IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 48/18

In the matter between:

HUNTER SHONGWE **Applicant**

and

PRISCILLA DLAMINI & FOUR OTHERS **Respondents**

Neutral Citation : *Hunter Shongwe vs Priscilla Dlamini & 4 Others* (48/2018) [2019] *SZSC* 22 (31/05/2019).

Coram : **R.J. CLOETE JA, J.P. ANNANDALE JA AND J.M. CURRIE AJA.**

Heard : 23rd May 2019

Delivered : 31st May 2019

SUMMARY: *Civil Procedure – Application to rescind Order of this Court dismissing applicant's appeal for non-appearance in Court in terms of Common Law ostensibly/purportedly to be recognized by Supreme Court in terms of section 152 of Constitution – Principles and requirements of common law rescission expounded in lower courts – Supreme Court only has Appellate jurisdiction in terms of Sections 146 (1) & 2 of the Constitution and Review jurisdiction in terms of Section 148 (2) – Supreme Court functus officio – Application dismissed with costs on attorney and client scale*

CURRIE AJA

INTRODUCTION

[1] The application before this Court is an urgent application brought by the Applicant, (the Applicant in the court *a quo)* as a result of an order made by this Court on the 14th March 2019 dismissing the applicant's appeal for non-appearance in Court and failure to file all documents required by the Rules. The application is brought, purportedly, in terms of the Common Law. The Order attached to the papers is not the Order made by the Court and this was pointed out to Mr. Jele. The application is irregular in that only Priscilla Dlamini (the First Respondent in the court *a quo*) is cited in the application and not the other Respondents

including the Deputy Sheriff against whom the Applicant sought an order for a stay of execution. The application was only served on attorneys Magagula Hlophe who represented the 1st Respondent in the court *a quo*.

[2] The applicant seeks an order as follows:

> "*1. The applicant is condoned for the non-compliance with the Rules of this court relating to time limits and manner of service and this matter is enrolled to be heard as one of urgency;*
>
> *2. A rule nisi is hereby issued calling upon the respondent to show cause on a date to be fixed by the above Honourable Court why a final order in the following terms should not be made final;*
>
> *2.1 The Order granted by the Honourable Court on the 14th day of March 2019 dismissing the applicant's appeal is hereby rescinded and/or set aside;*
>
> *2.2 The applicant's and/or his attorneys are condoned for the non-appearance in Court on the 14th day of March 2019;*

2.3 *The applicant's main appeal is hereby reinstated back to the Roll for hearing; and*

2.4 *The respondent is ordered to pay costs only in the event of unsuccessful opposition;*

3. *Pending finalization of the matter in due course it is ordered that the Court Order granted on the 14th day of March 23018 is hereby stayed.*

4. *Granting the applicant further and/or alternative relief."*

[3] The parties appeared before Court in chambers on the 22nd March 2019 and the following interlocutory order was made:

"1. The Respondents shall file their Opposing Affidavit by 29th March 2019.

2. *The Applicant shall file his Replying Affidavit, if any, by 5th April 2019.*

3. *The Applicant shall file his Heads of Argument and his Bundle of Authorities by 12th April 2019.*

4. *The Respondents shall file their Heads of Argument and their Bundle of Authorities by 18th April 2019.*

5. *The matter shall be set down for hearing in the current Session of this Court by arrangement with the Registrar of the Supreme Court and the Chief Justice.*

6. *The execution of the consequences of the Judgment handed down by this Court on 14th March 2019 is suspended until the handing down of Judgment in the current application.*

[4] The Applicant opposes the application for rescission on, *inter alia* the basis that this Court is *functus officio.*

BACKGROUND

[5] The Respondent instituted proceedings in the court *a quo* seeking an order to endorse a decision of the Ezulwini Umphakatsi (Royal Kraal) to evict the Appellant. The application was opposed on the basis that the civil courts have no jurisdiction to entertain an application to enforce decisions of the Umphakatsi and that the dispute was pending before the Ludzidzini Royal Council and that the Umphakatsi have their own mechanisms to enforce their own decisions.

[6] The court *a quo* dismissed the Applicant's grounds of opposition and granted the orders sought by the Respondent.

[7] The Applicant, being dissatisfied with the judgment of the court *a quo,* timeously filed an appeal against the judgment of the court *a quo* and also filed the record within the prescribed time limits. However, no heads of argument were filed by the Applicant as required by the Rules of Court before the date of the Appeal hearing being the 14th March 2019.

