IN THE SUPREME COURT OF ESWATINI

HELD AT MBABANE **Civil Appeal No. 58/2016**

In the matter between:

Michael Masotja Shongwe **Applicant**

And

Henry Sibusiso Shongwe N.O **First Respondent**

Mduduzi Shongwe N.O **Second Respondent**

The Registrar of Deeds **Third Respondent**

The Attorney General **Fourth Respondent**

Neutral Citation: **Michael Masotja Shongwe v. Henry Sibusiso Shongwe N.O and Three Others (58/2016) [2019] SZSC 16 (20th May, 2019)**

Coram: **MCB Maphalala CJ, SP Dlamini JA, JP Annandale JA, SJK Matsebula AJA and AM Lukhele AJA**

Heard: **15th April 2019**

Delivered: **20th May, 2019**

Summary

Application to review a judgment of the Supreme Court in its appeal jurisdiction – Section 148 (2) of the Constitution of ESwatini, Act 001 of 2005. Applicable principles of such review jurisdiction reiterated. Present application in fact an attempt to appeal against prior judgment of the Supreme Court. Res judicata. No second appeal in same matter on same grounds permissible, even under subterfuge of ostensible review. Application to review dismissed with costs.

JUDGMENT

Jacobus P. Annandale JA

[1] Dissatisfied with the outcome of a matter in the High Court, the applicant herein noted an appeal to the Supreme Court. Again dissatisfied with the outcome of the judgment in the appeal, which confirmed the initial judgment of the High Court in all respects, the applicant now wants a review of this Court's judgment on appeal essentially the same grounds which were previously considered by both Courts. In essence, this Court has a second appeal before us, disguised and under subterfuge of a review.

[2] The Constitution of ESwatini, Act 001 of 2005, provides that the Supreme Court may review its own decisions. Section 148 (2) reads that:

> "The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by an Act of Parliament or Rules of Court."

It is common cause that up to now no such Act or Rules have been promulgated which regulate the conditions precedent or procedural aspects with regard to this review jurisdiction. However, the case law by this

Court, even in its relative infancy, contains clear guidelines as to when, how and under which circumstances a previous judgment may be reviewed. The well-established principles of *res judicata* and *stare decisis* are not insurmountable barriers to the avoidance of a manifest injustice or error made by the Supreme Court. I will soon revert to these aspects. However, neither the Constitution nor any other legal instrument or principle provides for a second appeal in the same matter where a litigant is dissatisfied with the outcome of an appeal to the apex court. Simply put, there is no "second bite at the cherry."

[3] The applicant for review is a son of the late Nelson M. Shongwe who was during his lifetime the owner of a certain property (Lot 943) situate in Manzini. The acquisition thereof by the applicant was the subject-matter of litigation in the High Court where the first two respondents on review sought and obtained an order to set aside the purported sale of the property by the deceased and subsequent transfer to his son, the present applicant. The first two respondents are co-executors dative in the deceased's intestate estate. He had seventeen children from three wives.

[4] Post burial, the co-executors were advised by the now applicant for review that he had acquired the developed fixed property which the deceased had owned, duly transferred into his name. On enquiry, the co-executors established that the transfer was consequent to a power of attorney ostensibly by the deceased and a deed of sale which would have been the *causa causaus* for transfer against a purchase price of E100 000. They further established that firstly, no deed of sale could be furnished by the

applicant and secondly, that no amount which corresponds with the purchase price ever reached the pockets of the deceased.

[5] In their application to the High Court to set aside the transfer of the property to the now applicant for review, they listed various apparent anomalies which ultimately persuaded the learned judge to order accordingly and the Registrar of Deeds was ordered to cancel the registration of transfer in the name of the erstwhile first respondent, Michael Masotja Shongwe.

[6] In due exercise of his legitimate legal rights, the latter noted an appeal against this but it was dismissed by the Supreme Court. Yet again dissatisfied by the outcome of the appeal he now wants the Supreme Court to review and set aside the adverse judgments against him, but presumably because there is no avenue for a second appeal, he approaches this Court under cover of a review, as stated above.

[7] In the impugned judgment of the Supreme Court in its appellate jurisdiction, all of the challenged issues which were dealt with by the High Court were comprehensively and thoroughly considered and decisively dealt with and in my considered view, correctly and justifiably so.

[8] The grounds of appeal before the Supreme Court were formulated as follows by the then appellant, now applicant for review:-

"1. The Court a quo erred in fact and in law in holding that when the deceased (Nelson Mavukela Shongwe) died he was the registered owner of Lot No.943 Ngwane Park Extension 1 in Manzini.

2. The Court *a quo* erred in holding that the executors of the estate (1st and 2nd Respondents herein) discovered that the Appellant had allegedly paid E 100 000.00 (one Hundred Thousand Emalangeni) for the purchase of the property, Lot 943 Ngwane Park Extension No.1.

