IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 100/2017

In the matter between:

THE WEEKEND OBSERVER (PTY) LTD	**1st Applicant**
MUSA NDLANGAMANDLA	**2nd Applicant**
PHINDA ZWANE	**3rd Applicant**

and

SIPHO MAKHABANE **Respondent**

Neutral Citation: *The Weekend Observer (Pty) Ltd and 2 Others vs Sipho Makhabane* (100/2017) [2019] *SZSC* 39 (25/11/2019)

Coram: **R.J. CLOETE JA, S.J.K. MATSEBULA AJA, J.M. CURRIE AJA, J. MAVUSO AJA AND M.J. MANZINI AJA.**

Heard: 24th September, 2019.

Delivered: 25th November, 2019.

SUMMARY : *Review application in terms of Section 148 (2) of Constitution – Main ground that a Judge sitting in the Appeal should have recused himself because he was involved in a dispute with 1st Applicant – Second ground that the Court on Appeal misdirected itself in severely restricting right of freedom of speech enshrined in Section 24 of the Constitution – Found that no sustainable proof before Court relating to such alleged dispute – Notwithstanding the finding issues of bias and recusal discussed in detail – Found that neither the High Court nor this Court in its Appellate Jurisdiction misdirected themselves nor restricted the right of freedom of speech – Found that principles set out in President Street Properties not present in the matter – Held that the purported Application for review really a disguised second Appeal – Application dismissed with costs.*

JUDGMENT

CLOETE – JA

BACKGROUND

[1] The Applicants (the Defendants in the Court *a quo)* were sued by the Respondent (the Plaintiff in the Court *a quo*) for defamation relating to an

article which appeared in the edition of the 1st Applicant on 20th January 2007. I do not believe that it is necessary to repeat the whole article here as it was dealt with extensively in both of the Judgments of the Court *a quo* and this Court in its appeal jurisdiction.

[2] Suffice it to say here that the Court *a quo* per M. Dlamini J. found in favour of the Respondent and awarded punitive damages in the sum of E300 000.00 (Three Hundred Thousand Emalangeni).

[3] The Applicants being unhappy with the Judgment of the Court *a quo*, launched an Appeal against the Judgment in this Court and the Respondent in turn launched a Cross' Appeal relating to the quantum of damages awarded in his favour.

[4] The said Appeal was heard by this Court on 15th August 2018 and on 24th October 2018 handed down the following unanimous Judgment written by Dr. Odoki JA:

Accordingly, I make the following order:

1. **The Appeal is dismissed with costs to the Respondent**
2. **The Cross-appeal is dismissed with costs to the Appellants**

3. **The Judgment of the Court *a quo* is confirmed.**

[5] On 8th November 2018 under a certificate of urgency the Applicants brought the following Notice of Motion to this Court, having signed the founding affidavits on the same date:

1. **Dispensing with the usual forms and procedures relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.**

2. **Condoning Applicants' non-compliance with the Rules and Procedures and time limits relating to institution of proceedings.**

3. **Pending the final determination of the Application for the review of the Supreme Court judgment dated 24 October 2018 in terms of Section 148 of the Constitution, the implementation and execution of the Supreme Court order dated 24 October 2018 dismissing the Appeal with costs and the High Court order dated 10 November 2017 awarding the Respondent damages in the sum of E300 000.00 and costs be and are hereby stayed.**

4. **Reviewing, correcting and setting aside the Supreme Court Judgment dated 24 October 2018 dismissing the Appeal with costs and confirming the Judgment of the High Court dated 10 November 2017.**

5. **The Judgment of the Supreme Court dated 24 October 2018 is set aside and replaced with an order that the Appellants' Appeal is allowed with costs.**

6. **The Respondent is ordered to pay costs, in the event he opposes this Application.**

7. **Granting such further and alternative relief as the Court may deem fit.**

[6] The matter was set down for hearing on 15th May 2019 but postponed to the next Session when it was set down for 23rd July 2019 but as a result of Mr. Magagula, on behalf of the Applicants, objecting to the composition of the panel of Judges, it was further postponed for hearing on 24th September 2019.

