from non-compliance with time limits under the rules. Amongst other factors, the applicant's attorney was off guard and did not acquaint himself with different dates for the hearing, as was well publicized and issued by the Registrar in the different provisional or draft and final court rolls. He stated his woes which were aimed at absolving himself and his client from

any notion of being labelled as tardy, or slothful, but to the contrary, presenting it as reasons for being late and seeking condonation.

[8] However – that is where it all ended. Unbeknown to the lawyer, due to his failure to acquint himself with rules, procedure and practise of the Supreme Court, and reading the judgments which are binding on all Courts of Law as well as legal practitioners, he was unaware that it is a *conditio sine qua non* that he was also required to set out the prospects of success in the intended review. He did not do so. In its entirety, the applicant failed to state any prospects of success on review, nothing at all.

[9] It was therefore no surprise that the Full Bench ordered the matter to be struck off the roll. The *ratio* behind this order is plain and simple: If you do not state your prospects of success in a matter where you failed to comply with deadlines as defined under the Rules, and you were not timeously excused from compliance when prudent foresight dictated a timeous application founded on a reasonable apprehension of being late, once you are obliged to apply for condonation, it is trite that the reasons for delay must be adequately explained and equally importantly, to demonstrate to

the decision maker that you have at least a reasonable chance or prospect of success in the matter at hand.

[10] It was for nothing else than the fact that the application for condonation of the late filing of crucial pleadings etcetera was entirely devoid of even a cursory mentioning of the prospects of success, that it was dismissed. The prospects of success had therefore never been judicially considered, opposed or not, and remains virgin territory. With the Court having ordered the intended review to be struck off the roll, with costs, it further ordered that the matter was not to be re-enrolled for hearing, unless prior leave to do so has been sought and obtained. It is this leave which is now being sought.

[11] The respondents will have none of this. They vigorously, adamantly and in all due fairness to themselves, understandably oppose leave to re-enroll the review. Their concept of fairness is obviously a subjective one. They have successfully appealed a judgment of the High Court. They have been absolved from the payment of enormously big sums of money to the Revenue Authority by the Supreme Court. A few million of Emalangeni are at stake. They want to retain the closure they have struggled for

and obtained through the courts. Obviously, they do not have any wish to yet again go through the vigours and risks of a trial.

[12] It is only human to have a sympathetic heart for them when they were confronted with a Lazarus like bouncing back of their assumedly dead and buried dispute with the Swaziland Revenue Authority. The Authority exercised their rights and duly sought a review of the Supreme Court's decision. It is provided for under the Constitution and there is ample judicial precedent of this very same procedure, when a full bench of the Court may review a former decision of the Supreme Court. Under certain limited circumstances, it may then set aside whatever offending part it contains and substitute or correct it afresh. This has been adopted and approved by this Court over and over again and in that regard see Swaziland Revenue Authority v Impunzi Wholesalers (Pty) Limited, Appeal Case No. 06/2015, the Commissioner of Police and Another v Dallas Busani Dlamini and Others, Appeal Case No.39/2014, Mntjintjwa Mamba and Others v Madlenya Irrigation Scheme, Appeal Case No. 37/2017.

[13] Therefore, it is wholly understandable that the present application for leave to reinstate the review case is vigorously opposed, to the legal maximum. Without hindsight, it is doubtful that the initial

review proceedings would have been derailed. The omission of one aspect, prospects of success on review, which forms a twin pillar with its brother the reasons for delay, is the reason why. Safe to say that had it not been for the personal and professional laxity of playing by the rules of the game, so to speak, the applicant's attorney would not have been in the present predicament at all. Thinking away the causes of delay, if all went according to plan, there would have been no reason to scupper the review hearing in the first place.

[14] There are a phletora of authorities in this jurisdiction and elsewhere which deal with the legal consequences of issues which cause embarrassment, damages and loss, over and above whatever else, when an attorney fails to diligently and industriously represent his client in this Court. Had it not been for the most unfortunate configuration of all different facets of the matter, it seems to me that such indifference and its consequences must now be provisionally forgiven. In the totality of things, the dimensions and potential consequences either way, it would not be good and fair justice if the omission to also deal with prospects of success, once already on the back foot when time ran out, must here and now be elevated to a level where the applicant must yet again be denied access to a full bench of the Supreme Court. The

provisional forgiveness, even if only for the sake of argument, would then depend upon the prospects of success on review which is presently before me for judicial consideration.

[15] Further alleged impediments as argued for the respondents, are principally said to be in relation to the long and protracted period of time which has already been consumed by this matter. Yet again, the applicant allegedly took his time to return to Court with its tail between the legs. As is customary, a hue and cry over an alleged abuse at the legal process and precedent is made. Costs at five star rates would also be a good part of the parcel, should the doors not be shut. It was also argued that a flood of "frivolous and equally baseless litigation" will follow unless the respondent gets his day.