3. The Court *a quo* erred in holding that there was no Deed of Sale for the immovable property.

4. The Court *a quo* erred in holding that the Appellant had a claim against the estate for the amount of money spent by Appellant on his father.

5. The court *a quo* erred in holding that the property was undersold for a paltry sum of E100 000.00 (One Hundred Thousand Emalangeni).

6. The Court *a quo* erred in holding that the most logical step was to have the property lawfully donated to the Appellant whereas the parties to the transaction had deliberately chosen a sale.

7. The Court *a quo* erred in holding that the Appellant contradicted the contents of the Deed of transfer and Power of Attorney in so far as they relate to the cause or reason for the transfer.

8. The Court a *quo* erred in holding that the reasons given or explanation by the Appellant were an afterthought and that the Appellant had to manufacture a story to explain the failure to pay the purchase price."

[9] In dismissing the appeal, the Supreme Court adversely noted that the purported Deed of Sale, said to have been drafted by the appellant but thereafter being "lost", is a contradiction in terms. On the one hand, the property would have been "given" to him by the deceased because he took care of his father during his illness and because he would take care of his siblings. On the other hand, the property was "sold" to him at an undervalued sum of E100 000, which was never paid. The purported sale of the property was held to be a sham.

[10] It was further found that it is disconcerting that the illiterate deceased would have both signed and affixed his thumbprint on the power of attorney to transfer the property to his son. Furthermore, that it contained an error as to the identity of his wife, who by then was deceased. This was compounded by the absence of any evidence that the deceased informed his family of either an intention to sell or to donate his fixed property to the appellant.

[11] The Court also had a difficulty to accept that the appellant, being a layman, would have drawn the missing Deed of Sale which would have purportedly been signed by the deceased, in compliance with our common law and the Transfer Duty Act of 1902. It was particularly concerned with the absence of any evidence from the appellant and conveyancer to verify the contents and terms of the Deed of Sale which conveniently disappeared. Over and above this, the entire absence of proof of any payment in consequence of the sale, which the appellant did not dispute, since the purchase price " was not only in cash but to be repaid to the obligations which he bestowed upon me"(sic). The Court had a problem to accept that despite a challenge to

adduce evidence as to the propriety of the transaction, the opportunity was not availed to.

[12] Section 34 of the Constitution provides that surviving spouses are entitled to a reasonable provision out of the estate, testate or intestate, married by either Civil or Customary rights. The Court adversely remarked on the apparent contradiction to this in that the appellant alone was to remain with the lions' share of the estate, to the detriment of his siblings and the surviving spouses. This also conflicted with evidence to the effect that the deceased left instructions relating to his pension proceeds and that all of his spouses and children were to be beneficiaries, intending that no one should be deprived.

[13] Consequently, the outcome of the appeal was, as it also was in the High Court, that the purported sale was held to be invalid. The appellant was not deprived of any claims for improvement of the property or any other lawful claims which he could prove against the estate.

[14] In his stated grounds for review, the applicant says that "since the cause of action which was relied upon in the High Court was not based on facts but on assumptions and conclusions made by them, then the Court *a quo* erred in granting the order to cancel and reversed the transfer into my name as there were no facts to prove their case" (emphasis added).

[15] On appeal, the Court meticulously and critically examined and analysed the evidence and rightly concluded that indeed there was ample evidence

before the High Court to justify the relief that was prayed for. To yet again saddle the same horse in the hope that it would now be held to the contrary, that there were "no facts" to rely upon and that it was mere "assumptions and/or conclusions" which persuaded both courts to hold that the transaction was a sham, is no more than a further attempt to re-appeal the matter.

[16] Each and every of the facets which he expounded on in order to try and rehash his appeal under the guise of a review has also been subjected to close scrutiny in the impugned appeal judgment. The applicants' understanding of what evidence is and how facts are proven, and the consideration of such material in the course of an appeal, do not tally with reality. It would only be possible to conclude to the contrary of the judgments under challenge if an abuse of both process and law was to be allowed.

[17] The foundation of the power of the Supreme Court to review its own decisions which emanate from its appellate jurisdiction is enshrined in Section 148 (2) of the Constitution as aforestated. It is to be exercised only when really necessary, in rare and compelling or exceptional circumstances, to remedy manifest injustice otherwise *res judicata*. It is not an open door for further appeals, a second helping from the fountains of justice. In President Street Properties (Pty) Ltd v Maxwell Uchechukwa and Four Others Civil Appeal Case No.11/2014 at para 26 and 27, it was stated that:

> "26. *In its appellate jurisdiction the role of the Supreme Court is to prevent injustice arising from the normal operation of the*

adjudicative system, and in its newly endowed review jurisdiction this Court has the purpose of preventing or ameliorating injustice arising from the operation of the rules regulating finality in litigation whether or not attributable to its own adjudication as the Supreme Court. Either way, the ultimate purpose and role of this Court is to avoid in practical situations gross injustice to litigants in exceptional circumstances beyond ordinary adjudicative contemplation. This exceptional jurisdiction must, when properly employed, be conducive to and productive of a higher sense and degree or quality of justice. Thus, faced with a situation of manifest injustice irremediable by normal court processes, this Court cannot sit back or rest on its laurels and disclaim all responsibility on the argument that it is functus officio or that the matter is res judicata or that finality in litigation stops it from further intervention. Surely, the quest for superior justice among fallible beings is a never ending pursuit for our courts of justice, in particular, the apex court with the advantage of being the court of the last resort.

27. *It is true that a litigant should not ordinarily have a 'second bite at the cherry', in the sense of another opportunity of appeal or hearing at the court of last resort. The review jurisdiction must therefore be narrowly defined and be employed with due sensitivity if it is not to open a flood gate of reappraisal of cases otherwise res judicata. As such this review power is to be invoked in rare and compelling or exceptional circumstances... It is not review in the ordinary sense."*

[18] In the present matter, it seems to me that the applicant is blissfully unaware of this exposition of our law. He is dissatisfied, yet again, with the outcome of an application to de-register a property from his name. From all the facts and evidentiary material before both the High Court and Supreme Court on appeal, each and every ground of appeal was thoroughly and extensively examined, scrutinised and properly dealt with. Yet, again dissatisfied with the legal outcome of analysis of the evidence and his presentation made to the Court, he was advised that there could yet again be a rehash or recapitulation of his case, this time on review. He was ill-advised.

[19] The applicant remains unable to indicate any manifest injustice occasioned by the outcome of his appeal, or for that matter, the manner in which the High Court initially dealt with the very same issues. He has not shown any irremediable harm which he has suffered, save for another repetition of the basic facts. He has been unable to identify any error in law or misapprehension or mistake made by the Court which heard and determined the appeal. The applicant caused a sham transaction to be registered at the Deeds office, ostensibly to have purchased a piece of land for E100.000, but apart from not paying over the stated purchase price and trying to deprive the other heirs and beneficiaries of the deceased estate in the process, he presents a totally different *causa causans*. He might very well have come to the assistance of the deceased in his time of need, and he very well may expected to be rewarded for it. However, the power of attorney which was utilised to effect transfer of the property into the name of the applicant is totally void of any reference to a donation or anything else than an outright sale, which fact was contested by the applicant in the litigation leading up to the application for a review. His contentions were held to be unacceptable, and it remains so, yet again.

[20] In The Principal Secretary, Ministry of Public Service and 4 Others v Xolile Sukati In re: The Principal Secretary, Ministry of Finance & 3 others (45/2014) [2015] SZSC 38 (29 July 2015) at para 21, the point of yet again trying to resuscitate an issue which has already been adjudicated upon, which the applicant now wants to do yet again, was dealt with as follows, and I see no reason to depart from the following *dictum*:

> *"It is thus competent to rationalize Section 148 (2) as an exception to the res judicata doctrine. The section must as of necessity be applied with caution as it goes against the underlying principle that the court must prevent the recapitulation of the same action and must always endeavour to put a limit to needless litigation. It must ensure that certainty is maintained in cases which have been decided by the courts. Therefore, where any cause of action has been prosecuted to finality between the same parties, any attempt by one party to bring the matter to the court on the same cause of action should not be permitted. "The rule appears to be that where a court has come to a decision on the merits of a question in issue, that question, at any rate as a causa petendi of the same thing between the same parties, cannot be resuscitated in subsequent proceedings" per* ***Herbstein and Van Winsen The Civil Practice of The High Courts and The Supreme Court of Appeal of South Africa, 5th ed, Vol, 2012 at page 610 footnote 149. See National Sorghum Breweries v International Liquor Distributors 2001 (2) SA 232 (SCA), African Farms and Township v Cape Town Municipality 1963 (2) SA 555 (A)."***

[21] Counsel for the applicant was unable to point to any exceptional circumstances or manifest injustice to sway us to exercise the review

jurisdiction of the Supreme Court, nor of any particular irremediable hardship to be suffered as consequence of the adverse judgments which were ordered against the applicant for review. In Nasali v Addy [1987 - 88] 2 GLR 286 – 288, Taylor JSC stated of the powers of review, akin to that which is embodied in Section 148 (2) of our own Constitution, that:

> *"The jurisdiction is exercisable in exceptional circumstances where the demands of justice make the exercise extremely necessary to avoid irremediable harm to an applicant. In this connection all persons who have lost a case are likely to complain of miscarriage of justice, but in my view in the absence of the exceptional circumstance such complaints are a poor foundation for the exercise of the review power, for it is only in exceptional circumstances that the interest of* rei publicae ut sit finis litium *principle yields to the greater interest of justice."*

[22] In actual fact, what the applicant really wants is to have the whole appeal which already served before this Court reargued on the very same points of fact and law. In my considered view, it is an abuse of the process and procedure, to go down same road yet again, under the guise and subterfuge of a review application.