[7] For the sake of the record I deem it necessary to place on record that Mr. Jele, acting for the Respondent, did not act for Justice S.P. Dlamini JA in the matter which has become central to this Application and at least two other similar matters before this Court.

[8] Also for the sake of housekeeping and since the Judgment concerned was filed before this Court, I have taken the liberty of perusing and studying the Court file in appeal No.13 of 2018 (which, in any event, is a public document) which relates to the matter between the 1st Applicant and **Dr. Johannes Dlamini** simply because a Full Bench Judgment penned by Annandale JA had been handed down earlier this year on seemingly the same issues. For the sake of the record then I wish to record that in the matter of **Dr. Johannes Dlamini,** the Judgment sought to be reviewed was handed down on 19th September 2018 after the matter was heard on 20th August 2018 and the Review Application and affidavits were signed and launched on 16th October 2018. In other words that Application was launched before the Judgment in the current matter was handed down on 24th October 2018 and this becomes of interest as will be seen later in this Judgment.

[9] Both the parties to the current matter filed extensive Heads of Argument and Bundles of Authorities.

ARGUMENT FOR THE APPLICANTS

[10] Mr. Magagula, for the Applicants, advised that the current Application was premised on two main grounds namely that:

1. The Applicants did not receive a fair hearing as envisaged by the provisions of Section 21 of the Constitution in that Justice S.P. Dlamini JA was disqualified from sitting in the Appeal heard by this Court.
2. The Judgment on Appeal severely restricted the right of freedom of speech enshrined in Section 24 of the Constitution.

[11] As regards the first ground, Mr. Magagula argued:

1. Justice Dlamini was involved in a dispute with the 1st Applicant relating to an action Justice Dlamini had instituted against it in respect of an alleged defamatory article.

2. That the matter had been ripe for trial and his client was ready to proceed but that on 12th June 2017 the matter was postponed and that the High Court Judge Shabalala had reserved a ruling on the costs for that day, especially that relating to Senior Counsel having been briefed, and to

date there has still not been a ruling in that regard from her Ladyship and as such a dispute existed.

3. That despite Justice Dlamini having filed a Notice withdrawing the matter and having tendered costs, the offer for costs was **"on a normal scale which excludes the costs of Counsel who was engaged……".** (As set out at 5.6 of the Heads of Argument filed).

4. That accordingly it was inappropriate for Justice Dlamini to sit in the Appeal while a dispute existed.

5. That the mere appearance of bias was sufficient for the Judge to have recused himself from the matter.

6. We were referred to:
    1. **R v Bow Street Metropolitan Stipendiary Magistrate ex parte, Pinochet Ugarte (N.2) (1999) 1 All ER 577 (HL).** This is known as the Pinochet matter.
    2. **Minister of Justice and Constitutional Affairs v Stanley Wilfred Sapire – Appeal Court Case No. 49/2001.** The Sapire matter.

3. **Matthews Tuwani Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited and Others 2017 (6) SA 90 SCA.**

   In so far as these are in any way applicable to this matter they will be dealt with below.

7. That Mr. Magagula, who was acting for the Respondents in this matter, did not know that the matter between 1st Applicant and Justice Dlamini had not been finalised as that matter, although handled by him originally, was handled by Mr. Shabangu from his office.

8. That in view of the unresolved dispute between Justice Dlamini and the 1st Applicant, a manifest injustice had occurred and as such the Appeal Judgment was a nullity and should be set aside on review and that the Appeal should be re-heard.

[12] On the second ground the following arguments were raised:

1. The Court in the Judgment on Appeal committed a fundamental error by limiting the exercise of right of freedom of expression and opinion by introducing the requirements that the Applicants must prove the truth of the opinion expressed in the articles.

2. The right of freedom of expression and opinion is enshrined in Section 24 of the Constitution which reads:

24 (1) A person has a right of freedom of expression and opinion.

(2) A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of expression, which includes the freedom of the press and other media, that is to say –

(a) freedom to hold opinion without interference;

(b) freedom to receive ideas and information without interference;

(c) freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and

(d) freedom from interference with the correspondence of that person.

