IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CIVIL CASE NO: 68/2018**

In the matter between:

XOLILE GAMA APPLICANT

And

FOOT THE BILL INVESTMENTS (PTY) LIMITED RESPONDENT

In re:

XOLILE GAMA FIRST RESPONDENT

THE DEPUTY SHERIFF HHOHHO DISTRICT SECOND RESPONDENT

THE NATIONAL COMMISSIONER OF POLICE THIRD RESPONDENT

ATTORNEY GENERAL FOURTH ESPONDENT

Neutral Citation: *Xolile Gama v Foot the Bill Investments (Pty) Limited (68/2018) [2019] SZSC 35 (11 September 2019)*

CORAM: **S.P. DLAMINI JA**

M.J. DLAMINI JA

S.B. MAPHALALA JA

J.P. ANNANDALE JA

M. MANZINI AJA

DATES HEARD: 17 July 2019 & 16 August 2019

DATE DELIVERD: 11 September 2019

Summary

Civil law –- Application for a review of a judgment of this Court in terms of Section 148 (2) of the Constitution considered; - Held that the Application for review under Section 148 (2) does not meet the requirements for it to succeed and it is dismissed; - Held that a lien does not exist in favour of the Applicant and there is no defence based in the alleged existence of lien against the eviction of the Applicant – Held that there is no lawful basis to interfere with the judgment of this Court in its appellate jurisdiction and that such a judgment is hereby upheld; Held that the order by the High Court in suspending the operation of the judgment of the Supreme Court is hereby set aside - Held that the costs are awarded against the Applicant at a normal scale.

JUDGMENT

S.P. DLAMINI JA

[1] Serving and falling for consideration before this Court is an application to review the judgment of this Court in its appellate jurisdiction in terms of Section 148 (2) of the Constitution Act 1 of 2005 (the Constitution).

BACKGROUND

[2] The Respondent instituted proceedings at the High Court to evict the Applicant from premises he had bought in a public auction pursuant to a writ of execution.

[3] The High Court per His Lordship Magagula J concluded that; the Respondent had made improvements to the property of which the Applicant was aware of and as such the Applicant had a lien over the property; and according to his Lordship Magagula J, the Applicant was entitled to remain on the property until she was compensated for the improvements hence the Respondent's application for eviction was dismissed with costs.

[4] The Respondent was dissatisfied with the judgment of the High Court and appealed against it. The grounds of Appeal as per the Notice of Appeal dated 01 August 2018 were as follows:

> ***1. The Court a quo erred in law and in fact in holding that the First Respondent was and or is entitled to raise and enforce a right of lien against the Applicant;***
>
> ***2. The Court a quo erred in law and fact in holding that the First Respondent is entitled to be compensated for the improvements on the property by the Applicant and the Applicant is liable to compensate the First Respondent;***
>
> ***3. The Court a quo erred in law and fact in holding that the Applicant was duty bound to enquire about the position of the occupant before it bought the property.***

[5] Upon hearing the Appeal, this Court in its appellate jurisdiction as per a unanimous judgment written by Her Ladyship Justice Currie with the Lordships MCB Maphalala the Chief Justice and Justice R.J.

Cloete made the following findings at paragraphs 13 to 22 at pages 12 to 16:

[13] The rei vindicatio is available for the owners of property. To succeed the Applicant must prove that it owns the property and the First Respondent is in possession of the property at the time of the institution of the application as set out in Chetty v Naidoo 1974 (3) SA 13 (A) at 20.

[14] Counsel for the Appellant referred this Court to the Heads of Argument filed a quo wherein the said section 15 of the Deeds Registry Act 1968 had been raised expressly. This legal point therefore is not a new point raised for the first time on appeal and it is clear from the facts that there had been no transfer of the Property to the First Respondent and no notarial cession of the lien to the First Respondent.

[15] A family is not a legal person and the fact that the improvements were intended to establish a family home, cannot assist the First Respondent.