[8] The Applicant's counsel failed to appear in court on the 14th March 2019 and the Appeal was accordingly dismissed on the grounds of non-appearance and the fact that none of the documents required in terms of the Rules had been filed. The Applicant's counsel maintains that that this was due to fact that he had been instructed by the same Applicant in other matters and he had wrongly diarized the Appeal before this Court. He had attended to a criminal matter in the Magistrate's Court on behalf of the Applicant, in error, instead of appearing before this Court.

APPLICANT'S ARGUMENT

[9] Applicant's counsel contended that the application is brought under the Common Law, which is recognized by Section 252 (1) of the

Constitution and is applied in all the courts of Eswatini. This section reads as follows:

> *"Subject to the provisions of this Constitution or any other written law, the principles and rules that formed, immediately before the 6th of September 1968 (Independence Day), the principles and rules of the Roman Dutch Common Law as applicable to Swaziland since 22nd February 1907 are confirmed and shall be applied and enforced as the common law of Swaziland except where and to the extent that those principles or rules are inconsistent with this Constitution or a statute."*
> (my underlining)

[10] Applicant's counsel argued that there is nothing in the Constitution, neither the Rules of Court that state that this Court cannot rescind its own orders in terms of the Common Law. He referred to numerous cases dealing with the principles and requirements for rescission of a judgment under the Common Law but none of the authorities cited deal with a rescission of a judgment by the Supreme Court. Whilst he gave an explanation for his non-appearance, same was inadequate as was his explanation for not filing his Heads of Argument. Further, he could not provide any authorities in support of his contention that this Court has the power rescind its own judgment.

RESPONDENT'S ARGUMENT

[11] The Respondent contends that this Court is *functus officio* and has no authority to rescind or vary its order dismissing the appeal in terms of the Common Law. Whilst rescission in terms of the Common Law is generally applicable in the courts of Eswatini, the Common Law remedy of rescission is excluded in this Court, as a creature of Statute, which only has Appellate jurisdiction in terms of Sections 146(1) and (2) of the Constitution.

[12] Respondent's counsel further argued that this Court is not a court of first instance and does not provide for the institution of urgent application proceedings and for this reason the application ought to be dismissed.

[13] With regard to the prayer for the order granted on the 14h March to be stayed, the Respondent contended that same is flawed in that the Deputy Sheriff was not cited, nor was he served with a copy of the application.

[14] On the issue of costs the Respondent contended that this Court has a discretion to be exercised judicially upon consideration of all the facts and in fairness to both sides. Vexatious, unscrupulous or dilatory proceedings brought by a party ought to be penalized with a punitive costs order. He argued that the conduct of the Applicant has been reprehensible in that, whilst he noted an appeal in July 2018 and subsequently filed the record he had failed to file even its Heads of Argument by the date of the hearing, let alone the non-appearance of Applicant's Counsel. The fact that the proceedings were brought on an urgent basis whilst there is no provision in the Rules for same, amounts to a further abuse of the Court process.

[15] The Applicant in its own papers asserts that Swazi Law and Custom is the appropriate forum for the adjudication of the dispute yet it sought an interdict in the court *a quo* in an attempt to avoid execution of the judgment obtained by the Respondent.

[16] In the light of the aforegoing Respondent contends that costs on the attorney and client scale ought to be awarded to the Respondent in view of the conduct of the Applicant in abusing the process of this Court. In

addition the Respondent has been prevented from enjoying the benefit of a judgment granted in her favour whilst the Applicant moves from one court process to another.

FINDINGS

[17] Sections 146 (1) and (2) of the Constitution of Eswatini provide as follows:

> *"146(1) The Supreme Court is the final court of appeal. Accordingly, the Supreme Court has appellate jurisdiction and such other jurisdiction as may be conferred on it by its constitution or any other law.*
>
> *(2) Without derogating from the generality of the foregoing subsection, the Supreme Court has –*
>
> *(a) Such jurisdiction to hear and determine appeals from the High Court of Swaziland and such powers and authority as the Court of Appeal possesses at the date of commencement of this Constitution, and*
>
> *(b) Such additional jurisdiction to hear and determine appeals from the High Court of Swaziland and such additional powers and authority as may be prescribed by or under any law for the time being in force in Swaziland."*
>
> (My underlining)

[18] It is clear from the aforesaid provisions of the Constitution that this Court is a court of record and not a court of first instance. It has circumscribed jurisdiction which does not include the power to rescind its own judgments. Furthermore, the Rules of this Court do not provide for the institution of urgent proceedings.