3. Nothing contained or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;

(b) that is reasonably required for the purpose of –

(i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;

(ii) preventing the disclosure of information received in confidence;

(iii) maintaining the authority and independence of the courts; or

(iv) regulating the technical administration or the technical operation of telephony telegraphy, posts, wireless broadcasting or television or any other medium of communication; or

(c) that imposes reasonable restrictions upon public officers,

except so far as that provision or, as the case may be, the thing done under the authority of that law is shown not to be reasonably justifiable in a democratic society.

4. Defamation must be interpreted and adapted to meet the modern demands for free flow of information and exchange of ideas and this involves striking a balance between the right to freedom of expression and opinion and the protection of individual reputation.

5. We were referred to **National Media Ltd and Others v Bogoshi [1998] (4) SA from Khumalo and Others v Holomisa 2002 (5) SA 401**

ARGUMENTS FOR RESPONDENT

[13] As regards the first ground raised by the Applicants:

1. A Full Bench of this Court had rejected the review Application of the same 1st Applicant in the **Makhabane case** referred to *supra*, which *inter alia* had raised the identical argument relating to the alleged dispute with Justice Dlamini

2. That the Applicants, through their Attorney, did not apply for the recusal of Judge Dlamini at the hearing of the matter.

3. That they instead waited until a Judgment had been delivered and then because it went against them they then brought the current Application. One cannot wait until a matter has gone against you if you believe that

you had been wronged before bringing an Application for recusal or claiming that a member of the panel should not have sat in the matter.

4. That Attorney Magagula cannot say that he did not know about the issue of withdrawal because it had his reference on it. The Notice of Withdrawal was totally unconditional, contrary to the allegation of the Applicants in that it simply states **"Take notice the Plaintiff hereby withdraws the above action and tenders costs"**.

5. There is no evidence in the papers before us of any bias, nor evidence that Justice Dlamini in any way influenced the scribe of the Judgment on Appeal, Dr. Odoki, nor in any way influenced the other sitting Judge in any way whatsoever.

6. That all Judges take an Oath of office vowing to act fairly, without fear or favour and to uphold the Constitution at all times.

7. That after the Notice of Withdrawal had been served and filed by the Attorneys acting for Justice Dlamini there was no evidence of any dispute. The fact is that the Applicants and their Attorneys apparently

did nothing about the allegation relating to the alleged outstanding ruling on the High Court costs issue since 2017 for the last two years. The rules of the High Court dictate that they should have prepared a bill of costs, presented same for taxation and followed the procedures set out in the High Court rules.

8. The offer to pay costs by Judge Dlamini was unconditional and not restrictive in any way.

9. We were referred to **Mntjintjwa Mamba & Two Others vs Madlenya Farmers Irrigation Scheme Supreme Court Case No. 37/2014.**

[14] As regards the second ground of Appeal:

1. Contrary to what was argued by the Applicants, both the Court *a quo* and this Court on Appeal extensively dealt with the Constitutional rights of both parties and correctly weighed up the competing rights with each other in great detail and came to the conclusion that in this instance the provisions of Section 24 (3) (b) (i) trumped the provisions of Section 24 (1) and (2) of the Constitution.

2. That there is absolutely nothing in Section 24 (1) and (2) which entitles the Applicants to publish false unjustified, unreasonable information about the Respondent.

3. That the current Application is nothing more than a further Appeal disguised as a review Application.

4. We were referred to the Judgment of **African Echo (Pty) Ltd and Two Others vs Inkosatana Gelane Zwane Supreme Court case no. 77/2013** delivered on the 3rd December 2014.

ANALYSIS OF THE EVIDENCE BEFORE THIS COURT ON THE FIRST GROUND.

[15] As regards the alleged dispute between the 1st Applicant and Justice Dlamini which forms the very core of the basis for the Applicants alleging that Justice Dlamini was not entitled to sit in the hearing of the matter:

1. There is no dispute that Justice Dlamini in writing filed and served a Notice through the Attorneys acting for him in the matter against the 1st Applicant withdrawing the action and tendering costs as set out at page 95 of the record.

2. One does not need to go any further than to say that the tender for costs was not restrictive in any way and was completely unconditional in all respects. Accordingly for the Applicants to allege as they did that the tender for costs purportedly excluded any of the costs rightfully and lawfully due to the 1st Applicant is completely disingenuous.