[23] In deciding the appeal, the Supreme Court meticulously dealt with all of the grounds of appeal and it was again concluded, on the same facts and evidence which was before the High Court, that indeed there was no valid contract of sale and that the transaction was a sham. The applicant has been blowing hot and cold all along. On the one hand, he repeatedly asserts the land was "given" to him by his most appreciative late father. On the

other hand, he just as often said that it was "sold" to him. The so called "Deed of Sale", as ultimately embodied in the transfer documents at the Deeds office, was conveniently lost.

[24] The bottom line of what the applicant really wants is a reversal of the Orders of Court to have the transfer reversed. His siblings and the executors of the estate applied for such relief and it was granted in their favour. His appeal did not change the situation; hence, the "second bite at the cherry", to rehash the same matter with the hope of a favourable outcome this time. It is not going to happen.

[25] In closing, it needs to be recorded that despite undertakings during the hearing of this matter, applicant's counsel has still not filed any authorities in support of his argument. It has not been helpful at all. Also, despite an undertaking by Mr Manzini to file a copy of some text by Grotius which he read out during the hearing but which was not referred to in his Heads of Argument, has also not yet been given to us for consideration.

[26] The context of the argument in this regard with reference to the common law authority quoted in court by applicants' counsel was to the effect that a valid agreement of sale is not dependent upon the payment of a stipulated *pretium* or purchase price. It was urged that valid effect to cause transfer could as well have been that mere appreciation by the transferor could equally suffice to substitute payment of the purchase price. However the absent deed of sale which was key to the power of attorney reflected otherwise it was recorded that a specific purchase price, E100 000, was to

be paid in consequence of the transaction. If it was otherwise, a gift or a token of appreciation, it would have been recorded on such.

[27] Section 31 of the Transfer Duty Act No.8 of1902 provides that "no contract of sale of fixed property shall be of any force or effect unless it is in writing and signed by the parties thereto or by their agents duly authorised in writing". On appeal, the court took this into account when it stated the following at paragraphs 6 -8 of the judgment:

"*As stipulated above, Appellant stated that he personally drew the Deed of Sale which was purportedly signed by the late Nelson. There is no evidence that a document drawn by a complete layman complied with the provisions of the Transfer Duty Act of 1902 and our common law.*

In preparing the answering Affidavit the Appellant and the Conveyancer had the perfect opportunity to verify under oath that there was indeed a compliant and valid and binding Deed of Sale and what the contents were relating to the purchase price and the alleged obligations of the Appellant that he had to fulfil, but both of those parties failed dismally to do so.

There is no proof that the purchase price or infact any part thereof was paid by the Appellant. Interestingly at paragraph 7 on page 47 of the record he states; ***"However, as stated above, I never paid the E100 000.00 to my father's bank account as the purchase price was not only in cash but to be repaid to the obligations which he bestowed upon me."*** *That clearly implies that some unknown part of the purchase price was indeed to be paid in cash. (My underlining)*."

[28] From this, it is clear that on appeal, as it was in the High Court, the applicant did not avail himself of the opportunity to dispel any notion of impropriety regarding the "lost" Deed of Sale. He readily could have done so, with the assistance of his conveyancer. His assertions that the property was both "sold" and "given" to him remains an irreconcilable anomaly. It is not an issue to now rehash on review, all over again.

[29] Finally, I reiterate that on appeal, the Supreme Court has stated that in the event that the appellant, now applicant, has any proof of claims for improvement of the property or any other lawful claims, these can be proved against the estate of the late Nelson Mavukela Shongwe and dealt with by the Respondents and the Master of the High Court in the winding up of the estate.

ORDER

It is ordered as follows:

1. The application for review in terms of Section 148 (2) of the constitution is dismissed.
2. The judgments of both the High Court and the Supreme Court on the appeal are confirmed.
3. Costs of the first and second respondents are ordered against the applicant.

J. P ANNANDALE

JUSTICE OF APPEAL

I agree

MCB MAPHALALA
CHIEF JUSTICE

I agree

SP DLAMINI
JUSTICE OF APPEAL

I agree

SJK MATSEBULA
ACTING JUSTICE OF APPEAL

I agree

AM LUKHELE
ACTING JUSTICE OF APPEAL

For the Applicant: Mr. N. Manzini of CJ Littler Attorneys, Mbabane.

For the First Respondent: Mr. X. Mthethwa of Bhembe Attorneys, Mbabane.