[16] The First Respondent refused to vacate the Property and relies on a lien for improvements to the Property. She states in her Answering Affidavit in the Court a quo that her brother Jabulane Gama assisted her, through finance, to buy the Property from Dumisani Nkosinathi Dlamini and develop it by building a three-bedroom home with outbuildings as a family home. No specifics are provided as to the amounts expended but the First Respondent relies on a valuation report indicating that the value of the Property as at 11th April 2014 was (E1 400 000). Considering that she bought the vacant land for (E220 000) through finance provided by her brother she maintains that the value of the improvements is (E1 180 000 00). The First

Respondent should have alleged and provided what the actual expenses were that she expended and lodged a counter application. After completion of the Property her brother authorised her to assume occupation and control of the Property. A signed written deed of sale was entered into with the said Dumisani Nkosinathi Dlamini but the Property was never transferred to her. Despite this the First Respondent continued to reside on the Property. The Property was the sold in execution and was bought by the Appellant. The company documents as filed at the Registrar of Companies reflect the shareholders as being Alice Lucia Hungwane and Fanele Bongwe Hungwane and not Mphenduli Maguba Dlamini as alleged by the First Respondent.

[17] It is therefore clear that the First Respondent failed to acquit herself of the onus that she held a lien. The improvements to the Property were effected by First Respondent's brother and she did not incur expenses in respect thereof which would have given rise to ilis retentionis. The Property was sold to the First Purchaser at a Sale in Execution and when immovable property is sold in execution to a bona fide purchaser, he is not obliged to recognize the lien. In Grace Ntombane v Philemon Ngulube Sifundza Civil Case No. 1952/2003 (6th February 2004) at p.10 –

> ***"An improvement lien over the property effected by the Respondent at the time he was the owner of the property and which ownership finally came to an end in December 2001 when it was sold in execution, cannot now be validly raised against the subsequent purchaser."***

[18] In this matter it is indisputable that the First Purchaser, who sold the Property to the Appellant, at the time of his purchaser at the sale in execution on

the 21st March 2014, had been unaware of the purported lien and was under no obligation to recognize that lien.

[19] The Court a quo erred in finding that the First Purchaser was duly bound to enquire about the position of the occupant when he bought it. The Property was sold at a sale in execution to a bona fide purchaser who is not obliged to recognize a lien even if one existed which it did not in this instance so there was no obligation upon him to enquire about the position of the occupant.

[20] The Court a quo erred in finding that compensation was payable to the First Respondent by the Appellant. I disagree with his contention in that First Respondent clearly failed to acquit herself of the onus to prove that she held a lien over the Property and was thus entitled to any compensation. Furthermore no counter-claim for compensation is therefore not payable.

[21] A lien cannot be validly raised as a defence by any purported lien holder against a subsequent purchaser after the property had been sold in a sale in execution where the person who had purchased it had been unaware of the lien.

[22] In view of the above finding, which is decisive of this appeal, the other grounds of appeal do not require further consideration save to affirm that a lien is a defence and not a cause of action and absent of a counter-application for payment for improvements, that an order to make such payment is not competent.'

[6] On the basis of the aforesaid findings, the Court proceeded to make the following orders at paragraph 23 at pages 16-17 of the judgment:

> ***'[23] I therefore make the following order:***
>
> 1. ***The Appeal succeeds and the judgment of the Court a quo is substituted with the following order:***
>   a. ***The First Respondent and any person occupying the immovable property being Certain Lot No 3013 situate in Mbabane Extension 11, (Thembelihle Township), District of Hhohho held under Deed of Transfer No. 176/2010 dated 25th March 2010 ("the property") with the permission of the Respondent, shall vacate the property forthwith and by no later than 30th April 2019.***
>   b. ***The Second Respondent is authorised to give effect to this Order forthwith.***
>   c. ***The Third Respondent is directed and authorised to render such assistance as may be necessary in the event of the First Respondent failing to comply with the order in 1 (a) above.***
>   d. ***The Appellant is granted costs including the costs of Counsel in terms of Rule 68 (2).'***

PRESENT PROCEEDINGS

[7] The Applicant was dissatisfied with the outcome of the appeal which was in favour of the Respondent and launched an urgent application

for the review of the judgment under Section 148 (2) of the Constitution and also to have the order of the Appeal Court stayed pending the finalisation of the matter.

RELIEF SOUGHT BY THE APPLICANT

[8] In the Notice of Motion dated 27 April 2019, the Applicant prays that this Court in its review jurisdiction grants her the following relief:

> ***'1. Dispensing with the procedures and manner of service pertaining to form and time limits prescribed by the Rules of the above Honourable Court and directing that the matter be heard as one of urgency.***
>
> ***2. Reviewing and correcting the judgment delivered by the Supreme Court (in its Appellate position) on the 9th day of April 2019 on the basis that same is patently and obviously grossly erroneous both in fact and in law.***
>
> ***3. Pending finalisation of prayer 2 above, the order of the Appellate Court be stayed.***
>
> ***4. Costs in the event of any opposition.***
>
> ***5. Further and / or alternative relief"'***

[9] When the matter was called on 17 July 2019 Mr. Mabila who appeared for the Applicant indicated that he was unwell, nevertheless, he assured the Court that he was ready to proceed. However, after a while it became clear that he had some difficulties resulting in the postponement of the matter. The hearing resumed on 16 August 2019.