3. There is no evidence before us of any form of dispute relating to the issue of costs except for an allegation in the Founding Affidavit which is not substantiated by any documentary evidence of any nature for example in the form of some correspondence between the respective firms acting in that matter. Furthermore it cannot be said that the mere allegation in the Founding Affidavit is uncontroverted simply because Justice Dlamini was not a party to these proceedings nor is there any evidence that his Attorneys were in any way served or notified relating to this Application.

4. There is no evidence before us that the Attorneys acting for the 1st Applicant did anything for two years relating to the alleged outstanding ruling by Justice Shabalala in the High Court.

5. There is no evidence before us that the 1st Applicant followed the provisions of rules 68 and subsequently rule 48 of the High Court rules which relates to the taxation of bills of costs and the right of review against the Taxing Master whilst this must not be seen as a debate on the issue of the relevant High Court rules, I must nevertheless point out that the Taxing Master is granted extensive discretionary powers by rule 68.

6. The provisions of rule 41 of the High Court rules become pertinent here. Rule 41 (1) (a) entitles a person to withdraw instituted proceedings and embody in such notice a consent to pay costs. That this rule has been exercised is not in dispute in anyway whatsoever by either of the parties to this Application. It is then pertinent to point out the last part of that rule 41 (1) (a) provides that: "**and the Taxing Master shall tax such costs on the request of the other party."**

7. Even more damning are the provisions of rule 41 (1) (b) which reads: "A **consent to pay costs referred to in paragraph (a), shall have the effect of an order of court for such costs".** (my underlining)

8. Accordingly, in the light of all of the above, there is still no sustainable evidence before us that any such dispute as alleged by the Applicants

exists and in my view the ground is frivolous and unsustainable in any way.

9. Theoretically that should be the end of the matter but given that there are a slew of matters of this nature coming before this Court I deem it necessary to deal with all possible avenues definitively and finally.

[16] As regards whether the Attorney for the Applicants knew or did not know about the purported dispute as alleged when the Appeal in this matter was heard, I wish to state as follows:

1. It is instructive to note the comment of Annandale JA in the Full Bench decision in the Dr. Johannes Dlamini matter which I will refer to below.

2. In that matter neither Mr. Magagula nor Mr. Shabangu filed affidavits in support of the review Application nor did the deponent to the founding affidavit in any way allege that the Attorney acting for them in that review Application had no knowledge of the purported dispute now raised in this matter.

3. In this matter the deponent, only in a replying affidavit and not in the founding affidavit, at 8.6, states the following: **I am advised that the**

time of the hearing of the appeal, the Attorney handling the appeal, Mr. Magagula was unaware that an aspect of the matter between the 1st Applicant and the Judge was still pending. Furthermore, a recusal application is brought by a Litigant and not by the Lawyer. As a Litigant we were not aware that Justice Dlamini was sitting in the appeal and therefore did not give instruction to the Attorney to move a recusal application. I beg leave to attach the Confirmatory Affidavit of Mangaliso Magagula.

4. Importantly however neither the deponent nor the Attorney place any evidence before us as to when they allegedly actually established that there was this alleged dispute still pending.

5. I am pointing this out due to the fact that upon a scrutiny of the timelines referred to above, they show that on 16th October 2018, when the 1st Applicant signed the affidavits in support of the review Application in the **Dr. Johannes Dlamini** matter, they must have known that the alleged dispute existed because that formed one of the grounds for that review Application.

6. The Judgment in the Appeal in the current matter was not handed down until 24th October 2018. The Applicants, as would have been their right,

did absolutely nothing to attempt to nullify the hearing of the Appeal matter in any way prior to Judgment being handed down. Instead, they waited until the Judgment had been handed down and, in my view, then launched a belated attempt to review the Judgment on the basis of the panel which heard the appeal as an afterthought.

7. By not taking this Court into their confidence as to when it allegedly came to the notice of the Attorney acting in this matter and the client, it casts serious doubt in my mind as to the actual date upon which the alleged dispute came to the attention of the relevant persons and as such giving rise to this Application.