[16] Before putting the cart before the horse and jump to anticipated conclusions, it behooves a look at what is now on offer on the menu of "Prospects of Success, a-la Carte." The main item on offer is focused around divergent opinions about the persuasive value, or otherwise, which pertain to endorsing stamps in use at Customs Border Controls. It goes hand in hand with the remittance of exportation documents within stipulated periods, while the third issue concerns itself with records of vehicles and

persons who cross various border control posts at certain frequencies, vehicles which are cleared for trans frontier crossings and exports.

[17] In the main, the context of whether these aspects, once placed before the Supreme Court on review, might well persuade the Court to now hold otherwise and deal with its earlier decision however it sees fit is a crucial issue to this application. First prize for the applicants would be to obtain a directive for the issues to be fully dealt with and decided in the High Court.

[18] Considerable effort has been channeled into the proof or otherwise of authenticity regarding stamp impressions. Each litigant has obtained its own “expert opinion” in the matter, but with expertise and conclusions under serious dispute. Border crossing and movements of man, liquor and vehicles are equally so not on common ground. The case of the applicant is that at the time when the Supreme Court pronounced itself in the appeal, the existence of the contentious “expert evidence” relating to customs endorsing stamps, cross border movements, irregularities in remittance documentation and so on, was not available for consideration because by then, it had not yet been known. In other words, it is

the “new evidence” which forms the belief of the applicants that they will be successful on review.

[20] The empowering section of the National Constitution which confers this review juriction on the Supreme Court, lists “new evidence” as one of the factors which can trigger a review of its own prior decision. It is only once the “new evidence” has been brought to the fore in the Supreme Court, when the full bench will consider the implications thereof. It will only then be able to take cognizance of the manner in which it is sought to be presented for judicial pronouncement.

[21] In my considered view, had it not been for the pre-hearing tribulations which resulted in a condonation application, which itself fell short of the required standard, and had the current motivational issues been included in the condonation application earlier this year, that I daresay that the hearing of the review by a Full Bench would then have proceeded.

[22] In order to reach the delicate balance of the scales of justice, it essentially needs to be decided how much weight to attach for the unfortunate omissions, lateness and ill comprehended issues by the applicants’ attorney. He will have to explain to his clients about

the costs order against them, despite being successful in the application itself. Further considerations are potential prejudice to the respondents, the public interest in tax collection, the ease of doing business in Swaziland, protection against arbitrary taxation and fairness. Judicial certainty and a further variety of considerations can well be added to the list, which can go on and on.

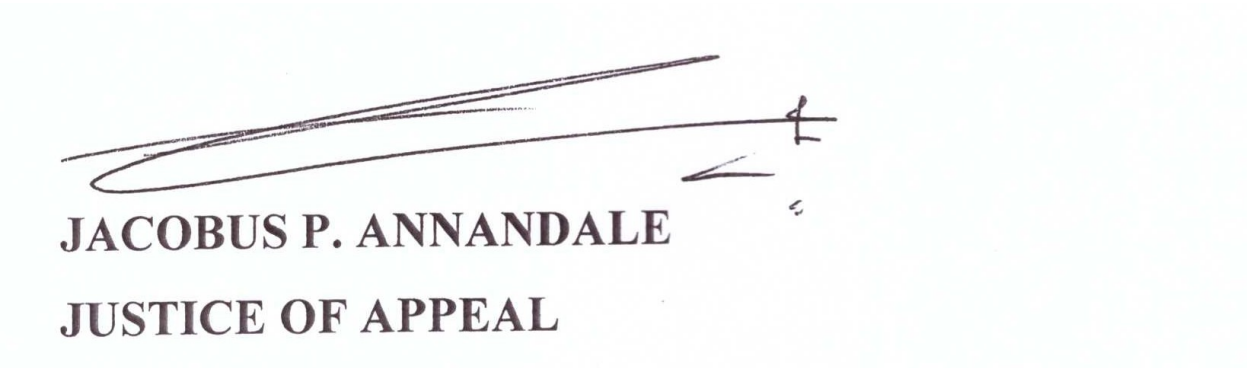
[23] It is when I have carefully applied my mind to all of the above that it has to be found that the applicants must be granted the relief they need in order to have the application for review re-enrolled. Accordingly, such relief is ordered.

[24] Due to the reasons stated above, even though the applicants are successful in obtaining the relief they sought, they cannot also be favoured with a costs order. It is no fault of the respondents to have had the previously struck off matter again resurfacing and requiring of them to incur legal costs to oppose it. Costs are accordingly ordered in favour of the respondents, even though they could not successfully oppose the application.

[25] The order is thus:-

1 Leave is granted to re-instate the application for review.

2 Costs are ordered in favour of the Respondents, including certified costs of Senior Counsel.



For the Applicants: Advocate Steph du Toit SC, with him Advocate Iain Currie, instructed by CJ Littler Attorney

For the Respondents: Advocate Francois Joubert SC, Mbabane instructed by Magagula Hlophe Attorneys, Mbabane.