ISSUES FALLING FOR CONSIDERATION

[10] The issues falling for consideration before this Court are: whether the application by the Applicant meet the requirements of Section 148 (2) and whether the Applicant made out a case for the relief sought; and costs of suit.

APPLICANT'S CASE

[11] Upon service by the applicant of this Application, the Respondent filed an answering affidavit in response to the Founding Affidavit in support of the application. The Applicant did not file a Replying Affidavit. However, at the hearing of the matter Advocate Mabila indicated that he was in possession of a Replying Affidavit and sought to hand over same. The Court rejected the request to hand over the Replying Affidavit from the bar on the basis that it was unprocedural. There was neither a formal application to do so or application for condonation.

[12] Accordingly, this matter must be decided on the papers filed of record and it is trite law that averments made in the Answering

Affidavit are taken to be admitted if not contradicted in the papers before Court.

[13] I have tried my utmost best to ascertain the Applicant's case from both Applicant's Founding Affidavit and the Heads of Argument and has not been an easy task.

[14] Paragraphs 11 to 18 of the Applicant's Founding Affidavit do somewhat shed some light as to Applicant's case and the reproduced hereunder:

> ***'AD PRESENT REVIEW APPLICATION***
>
> ***11. The points raised by the Applicant were dismissed by the High Court as having no substance, and having regard to the fact that in principle the Applicant had successfully opposed the grant of the relief sought by the Respondent and the fact that as a result thereof any appeal against the said dismissal would have been academic yet our courts only deal with resolving real disputes between parties, no appeal against the dismissal of the points of law was noted by the Applicant.***
>
> ***12. However, the Applicant submits that, when regard is had to the Respondent's Heads of Argument, reference to the dismissed points of law cannot be brushed aside irrespective of the fact that no appeal was noted against their dismissal.***

13. As may be seen at Pages 147 to 148 of the Respondent's Notice of Appeal, the grounds of appeal are, inter alia, that the Court a quo erred in law and in fact that Applicant was entitled to raise and enforce right of lien against the Respondent, further that Applicant was entitled to be compensated by the Respondent for improvements effected on the property and that Respondent was duly bound to enquire about the position of the occupant before it bought the property.

AD COMMON CAUSE FACTS

14. Save for adding that both Mphenduli Maguba Dlamini and Alice Hlungwane (a Director and Shareholder in the Respondent) became aware of the Applicant's right of lien on the date of the same execution and in subsequent engagements which occurred before Mphenduli Maguba Dlamini acquired transfer and registration of the property in his name, the Applicant accepts the common cause facts as stated by the Respondent.

15. One issue which the Respondent, and which was raised and argued without opposition before the High Court, does not address is the fact that the property subject herein was never subject to any bond in favour of the then Swazi Bank which attached and sold the same in execution. In short the property was never subject to any declaration of being executable in any order of Court.

16. Further sigh should not be lost to the fact that there are undisputed averments that Jabulane and the said Dumisani Dlamini had prior engaged in a gentlemen's understanding prior to the advertisement and sale of the property.

17. The Applicant hereunder deals with the patent errors and manifest injustice resulting from the judgment of the Appellate Court and which she is now seeking to have reviewed and set aside.

SECTION 15 OF THE DEEDS REGISTRY ACT (1968)

18. At page 12, paragraph 14 of the judgment of the Appellate Court the following is stated:

"Counsel for the Appellant referred this Court to the Heads of Argument file a quo wherein the said section 15 of the Deeds Registry Act 1966 had been raised expressly this legal point therefore is not a new point raised for the first time on appeal…"

19. For the first time in the matter, the Respondent raised the issue of compliance with Section 15 of the Deeds Registry Act (1968), which section provides as follows: …'

RESPONDENT'S CASE

[15] The Respondent's case is set out in both the Respondent's Answering Affidavit and Heads of Argument.

