



HELD AT

MBABANE

in the matter

between:

BEAUTY

**IN THE SUPREME COURT OF ESWATINI**

BUILD

**JUDGMENT**

CONSTRUCT

ION (PTY) LTD

CIVIL CASE NO: 68/2015

And

*I*

MUZI P. SIMELANE

APPLICANT

T / A M P SIMELANE ATTORNEYS

NATIONAL COMMISSIONER OF POLICE

FIRST RESPONDENT

THE ATTORNEY GENERAL

**Neutral Citation:**

*Beauty Build Construction*  
*v Muzi P.*  
*Simelane T/A M*  
*P*

SECOND RESPONDENT

THIRD RESPONDENT

*Simelane Attorneys (68/2015) [2019] SZSC 34 (22 August 2019)*

S.P. DLAMINI JA S.B.

MAPHALALA JA

CORAM:

J.P. ANNANDALE JA

*Summary*

DATE HEARD: 16 August 2019 22

DATE DELIVERED: August 2019

*Civil law - Application for a postponement from the bar considered and rejected - Application for committal in order to enforce compliance with an order of Court considered and granted - Applicant found to have made out a case on its papers and 1<sup>st</sup> Respondent have failed to have a valid defence against same.*

## **JUDGMENT**

**S.P. DLAMINI**

### **APPLICATION FOR A POSTPONEMENT**

[1] This matter was initially enrolled for hearing on the 15<sup>th</sup> July 2019 but it could not then proceed [due to late filing of Heads of Argument by the First Respondent's attorney of record. It was then postponed to a date which was to be determined in due course. Also, the First Respondent was ordered to forthwith file his Heads of Argument and bundle of authorities and he was exempted from the need to apply for late filing of same. Subsequently a new date, the 16<sup>th</sup> August 2019, was allocated for hearing and the litigants were advised accordingly.

[2] On the 25<sup>th</sup> July 2016, the Applicant served in Notice of set down for hearing of argument on the First Respondent's attorney of record. However, when the matter was called on the 16<sup>th</sup> August 2019, the First Respondent's attorney of record was absent. Mr. D. Khumalo stood in for First Respondent's Attorney Mr. Howe and he made an application from the bar for the postponement of the matter on the basis of communication with the office of the Registrar. The Court found the motivation for the postponement not satisfactory and dismissed it.

[3]

[4] It was also not helpful to the First Respondent that by the absence of Mr. Howe, his stand-in attorney had no instruction to proceed in case the application was not granted. This is very strange. It is even more so particularly because there was no clarity as to why Mr. Howe was not available to represent the Applicant in a matter that has been set down for some time. Mr. Jele for the Respondent informed the Court that he was advised by Mr. Howe that he was attending a funeral outside the country but the nature'-of the bereavement was not explained to him by Mr. Howe. Mr. Khumalo informed the Court that Mr. Howe did not inform him of the reasons why he would not be able to attend the scheduled hearing. The Assistant Registrar on the other hand had informed the Court that the information they were given as to why Mr. Howe was unable to come to Court was that he was attending a course or training outside the country. It is not indicated as to why Mr. Howe did not hand over the matter to one his senior colleagues in his firm. This matter has been in and out of Court many times and has been postponed previously. It is apposite to repeat the often used legal adage that **“justice delayed is justice denied”**.

### **RIGHT TO BE HEARD**

C] The Court considered the right to be heard and found that in the circumstances of this matter it was not infringed by proceeding with the

hearing in the manner it did; full sets of papers including Heads of Argument had been filed by both parties. Mr. Jele and Mr. D. Khumalo agreed to rely on the respective Heads of Argument without any further submissions. In any event while this is a very important matter as it touches on the liberty of the First Respondent it is otherwise straight forward and fully dealt with in the respective heads.

## **BACKGROUND**

[5] There is no need to burden this judgment with a long historical  
1  
background of the matter. The simple, summary is as follows: The Applicant instructed the First Respondent to sue the Government of Eswatini to recover money for construction works which it did for and on behalf of the Government. When payment fell due, Government did not pay, resulting on the legal suit instituted by the First Respondent that the Applicant won. The judgment debt was satisfied by the Government and the due amount was paid to the First Respondent's trust account. Some of the monies were paid over to the Applicant by the First Respondent but there were disputes regarding the balance which was subject to the litigation between Applicant and First Respondent. The matter in one form or another has been through both the High Court and the Supreme Court. In all of the matters the Applicant in **BEAUTY BUILD CONSTRUCTION (PTY) LTD v MUZI P. SIMELANE ATTORNEYS & 2 OTHERS CASE NO. 68/2015 [2019]**

SZSC J14, has been successful. Ultimately this Court in its appellate jurisdiction ordered in its majority judgment that:

- “1. The First Respondent is hereby ordered and directed to pay to the Applicant the sum of E547, 992.35 within 14 (fourteen) days from date of the granting of this Order.*
- 2. In the event that the First Respondent fails, refuses or neglects to pay the aforeiaid sum, the' Applicant may set the matter down and apply for an Order for the committal of the First Respondent to gaol for the period specified in the Order of this Court dated 23<sup>rd</sup> August, 2018.*
- 3. No order as to costs. ”*

The First Respondent has not complied with the order of the Supreme Court hence the present proceedings. ■

[6] His Lordship Matsebula AJA in the minority judgment in the case referred above had this to say in paragraph [18] and [20] at page 22:

*718] Lastly, I hold the view that it is immoral, unethical and unlawful to see a person when he gives out instructions to collect his money from the debtor and soon as you have collected the money you no longer see him when it's time to account and pay that person on allegation or technicality that that person is not a legal person as per requirements of the company laws of Eswatini.*

*[20] Finally, it is common cause that the Respondent has not paid the sum of E547, 992.35 to date to the Applicant as ordered by this Court.*

His Lordship then concluded as follows: “*In the circumstances, I, but for the majority judgment, would have -*

- a) Found Respondent guilty of contempt of this Court;*
- b) Sentenced the Respondent to a period of 30 days in goal for his refusal to comply with the Court Order dated 23<sup>rd</sup> August 2018; and*
- c) Ordered the Respondent to pay costs of this application at attorney and own client scale. ”*

[7] In the same matter this Court in its review jurisdiction in **M.P. SIMELANE ATTORNEYS v BEAUTY BUILD CONSTRUCTION (PTY) LTD & 2 OTHERS** **CASE. NO. 68/2016 [2017] SZSC 14**, His Lordship Dr. B.J. Odoki had this to say at paragraph [33] page 20:

*733] As the 1<sup>st</sup> Respondent submitted, the conduct of the Appellant in presenting a dishonest defence that its client was fictitious and in delaying to pay to the 1<sup>st</sup> 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. ”*

## **APPLICANT'S APPLICATION**

[8] There is no evidence that the Law Society did anything regarding the referral of the judgment by His Lordship Dr. B.J. Odoki. It is of concern to me in the circumstances that the First Respondent is represented by Mr. Howe who is an executive member of the Law Society. I say this fully appreciating litigants' rights to be represented by attorneys of their choice and Attorneys' obligations to receive instructions from litigants. In the present proceedings the Applicant has by way of motion instituted an application seeking relief as follows:

1. The First Respondent is sentenced to a period of 30 days for contempt of Court, and such period to be reviewed for a further 30 days, until the first respondent complies with the Orders of this Court;
2. The First Respondent is ordered to pay the costs of this application at Attorney and own client scale;
3. Further and/or alternative relief.

## **RESPONDENT'S CASE**

[9] The Applicant's application is opposed by the First Respondent. The First Respondent advances various defences to the relief sought namely that; the Court Order sought to be enforced has been complied with, the matter is *res judicata* as the Court has dealt

with and concluded it, the Court granted an Order that was not prayed for, no prior finding of contempt has been made, the matter is. *lis pendens* application to



rescind Order pending, to grant the relief sought by the Applicant would amount to a double jeopardy since according to the Respondent the Chief Justice had already sanctioned him and the Applicant has not exhausted domestic remedies and ought to have firstly approached the Law Society.

[10] The defences advanced by the First Respondent are convoluted and contradictory. On the one hand the First Respondent's position is that the matter is *res judicata* and that he has complied with the Court Order in question yet on the other he claims that the Applicant has not exhausted local remedies or that the Court Order is fraught with some invalidity and that an application challenging it is pending before the Court. There is no evidence placed before this Court to suggest that the Court Order of this Court has been complied with. All the defences advanced by the First Respondent have no merits and stand to be dismissed.

#### **THE LAW AND ITS APPLICATION**

The law relating to this matter is long settled Therefore, there is no need for a long exposition. The High Court of Uganda in the matter of **NAMBASI NELSON LUDAMBISA v KHAN INVESTMENTS LTD MISC. APPLICATION NO. 602 of 2018** in which His Lordship Justice SSEKAAN MUSA stated with approval the decision of the Appeal Court in **HOUSING FINANCE BANK LTD 8s ANOTHER v EDWARD MUSISI MISC. APPLICATION 158/2010 CA** which held that:“*A party who knows of an order, 'regardless of whether, in view of that party, the order is null or valid, regular or irregular cannot be permitted to disobey it by reason of what that party regards the order to be. It is not for that party to choose whether or not to comply with such order. The order must be complied with in totality, in all circumstances bu the party concerned subject to the party's right to challenge the order in issue*

*.....It is the responsibility and duty of the party concerned, in case that party for some genuine reason finds compliance with the court order not possible, to appropriately move court issuing the order and bring to the attention of the court the reasons for non-compliance. ” (my underlining)*

[11] The Court is satisfied that Applicant has made out a case for the relief sought. The First Respondent has no valid defence against the relief sought. He does not deny that he has not complied with the order of this Court. The application stands to succeed and the First Respondent's defence stands to be dismissed.

### **EX TEMPORE ORDER**

[12] At the hearing of the matter, the Court considered the matter and made an *ex tempore* order. That order must be read as one and forming part of this judgment.

**COURT ORDER**

FOR THE APPLICANT:

**N.D. JELE**


In view of the foregoing, the Court makes the following order:

- 1 The First Respondent is sentenced to a period of 30 days for contempt of Court, and such period to be renewed for further 30 days<sup>5</sup> period, until the First Respondent complies with the Orders of this Court and purges his contempt.
  
2. The First Respondent is ordered to pay the costs of this application at Attorney and own client scale.
  
3. It is further ordered that the Registrar serves a copy of this judgment on the Secretary of the Law Society of Eswatini.



**S.P. DLAMINI JA**

I agree



**S.B. MAPHALALA**

I also agree

**J.P. ANNANDALE**



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

FOR THE 1<sup>ST</sup> RESPONDENT: **D. KHUMALO**