8. In my view, as soon as it apparently came to the attention of the client and the Attorney concerned, definitely on 16th October 2018, but probably before that on a date unknown to the Court, the Attorney and or the Applicants could have brought an application before this Court to nullify the hearing because at that point the judgment in this matter had not been handed down and as such the Court was not *functus officio.* They failed to do so and only when the Judgment went against them did they suddenly wish to raise the alleged dispute again.

9. The same allegations relating to the alleged dispute were contained in the Application for review in the **Dr. Johannes Dlamini** matter and I wish to quote from that Full Bench Judgment as follows:

> **[14] The matter between the impugned Justice and the first applicant of which the latter's counsel refers to in the present tense, as if it is a pending and unconcluded matter, was in fact withdrawn over one year before the hearing of the case at hand. This hearing was on the 20th August 2018 whereas a Notice of Withdrawal of Action was served on the applicant's attorney of record, then and now, on the 1st of day August 2017. Costs of the then defendants was also tendered. It is thus inconceivable that the attorney of record who appeared for the appellants, being the applicants for Condonation, could not have been aware of the past intended but withdrawn litigation between the learned Justice and the Swazi Observer at the time when the matter was heard in the Supreme Court.**
>
> **[15] Yet, despite this being so, he did not move any application for recusal at the time when he could have done so, if indeed his client had any reasonable apprehension of bias by His Lordship. It is only now that his application for**

Condonation was dismissed on the 19th September 2018 that a review application which is premised on such a stated belief of bias comes to the fore. The Notice to seek a review is dated the 16th October 2018, about one month after the judgment was handed down.

[17] After a careful study of all of the Judgments referred to by the Applicants, I find that none of them have any factual correlation or application in this matter as I have found that on what is before this Court there cannot be said to be any dispute between Justice Dlamini and the 1st Applicant.

[18] Despite that, and in the interest of clearly setting out the provisions of the law relating to recusal by judicial officers, I intend setting out in some detail my view in that regard by reference to what I believe to be the flagship decision handed down in a unanimous full bench South African Constitutional Court decision in the matter of **Enrico Bernert vs ABSA Bank Ltd (CCT 37/10)** and some of my own observations relating to the specific matter at hand. In the **Bernert** matter the Court was asked to deal with recusal issues in that it was contended that one of the Judges in the Supreme Court of Appeal held shares in the defendant, that two of the Judges had a prior relationship with the defendant and that the presiding

Judge created apprehension that he was biased. Here follows the relevant legal propositions relating to recusals which I fully approve of as the provisions of the South African Constitution are very similar to those of our Constitution:

30. The *SARFU II,* this Court formulated the proper approach to an application for recusal and said:

> **"It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal believes or predispositions.** (my underlining)

31. **<u>What must be stressed here is that which this Court has stressed before: the presumption of impartiality and the double-requirement of reasonableness.</u> The presumption of impartiality is implicit, if not explicit, in the office of a judicial officer. This presumption must be understood in the context of the oath of office that judicial officers are required to take as well the nature of the judicial function. Judicial officers are required by the Constitution to apply the Constitution and the law "impartially and without fear, favour or prejudice." Their oath of office requires them to "administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law. And the requirement of impartiality is also implicit, if not explicit, in section 34 of the Constitution which guarantees the right to have disputes decided "in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." This presumption therefore flows directly from the Constitution.** (my underlining)

34. **<u>The other aspect to emphasise is the double-requirement of reasonableness that the application of the test imports. Both the person who apprehends bias and the apprehension itself must be reasonable.</u>** (my underlining)

35. **The presumption of impartiality and the double-requirement of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her. Nor should litigants be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their case heard by another judicial officer who is likely to decide the case in their favour. Judicial officers have a duty to sit in all cases which they are not disqualified from sitting. This flows from their duty to exercise their judicial functions. As has been rightly observed, "Judges do not choose their cases; and litigants do not choose their judges". An application for recusal should not prevail unless it is based on substantial grounds for contending a reasonable apprehension of bias.** (my underlining)

37. **Ultimately, what is required is that a judicial officer confronted with a recusal application must engage in the delicate balancing process of two contending factors. On the one hand, the need to discourage unfounded and misdirected challenges to the composition of the court and, on the other hand, the pre-eminent**

value of public confidence in the impartial adjudication of disputes. As we said in *SACCAWU,* in striking the balance, a court must bear in mind that it is "as wrong to yield to a tenuous or frivolous objection as it is to ignore an objection of substance". This balancing process must, in the main, be guided by the fundamental principle that court cases must be decided by an independent and impartial tribunal, as our Constitution requires. (my underlining)