[16] In the Heads of Argument at paragraphs 8.5 to 10 it is contended on behalf of the Respondent that:

'8.5 Most significantly, there is no allegation that the above Honourable Court erred on appeal in holding that the Applicant never acquired a lien as alleged by the Applicant and as such had no defence of a lien to the application for eviction. That was the crux of the appeal and the primary issue, which is not and cannot be affected by any alleged secondary errors since this core finding is and remains unassailable.

9 Of further importance is that the Applicant does not make a single averment to bring her application within the "rare, compelling or exceptional" or "manifest injustice" ambit of the situations which would justify a judicial intervention post appeal or which would distinguish the purported grounds of review from disguised grounds of appeal.

9.1 No fact or circumstance that would elevate the matter above a mere "second bite at the cherry" is alleged by the Applicant.

9.2 All that is alleged is a vague suggestion that it is "in the interests of justice that he decision be reviewed", based on a rehashing of some of the argument presented during the appeal hearing and the sticking of sundry pins into the Appeal Judgment.

10 In the premises, the application is fatally defective for want of appropriate allegations in support of a review in terms of said section 148 (2) and falls to be dismissed outright.'

THE LAW AND PRINCIPLES RELATING TO SECTION 148 (2)

[17] The legislature in its wisdom promulgated Section 148 (2) in the Constitution Act 001 of 2005 (the Constitution) that provides that:-

'The Supreme Court may review any decision made or given by it on such grounds and subject to such condition as may be prescribed by an Act of Parliament or rules of Court.'

[18] This Court has in numerous judgments pronounced itself in so far as the applications of Section 148 (2) and the guiding principles are concerned.

[19] The following are some of the cases in which the applications under Section 148 (2) and the guiding principles were considered by this Court: **PRESIDENT STREET PROPERTIES (PTY) LTD v MAXWELL UCHECHEKWU AND 4 OTHERS (11/2014) [2015] SZSC 11 (29th July, 2015); SIBONISO CLEMENT DLAMINI v WALTER P. BENNET, THABISO G. HLANZE N.O.; REGISTRAR OF THE HIGH COURT, FIRST NATIONAL BANK SWAZILAND LIMITED (45/2015) [2015] SZSC 21 (30th May, 2017) and SIMON VILANE N.O. AND OTHERS v LIPNEY INVESTMENTS (PTY) LTD IN-RE SIMON VILANE N.O.; MANDLENKOSI VILANE N.O.; UMFOMOTI INVESTMENTS (PTY) LTD (78/2013) [2014] SZSC 62 (3 December 2014),** to mention but a few.

[20] In the **Siboniso Dlamini** case, His Lordship Dr. Justice Odoki cited with approval the dictum in the **President Street Properties**

(Pty) Ltd case and stated in paragraph 32 at pages 28 to 31 as follows:

'***[32] His Lordship Justice M.J. Dlamini AJA, as he then was, in PRESIDENT STREET PROPERTIES (PTY) LTD v MAXWELL UCHECHEKWU AND OTHERS had this to say with regard to the review jurisdiction of this Court under Section 148 (2) of the Constitution:***

> ***"26. In its appellate jurisdiction the role of this 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 in 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 a 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 floodgate of reappraisal of cases otherwise res judicata. As much this review power is to be invoked in a rare and compelling or exceptional circumstances as … It is not review in the ordinary sense.

28. I accept that this inherent power of review, has always been with the Court of Appeal, hidden from and forgotten by all concerned. Now, the Constitution has reaffirmed it to be so. It is nothing new. The fear and hesitation to invoke it or invoke it frequently, has been a fear of the unknown. Once unleashed, how was it to be regulated or controlled and exercised only for the greater good in the administration of justice? But judges in their 'eternal' wisdom have always been able to open and shut legal doors and windows unless somehow stopped and controlled by superior authority. In this the courts have otherwise relied on their inherent discretionary authority."'

