IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CIVIL CASE NO: 10/2018**

In the matter between:

PIUS HENWOOD N.O. **Applicant**

And

EFFIE SONIA HENWOOD N.O. **1st Respondent**

ESTATE LATE ISRAEL CLARANCE HENWOOD **2nd Respondent**

In re:

EFFIE SONIA HENWOOD N.O. **1st Applicant**

ESTATE LATE ISRAEL CLARANCE HENWOOD **2nd Applicant**

And

PIUS HENWOOD N.O. **Respondent**

Neutral Citation: *Pius Henwood N.O. vs Effie Sonia Henwood N.O. & Another* (10/2018) [2019] *SZSC* 32 (11/09/ 2019)

Coram: **S.P. DLAMINI JA, M.J. DLAMINI JA and J. MAVUSO AJA.**

Date Heard: 07th August 2019

Date Delivered: 11th September 2019

SUMMARY: *Civil law; - Application for leave to institute Second Review proceedings under Section 148 (2) of the Constitution – Analysis of Section 148 (2) vis-à-vis Second Review proceedings – Review Application filed by the Applicant before this Court – Consideration as to whether to grant or refuse leave – Application by Respondent for joinder – Costs – Held that the Application for leave does not meet the requirements of Section 148 (2) and that Applicant has failed to make out a prima facie case in his papers justifying the relief sought hence the Application stands to be dismissed – Held that the Applications for a review and urgent Application by the Respondent are irregular steps on account of having been filed prematurely in the absence of leave having been granted first by this Court – Held that the office of the Registrar of the Supreme Court is not permitted to accept processes that do not comply with the Rules – Held that the Applicant being the unsuccessful party is to bear the costs including certified costs of Counsel.*

JUDGMENT

S.P. DLAMINI JA

[1] This is an Application for leave to institute Second Review proceedings under Section 148 (2) of the Constitution Act 1 of 2005 (the Constitution).

[2] Accompanying the Application for leave are two other Applications; an Application for a Second Review in connection with this Application and an Urgent Application to have the Application for leave heard together with Application for review filed by the Respondent.

"HOUSE-KEEPING ISSUES"

[3] When the matter was called it became clear that there were some house-keeping issues that needed to be attended to.

[4] Firstly, a full bench had been empaneled to hear the matter probably because on the roll it appeared as a Review of a judgment of a full bench of this Court. In terms of the Constitution this Court may be constituted by a single judge or three judges or a full bench (5 judges) of the Court in appropriate circumstances. The Court concluded that for the purposes of the Application for leave to institute second Review proceeding against a judgment of a full bench of this Court, it was appropriate for a bench of three judges to hear the matter.

[5] Secondly, the status of the two applications namely the second Review Application by the Applicant and the Application for Joinder by the

Respondent had to be settled. The Court concluded that when Applicant filed the Application for a second Review, it took an irregular step on the basis that the application was filed prematurely. The Court at that stage, had not considered and granted leave, to file same. That Application was as good as not being before Court. Similarly, the Application for Joinder by the Respondent was as good as not being before Court, as it is purely, a chain-reaction to the irregularly filed Application, for a second Review.

[6] Once again, this Court finds itself compelled to caution the office of the Registrar not accept processes that are not filed in terms of the Rules. This is not only a procedural concern, litigants coming before this Court may be exposed, to unwarranted legal bills as is the situation, in the present matter. (see **Mfanukhona Maduna and two Others and Junior Achievement Swaziland (105/2017) [2018] SZSC 31 (2018) and Thandie Motsa & 4 Others v Richard Khanyile & Another (69/2018) [2019] SZHC 24 (17 June 2019)**). In view of the aforegoing, the Application for leave to institute second Review proceedings, is the only application properly before this Court and falling for consideration.

[7] In the **Thandi Motsa case** (*supra*) this Court had this to say at paragraphs 31 and 32 and at pages 14 and 15;

[31]Regarding the office of the Registrar of the Supreme Court accepting processes that are out of time in the absence of an order of the Court allowing such, this Court in the matter of MFANUKHONA MADUNA AND 2 OTHERS V JUNIOR ACHIEVEMENT SWAZILAND at paragraph [21] (*supra*) had this to say:

> **'[21]** ***However, it is apposite at this juncture to caution the office of the Registrar that where the Rules preclude the office from accepting processes that are out of time, that it must be done so at all times in a uniform fashion. Therefore, the phenomenon whereby filing of papers which are out of time is allowed in certain cases and rejected in others must stop forthwith.'***

[32]Accordingly, all the processes that were irregularly filed or filed out of time, namely the applications for Condonation and extension of time, have no legal bearing whatsoever on the present application.