74. In my view, whether a litigant should be allowed to raise the issue of recusal at a later stage, despite an earlier opportunity to do so, implicates the interests of justice and not waiver. The question is whether it is in the interests of justice to permit a litigant, having knowledge of all the facts upon which recusal is sought, to wait until an adverse judgment before raising the issue of recusal. Here five appellate judges pondered the judgment for 39 days before deciding the matter and expended public resources in doing so. Cachalia JA was never afforded the opportunity to withdraw from the matter before judgment was delivered. In addition, the interests of justice demand that the interests of other litigants be considered. Absa Bank invested both time and

money in seeking a final outcome to the dispute, and it is entitled to one. (my underlining)

75. It thus seems to me that, in our law, the controlling principle is the interests of justice. It is not in the interests of justice to permit a litigant, where that litigant has knowledge of all the facts upon which recusal is sought, to wait until an adverse judgment before raising the issue of recusal. Litigation must be brought to finality as speedily as possible. It is undesirable to cause parties to litigation to live with the uncertainty that after the outcome of the case is known, there is a possibility that litigation may be commenced afresh because of a late application for recusal which could and should have been brought earlier. To do otherwise would undermine the administration of justice. (my underlining)

[19] In addition I agree entirely with and approve the findings in the **Mntjintjwa Mamba** matter and the following *dicta* from that Judgment:

"23. Firstly, it would appear to me it quite elementary, that even if a Judge was biased, it would be open to the Appellants at that very hearing to apply for a recusal of the relevant Judge and they cannot wait until the matter is finalized against them to contend

<u>that the Judge was biased.</u> (See S v Roberts 1991 (2) SA SACR 243, South African Commercial Catering & Allied Workers Union vs Johnson Ltd 2000 (3) SA 705 (C). (my underlining)

24. Secondly, at paragraph 12 of the Founding Affidavit the Appellants state that the other two Judges in the panel were not influenced by Nkosi AJA and making a concession to that effect.

25. It is my considered view after an assessment of the facts and arguments in this regard that the other two Judges Mabuza AJA and Mamba AJA were not influenced by Nkosi AJA and therefore the Appellants had a fair hearing. It is also clear on the papers that Nkosi AJA did not write the judgment complained of and there is no evidence that he influenced the other Judges to rule against the Appellants.

26. It would appear to me that they received a fair hearing. The Appellants are simply appealing the judgment under the guise of a review. Therefore the arguments of the Appellants ought to fail under this ground.

[20] In my view the Applicants have failed in all of the tests referred to above to convincingly prove to this Court that there was indeed a dispute between Justice Dlamini and the 1st Applicant and in view of the fact that we were repeatedly told that the mere fact that there was this so called dispute, that this gave rise to perceived bias, the whole basis for this ground falls away. In any event the double test referred to in the **Absa** matter has not been met and the timelines make it clear that in this matter the Applicants had every opportunity to intervene in the matter prior to Judgment being handed down which it failed to do and instead waited for the Judgment to be handed down and when it went against them sought to bring review proceedings on an extremely flimsy and unsustainable basis. I cannot find any reason why Justice Dlamini should under the circumstances have recused himself. He, like all other Judges, has taken the oath of office and there is no evidence that he has not complied with this oath. In addition, the very small Bench of the Supreme Court of Eswatini could on occasions result in a miscarriage of justice if every Judge who has a remote relationship with either of the parties, whether directly or indirectly, or having sat in a related matter, has to recuse himself or herself resulting in the totally untenable situation where matters would never be heard on the basis that a panel cannot be formed and justice will never be seen to be done. The principle of necessity will in those circumstances have to be applied.

[21] I am satisfied that the Applicants had a fair hearing on Appeal in compliance with the provisions of the Constitution. Accordingly the first ground by the Applicants cannot succeed.

ANALYSIS OF THE EVIDENCE BEFORE THIS COURT ON THE SECOND GROUND.