[21] His Lordship Justice Dr. Odoki proceeded to opine at paragraphs 33 to 34 at pages 32 to 33 as follows:

> ***'[33] It is well settled in our law that this Court has review jurisdiction over its previous decisions in accordance with Section 148 (2) of the Constitution. In exercising this jurisdiction, the Court has to sit as a full bench. This constitutional jurisdiction is exercised and invoked upon such grounds and subject to such conditions as may be prescribed by an Act of Parliament and Rules of Court. However, it is common cause that currently neither an Act of Parliament nor Rules of Court have been promulgated prescribing the grounds and conditions upon which the review jurisdiction may be exercised. However, this Court faced with legal suits requiring urgent legal remedies to disputes instituted by members of the public could not fold their arms in the absence of the requisite Act of Parliament or Rules of Court. General principles guiding this Court when exercising its review jurisdiction under Section 148 (2) of the Constitution have since been formulated.***
>
> ***[32] The review jurisdiction of this Court under Section 148 (2) of the Constitution is an exceptional remedy to the well-known legal principles of functus officio and res judicata whose object is to ensure finality in litigation. This legal remedy does not allow for a second appeal to litigants whose appeals have been heard and determined. Being an exceptional remedy, the review is intended to prevent, ameliorate and correct a manifest and gross injustice to litigants in exceptional circumstances beyond the normal court processes.'***

[22] The Learned Judge in paragraph 37 at pages 34 to 35 held stated that:

> ***'[37] It is apparent from the review application that the Applicant has failed to establish on a balance of probabilities the basis upon which this Court should invoke and exercise its review jurisdiction under Section 148 (2) of the Constitution. The Applicant has failed to establish the existence of a gross and manifest which requires to be prevented, ameliorated or corrected by this Court exercising its review jurisdiction under the Constitution. What the Applicant has presented to this Court is another appeal disguised as a review under Section 148 (2) of the Constitution.'***

[23] The Learned Judge proceeded to dismiss the application with costs.

APPLICATION OF THE LAW AND PRINCIPLES TO THE MATTER BEFORE THIS COURT

[24] The Applicant's application does not show any existence of **"gross and manifest injustice"** necessitating the intervention of this Court as envisaged in Section 148 (2).

[25] The Applicant has done no more than to repeat the arguments before the High Court and before this Court on Appeal. The Application is nothing else but an appeal disguised as a review and it stands to be dismissed.

[26] The Applicant naturally is happy with this judgment of the High Court which was to her favour and unhappy with the judgment of this Court on appeal because it is in favour of the Respondent. However, that is not a basis to invoke Section 148 (2). It is in the nature of litigation that ordinarily there is a loser and a winner. This will often be so, as long as justice is served. I think justice was served in the judgment of this Court on appeal. There was no misdirection on the part of this Court. Therefore, I see no reason to interfere with the judgment of this Court on appeal and it is hereby confirmed. Accordingly, the order staying the judgment of this Court on appeal is set aside. I will be remiss if I do not mention that I find it very strange that the High Court could suspend the operation of the judgment of this Court. I am not aware of any law permitting the High Court to make interlocutory orders regarding a matter whereby it is *functus officio* and this Court is siezed with the matter as a result of an appeal having been lodged.

[27] I agree with the Respondent that the Applicant's application dismally failed to establish a case for a review by this Court and that there is not merit in any of the grounds advanced for a review. Therefore, the application for review must be dismissed. That being the case, there is no need to deliberate on the other possible grounds for review advanced in the application.

COSTS

[28] It is trite in our law that costs follow the cause except in exceptional circumstances. I have not found any exceptional circumstances justifying a departure from this well-established principle in the present case. The Respondent argued strongly that costs must be awarded at punitive scale. I have considered the totality of the circumstances of this matter and I am not persuaded that it is in the interest of justice to award punitive costs. A cause of action might exist whether to be pursued by the Applicant or her brother against another party other than the Respondent. Applicant's claim may be misconstrued and misdirected against the Respondent but the claim per se is not baseless.

[29] Therefore, costs at normal scale including certified cost of Counsel must be awarded against the Applicant.

COURT ORDER

[30] Accordingly, the Court makes the following order, that:

(a) The Application for review under Section 148 (2) of the Constitution be and is hereby dismissed.

(b) The order of the High Court staying execution of the judgment of this Court on appeal is hereby set aside.

(c) The Respondent is awarded costs at a normal scale and such costs to include duly certified costs of Counsel.

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S.P. DLAMINI JA

I agree _____

M.J. DLAMINI JA

I agree _____

S.B. MAPHALALA JA

I agree _____

J.P. ANNANDALE JA

I agree _____

M.J. MANZINI AJA

FOR THE APPLICANT: **ADVOCATE M. MABILA**

(Instructed by Linda Dlamini and Associates)

FOR THE RESPONDENT: **ADVOCATE J.M. VAN DER WALT**

(Instructed by Henwood and Company)