I reiterated this caution to the office of the Registrar of the Supreme Court in this matter. This is as much applicable to cases in which leave has to be sought and obtained from the Courts, in order to issue certain processes, as in the cases, covered by the Judgments, referred to above.

[8] The Attorney General was not cited in the present Application. Notwithstanding the aforegoing, the Attorney General, filed papers, in opposition to the Application. Considering the background of the matter and the fact that none of the parties objected to his participation and or the papers filed, the Court allowed Mr. Simelane, a representative of the Attorney General, to address the Court.

[9] The Attorney General opposed the Application. The submissions of the Attorney General were largely in line with those of the first and Second Respondents. Therefore there is no need to deal with them separately.

BACKGROUND

[10] The brief background to this, matter is that it is a dispute, over certain immovable property. The dispute was whether a deceased relative had sold the said immovable property to the 2nd Respondent prior to his death.

10.1 The Applicant instituted proceedings at the High Court challenging the validity of the sale of the property in 2001 and he was successful.

10.2 The First and Second Respondents were not satisfied with the judgment of the High Court and they launched an appeal against it before this Court. Upon hearing the matter, this Court in its appellate jurisdiction, dismissed the appeal, on the grounds that the Deed of Sale did not comply with the provisions of Section 31 of the Transfer Duty Act, 1902 (The Transfer Duty Act).

10.3 The First and Second Respondents being dissatisfied with the dismissal of the appeal, by this Court, instituted proceedings to review the judgment against them in terms of Section 148 (2). This Court in its review jurisdiction, found in favour of the First and Second Respondents and set aside both previous judgments on appeal and before the High Court respectively.

10.4 Applicant was not satisfied with the outcome and launched the present proceedings (a second review) seeking this Court to review its judgment on review, relying on Section 148 (2). The application is opposed.

THE RELIEF SOUGHT BY THE APPLICANT

[11] In his Notice of Motion, Applicant prays that the Court grants him the following orders:

1. ***Granting Applicant leave of this Court to pursue a further review application against the Judgment of the Court issued on the 30th November, 2018.***

2. ***Directing that the execution of the Judgment of the 30th November, 2018 of the above Honourable Court under case number 10/2018 be and is hereby stayed pending finalisation of the review to be filed by Applicant.***

3. ***Directing the timelines and limits for which the second and further review is to be filed with this Court.***

4. ***Granting Applicant costs of this application in the event it is opposed.***

5. ***Further and/or alternative.***

ISSUES FALLING FOR CONSIDERATION

[12] The Court was called upon to decide on whether the application by the Applicant for leave to institute a second Review, met the requirements of Section 148 (2); and whether the Applicant made out a case for the relief sought in the Application. It was also called upon to decide on the issue of costs of suit.

APPLICANT'S CASE

[13] From the outset, it is important to record that Applicant at the hearing abandoned some of the grounds he had advanced in his papers and concentrated on two only, namely the issue of Justice Dr. Odoki being part of the Panel of Judges and secondly the contention that the conclusion by both the High Court and this Court, in its review jurisdiction, regarding compliance with Section 31 of the Transfer Duty Act amounted to a difference of opinion ("difference of opinion"argument)

THE LAW AND PRINCIPLES RELATING TO SECTION 148 (2)

[14] The legislature in its wisdom promulgated under Section 148 (2) an extra-ordinary remedy not found in many jurisdictions. (See: **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.; MANDLENKHOSI VILANE N.O.; UMFOMOTI INVESTMENTS (PTY) LTD (78/2013) [2014] SZSC 62 (3 December 2014), to mention but a few.

[15] Firstly, regarding the issue of Justice Dr. Odoki having reached the age of retirement, Applicant relied on the provisions of Section 156(1) of the Constitution. In addition, Counsel for Applicant, referred this Court to the Ugandan case of **Hon. Gerald Kafureeka vs Attorney General Constitutional Petition number 0039 of 2013** wherein the Court deliberated on the issue of the constitutionality of a subsequent appointment of Chief Justice Odoki (as he was then) in view of him having reached the age of retirement, in terms of the Constitution of that country (Uganda).

[16] Secondly, regarding the issue of the difference of opinion, it was argued on behalf of Applicant that the different conclusions of this Court, in its appellant jurisdiction and in its review jurisdiction, on the applicability of the Transfer Duty Act was no more than, a difference of opinion.