[22] With respect and totally contrary to what was alleged by the Applicants, in my view both the Court *a quo* and this Court on Appeal were at pains to closely examine the evidence and the rights of each of the parties in terms of Section 24 of the Constitution, both as to the rights contained in Sections 24 (1) and (2) on the one hand and the rights in terms of Section 21 (3) on the other hand.

[23] In a considered and well crafted judgment, M. Dlamini J in the Court *a quo* quoted extensively from the flagship decision on the issue relating to defamation in the matter namely; the **Holomisa** matter and I set out hereunder those excerpts which are pertinent:

> The Judgment of **M. Dlamini J** quotes **Justice O' Regan, after quoting a similar provision from the Constitution of South Africa, eloquently propounded:**

"In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperiled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of section 16." (my underlining)

She then stated immediately thereafter:

> **“However, although freedom of expression is fundamental to our democratic society, it is not a paramount value. It must be construed in the context of the other values enshrined in our Constitution. In particular, the values of human dignity, freedom and equality”.** (my underlining)

The learned Justice then quoted Corbett CJ as follows:

> **“I agree, and I firmly believe, that freedom of expression and of the press are potent and indispensable instruments for the creation and maintenance of a democratic society, but it is trite that such freedom is not, and cannot be permitted to be, totally unrestrained. The law does not allow the unjustified savaging of an individual’s reputation. The right of free expression enjoyed by all persons, including the press, must yield to the individual’s right, which is just as important, not to be unlawfully defamed. I emphasise the word ‘unlawfully’ for, in striving to achieve an equitable balance between the right to speak your mind and the right not to be harmed by what another says about you, the law has devised a number of defences, such as fair**

comment, justification (i.e. truth and public benefit) and privilege, which if successfully invoked render lawful the publication of matter which is prima facie defamatory." (my underlining)

She concluded:

"The law of defamation seeks to protect the legitimate interest individuals have in their reputation. To this end, therefore, it is one of the aspects of our law which supports the protection of the value of human dignity. When considering the constitutionality of the law of defamation, therefore, we need to ask whether an appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other." (my underlining)

O'Regan expressed this position of the law as follows:

"However, the common law delict of defamation does not disregard truth entirely. It remains relevant to the establishment of one of the defences going to unlawfulness,

> **that is, truth in the public benefit. The common law requires a defendant to establish, once a plaintiff has proved the publication of a defamatory statement affecting the plaintiff, that the publication was lawful because the contents of the statement were true and in the public benefit. The burden of proving truth thus falls on the defendant."** (my underlining)

[24] The learned Judge dissected all of the evidence and considered the balance in favour of each of the parties and correctly in my view found that the rights of the Respondent in this current matter outweighed the rights of the Applicants. She went further to say that there can be no public interest in falsehoods and I agree with that.

[25] Then the matter went on Appeal before this Court and all of the issues concerned were carefully studied by that Court and the Court came to the conclusion that it agreed with the Judgment in the Court *a quo.*

[26] At paragraph 18 of the Judgment the Court stated as follows:

I am unable to fault the conclusion arrived at by the Court *a quo* that the article contained statements that they were defamatory *per se*. The learned Judge did give the words used in the statements their ordinary and natural meaning which a reasonable reader of average intelligence would give them. There is no doubt that the article depicted the Respondent as not a Christian, a liar, a cheat and a dishonest person using the name of God to carry out dishonest and disreputable activities. Therefore, the Respondent's integrity and moral standing were questionable. Consequently the article was defamatory of the Respondent as it injured his reputation and standing in the public. The first ground of appeal therefore has no merit. (my underlining)

[27] At paragraphs 21 onwards of the said Judgment the issue of comment and opinion were dealt with and by reference to various cases including **Johnson v Becket an Another 1992 (1) SA 762,** pointed out that the **requirements for fair comment must be that the statement must be one of comment and not fact, it must be fair, the facts upon which it is based must be true and the comment must relate to matters of public interest.** (my underlining)

[28] This Court on Appeal agreed with the reasoning of the Judge in the Court *a quo* and then agreed with the finding of the Court *a quo* that after balancing the right to freedom of speech, Section 24 of the Constitution did not offer protection to the Appellants for the defamatory article published against the

Respondent and found that the criticism of the Appellants that the Court *a quo* applied the strict test of liability of *animus injuriandi* has no merit.