[19] In terms of Section 148 (2) this Court may review its own decisions. The section provides as follows:

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

[20] In terms of the above section this Court has power to review its own decisions as distinct from the power to rescind them. This Court upheld this remedy in **President Street Properties (Pty) Ltd v Maxwell Uchechukwu and 4 Others (11/2014) [2015]SZSC 11** where the following was expressed:

> "6.1 *In this matter, the Court is not relying on any so-called inherent jurisdiction as a court of final appeal. This Court is called upon to exercise the Constitution-endowed jurisdiction or power to review its own decisions. In the result the Court is not obliged to mull over issues of res*

iudicata or functus officio or similar rules. The Constitution does not do away with these rules: they remain in the background as a constant reminder to the Court not to be too complacent with itself and over indulge this new authority."

CONCLUSION

[21] In my view it is clear that the Applicant has embarked on the wrong procedure in bringing an urgent application for rescission of the Order granted on the 14th March 2019 and attempting to impute powers to this Court that it does not have. Whilst the Common Law remedy of rescission is generally applicable in the other courts of Eswatini, this remedy is excluded by Sections 146 and 148 of the Constitution. This Court pronounced its judgment on 14th March 2019 and as such is *functus officio.*

[22] Whilst the Applicant has given an explanation for the non-appearance on the date of the hearing, no reasonable explanation has been given for failing to properly prosecute the Appeal and file Heads of Argument. Furthermore, the explanation given for non-appearance is inadequate taking into account all the circumstances.

COSTS

[23] The issue of costs was argued by the parties and the Respondent argued vigorously that costs should be awarded to the Respondent on a punitive scale, taking into account the history of the matter and the fact that the Respondent has been brought to this Court on the basis of the wrong procedure.

[24] This matter has a checkered past and it is important with regard to the issue of costs. The Respondent approached the Ezulwini Umphakatsi seeking their assistance in evicting the Applicant from her house in Ezulwini as he had failed to pay rentals for the flat he was occupying since 2009. When the Respondent demanded rentals the Applicant refused to pay same claiming that he had renovated the flat and became violent towards the Respondent. She then approached the Umphakatsi which issued an order on 13th October 2012 evicting the Applicant from her flat. The Respondent made several attempts to enforce the decision of the Umphakatsi but Applicant defied the order of the Umphakatsi

and became violent towards Respondent and the Community Police of Ezulwini when they attempted to evict him.

[25] The Applicant then instituted proceedings in the court *a quo* seeking, *inter alia,* an order interdicting the Respondent from evicting him from her premises pending finalization of action proceedings claiming the sum of E100 000 being in respect of monies paid by the Applicant in renovating the property. The application was dismissed on the 10th July 2018 and the Applicant appealed against the said judgment, which was then dismissed by this Court when the Applicant had failed to file Heads of Argument and his attorney of record failed to appear on the day which had been allocated for the hearing of the Appeal.

[26] It is clear from the history of the matter that the Applicant's conduct has been reprehensible in defying the order of the Umphakatsi and who appears to be merely seeking to avoid and delay his eviction from the premises of the Respondent. I am of the view that he should be penalized with a punitive costs order in view of this unacceptable conduct. The Respondent has an order of the Umphakatsi which she has not been able to execute for some years in the Respondent's

premises and the Respondent has been unable to enjoy the fruits of her order of the Umphakatsi.

[27] Further, the conduct of the Applicant's legal representative in not prosecuting the Appeal, by filing the required documents, nor appearing in this Court on the day of the hearing and then bringing the Respondent to court, once again, using the wrong procedure, should be met with a punitive costs order.

[28] The principles relating to the award of costs were authoritatively stated by Holmes JA in **Ward v Sulzer 1973n930nJN701N9A0 at 706 – 707** as follows:

"1. *In awarding costs the Court has a discretion to be exercised judicially upon a consideration of all the facts, and, as between the parties, in essence it is a matter of fairness to both sides....*

2. The same principles apply to costs on the attorney and client scale. For example, vexatious, unscrupulous, dilatory or mendacious conduct (this list is not exhaustive) on the part of an unsuccessful litigant may render it unfair for his harassed opponent to be out of pocket in the matter of his own attorney and client costs; see ***Nel v Waterberg***

Landbouers Kooperatiewe Vereniging 1964 AD 597 *at p.607, second paragraph. Moreover, in such cases the Courts hands should not be shortened in the visitation of its displeasure; see* ***Jewish Colonial Trust, Ltd v Estate Nathan 1940 AD 163*** at p184.

[29] I accordingly make the following order:

ORDER

1. The application is dismissed.

2. The Applicant is ordered to pay costs on the attorney and client scale.

J.M. CURRIE
ACTING JUSTICE OF APPEAL

I agree

R.J. CLOETE
JUSTICE OF APPEAL

I agree

J.P. ANNANDALE

JUSTICE OF APPEAL

For the Applicant: MR. N.D. JELE

For the Respondent: MR. S. MATSEBULA