[17] In terms of the Constitution, an Act of Parliament or Rules of Court were to be promulgated to give effect to Section 148 as a whole. However, after 9 years of waiting, the envisaged Act of Parliament or Rules of Court have to date not yet been promulgated.

[18] This Court, having been ensured to give rights accorded to litigants by Section 148, proceeded to hear matters under Section 148 notwithstanding the legal *lacuna* created by the absence of an Act or Rules. The Court has relied on its greater duty to uphold and defend the Constitution and the dictates of constitutionalism. It can be said with authority that the application of Section 148 in our law, is now settled.

STARE DECISIS **AND SECTION 148 (2) OF THE CONSTITUTION**

[19] In ***Siboniso Clement Dlamini v Walter P. Bennet and 3 Others (supra),*** this Court had this to say:

> ***[35] From a reading of the Constitution, it is apparent that only a single review, by this Court, is envisaged under Section 148 (2) of the Constitution. A subsequent review is not envisaged by the law unless leave of Court has been sought and granted in very extreme and exceptional circumstances.*** (my underlining).

[20] It is trite that decisions of the Courts are binding. However, the decisions of higher Courts bind the decisions of lower Courts and higher Courts may depart from their previous decisions.

[21] This Court in previous judgments, like the **Siboniso Clement Dlamini** case (*supra*), has apparently appeared to leave room for second reviews albeit subject to leave having been sought and obtained, before a second review is launched. The Applicant followed this procedure and cannot be faulted for doing so.

[22] I respectfully disagree with what was said in the **Siboniso Clement Dlamini** case (*supra*) to the extent that it allows the possibility, for a second review.

[23] Section 148 (2) provides that:

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

In my view section 148(2) provides for an extra-ordinary remedy, being a correction of a Judgment, of this Court, in its appellant jurisdiction, reflecting a manifest error, leading to a gross injustice. It stands to reason that a correction under section 148(2) only relates to a judgment in the appellant jurisdiction of this Court and not a judgment in its review jurisdiction. Put in the simplest of terms, the Constitution does not provide for a review of a review or "a correction of a correction". Accordingly, to allow more than one review is constitutionally incorrect and I respectfully depart from that dictum in the **Siboniso Clement Dlamini** Judgment (*supra*) and similar decisions.

[24] I am of the view that the intention of the legislature is clear. The legislature provided for a review of a judgment of this Court, in its appellate jurisdiction and not on its review jurisdiction. As already stated above, the legislature provided for a single review and not for a "correction of a correction". The suggestion of a review on review, is

clearly venturing into a legislative function, which is not the duty of the Courts to perform, but that of Parliament.

[25] There is another problem that Section 148 (2) has given rise to, namely the issue of reviewing interlocutory Orders of this Court. For example, a litigant who is unhappy with a judgment of this Court, regarding Condonation for the late filing of Heads of Argument. A litigant has in some instances been allowed to have a judgment reviewed, purely on the basis that such an application was granted or refused before an Appeal is heard in its merits. Clearly, this could result in a situation where either party not being satisfied with such a judgment going for a second or a third review without the Appeal heard in its merits. It is undeniable that this could lead to very absurd result. There are at least two problems with this; Firstly, it flies in the face of the well settled principle in all jurisdictions that litigation must expeditiously come to an end and, secondly, that those who have financial means can string along litigation and browbeat their opponents through financial might. To countenance such would be unjust and the dictates of justice must jealously guard against such activities, lest our people lose faith in our justice system.

[26] The challenge with the qualification of Justice Dr. Odoki is that it is, not one of the issues that the legislature could have intended, to be primarily addressed in terms of Section 148 (2). I say this, because prior to the advent of the Constitution in 2005, challenges to the appointments of judicial officers, could be and were challenged through the available remedies at law. Section 148 (2) was drafted to address exceptional instances of gross errors, causing irreparable injustices occasioned upon litigants, by judgments of the Supreme Court, in its appellate jurisdiction, to which there is no other legal recourse. This cannot be said of the issue at hand namely, the allegations that a judge who had purportedly reached the age of retirement formed part of the bench.

[27] The retirement age of judges is more an issue of a security of tenure as opposed to a scientific finding of incapacity due to infirmity or other medical condition. In line with this, the Constitution allows a judge to serve and do judicial tasks for six months after attaining the age of retirement. As a matter of fact, the Applicant is not challenging the correctness of the judgment *per se* but the empaneling of Justice Dr. Odoki. In the circumstances, a remedy may lie elsewhere, definitely not under Section 148 (2).