[29] At paragraph 49 of the Judgment this Court on Appeal found the following:

> **[49] Although the learned Judge in the Court *a quo* did not analyse in detail the defence of reasonable publication, I agree with her conclusion that the defence failed in the circumstance's of this case. There was no evidence that the Appellants had reasonable grounds for publishing the article, nor did they take steps to verify with the Respondent the allegation they made, nor did they give the Respondent an opportunity to respond to the statements they published. In my view, the Appellants were negligent in publishing such statements whose publication became unlawful.** (my underlining)

[30] I am satisfied that both of the Judgments reflect a proper interpretation of the provisions of Section 24 of the Constitution in all respects and that the correct decision was arrived at by the correct route in both the Judgments. It is inconceivable that the media can hide behind the notion of opinion when the subject matter opined on is not based on facts which cannot be substantiated. Opinions on ideas and concepts which do not defame or impinge on the dignity and reputation of others are always to be welcomed

if those opinions are reasonable and in the public interest. Giving what it attempts to class as an opinion which is in fact a factual allegation which is untrue and unsubstantiated can never be classed as an opinion and it is for that reason that I agree with both of the Judgments concerned. Accordingly this ground cannot succeed either because in my view not only were the Judgments correct, but this application for review is nothing more than just another bite at the cherry as it is clearly just another Appeal in the disguise of a review Application.

FURTHER CONSIDERATIONS

[31] It is now trite law in this country that there are strict requirements, in the absence of rules, in the bringing of Applications for review in terms of Section 148 (2) of the Constitution and the flagship Judgment of a Full Bench of this Court and followed in numerous Judgments by this Court subsequently, it is clear that such Applications are governed by the following *dictum* from the Judgment concerned being **President Street Properties (Pty) Ltd v Maxwell Uchechukwa and Four Others Civil Appeal Case No. 11/2014 at para 26 and 27, where 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*. <u>As such</u>

this review power is to be invoked in rare and compelling or exceptional circumstances…..It is not review in the ordinary sense." (my underlining)

15. From the above authorities some of the situations already identified as calling for judicial intervention are exceptional circumstances, fraud, patent error, and bias, presence of some unusual element, new facts, significant injustice or absence of effective remedy. (my underlining)

[32] All litigation has to come to an end and the continued actions by practitioners in bringing disguised Appeals in the form of review Applications must be discouraged. In the current matter, in my view, neither of the grounds for review have any substance nor do they fall within the ambit of the provisions of **President Street Properties** and accordingly the Application must fail and costs must follow the result.

[33] There is one final issue which needs to be dealt with and that relates to the costs of the day on 15th May 2019 when the matter was postponed due to the fact that the Respondent had filed its Heads of Argument the day before on the 14th of May and the Application for Condonation for the late filing was condoned by this Court without an order for costs having been made. That

being the case I believe that it is only fair that the Applicants be awarded the wasted costs occasioned by the postponement of the matter on 15th May 2019 on the ordinary scale.

ORDER

[34] The following order is made:

1. The application of the Applicants for a stay of the Judgment of this Court dated 24th October 2018 is hereby denied.

2. The application by the Applicants for the review, correcting and setting aside the Judgment of this Court dated 24th October 2018 in terms of Section 148 (2) is hereby dismissed.

3. The Applicants shall bear the costs of the Respondent on the ordinary scale.

4. The Respondent shall bear the wasted costs of the Applicants relating to the postponement of the matter on 15th May 2019 on the ordinary scale.

R. J. CLOETE
JUSTICE OF APPEAL

I agree

S.J.K. MATSEBULA
ACTING JUSTICE OF APPEAL

I agree

J.M. CURRIE
ACTING JUSTICE OF APPEAL

I agree

J. MAVUSO
ACTING JUSTICE OF APPEAL

I agree

M.J. MANZINI

ACTING JUSTICE OF APPEAL

For the Applicants: M.B. MAGAGULA FROM MAGAGULA & HLOPHE ATTORNEYS.

For the Respondent: N.D. JELE FROM ROBISON BERTRAM ATTORNEYS.