[28] In my view, the Applicant has not made out a *prima facie* case justifying the invalidation of the impuned judgment on account of Justice Dr. Odoki's inclusion, in the Bench.

[29] Therefore, the Application is without merit on the ground that the matter raised cannot be subjected to a review under Section 148 (2). Accordingly, the Application does not meet the requirements of Section 148 (2) and the Applicant has not established a case justifying the relief sought. The Application must therefore fail and stands to be dismissed.

[30] The Court finds that the Applicant's application is without merit and it is accordingly dismissed.

[31] The High Court of the Solomon Islands in **Re: Nori's Application [1989] SBHC4; [1989]1 LRC 10 (29 May 1989)** declared;

"HELD: Declaration granted that Governor General not validly appointed; declarations refused that Governor General's acts invalid.

(1) The powers of the Head of State in Solomon Islands were defined and covered by the Constitution and were therefore subject to the Constitution, since, it was well established that, where an Act of Parliament covered a matter that was otherwise a prerogative power, the prerogative was subject to that statute and any rules it contained. It was clear that the power to appoint the Governor General, under s 27, was subject to the person appointed being properly qualified under sub – s (2). Since the High Court had jurisdiction, pursuant to ss 83 and 138, to determine whether any provision of the Constitution had been contravened, the court clearly had jurisdiction to inquire whether the power to appoint a Governor General had been validly exercised (see pp 19, 20, post). A-G v De Keyser's Royal Hotel Ltd [1920] AC 508 applied.

(2) At the time of his appointment by the Head of State the evidence showed that L still held public office and was therefore not qualified. Although neither Parliament nor the Head of State realized L's position, his appointment was contrary to ss 27, 48 and 49(1) of the Constitution and was, accordingly, void *ab initio* (see pp 18, 20-21, *post*).

(3) The application of the common law doctrine of de facto office was to consider the effect on the acts of a person, who had been inadvertently unlawfully appointed, of a misapprehension of his position. It did not suggest that such person could act outside the Constitution or ignore the requirements of the law, nor that he should be considered a de facto officer except when he was the apparent incumbent of a de jure office. The apparently lawful acts of L as Governor General, prior to the determination that his appointment was invalid, would not be invalidated. Since there had been no suggestion that his election or Parliament's address to Her Majesty were invalidated by the fact that he still held public office, once L had ensured he was properly qualified under s 27 the Head of State should be asked to make the appointment by her Commission according to the address from Parliament (see pp 22 – 23, *post*). *Dictum of Field J in Norton v Shelby County* [1886] USSC 184; 118 US 425 (1886) at 441-442 applied."

[32] The ratio *decidendi* of the Nori case is that, the lawful acts of an Officer, who is lawfully appointed, will not be invalidated by a subsequent discovery that his appointment was invalid. Except for the issue of

Justice Dr. Odoki having supposedly reached the age of retirement, the validity of his appointment has never been questioned in any way whatsoever.

[33] While in no way accepting the Applicant's argument in relation to Justice Dr. Odoki's age, the Application for leave ought not to succeed and it stands to be dismissed on the basis of the common law doctrine applied in the case above.

[34] The issue of Justice Dr. Odoki's age is incomplete in the papers as they stand and is hearsay. Firstly, the Applicant himself realized the inadequacy of the papers and purportedly wrote to the Judicial Services Commission requesting certain information. It does not appear *ex facie* the papers filed before Court whether Justice Dr. Odoki was engaged under a contract or not and there is no instrument regarding his appointment, placed before this Court. The Applicant has not joined the Judicial Services Commission in the present proceedings, yet it has an interest and the requisite information in this matter. Secondly, what we have before the Court as far as the age of Justice Dr. Odoki's is concerned is hearsay. It is insufficient to point out to a Judgment in

another jurisdiction, regarding the age of Justice Dr. Odoki, as Applicant sought to do.

[35] Section 157(2) provides:

> ***(2) Unless otherwise agreed between the contracting parties, a judge on contract shall vacate office at the end of the period provided in the contract.***

None of the parties dealt with the applicability or otherwise of this Section to the present matter. It may well be that even if there was conclusive evidence of Dr. Odoki's age, his sitting at the time of the hearing and Judgment, may have been subject to the above section provisions of the Constitution.

[36] The Respondent argued that Justice Dr. Odoki's sitting did not invalidate the Judgment as there were 4 other Judges sitting with him, whose sitting was not challenged and the impugned Judgment was unanimous. I am persuaded by this argument.

[37] Additionally, the **Re: Nori's Application case** (*supra*) concluded that an officer may be invalidly in office but his or hers acts are not invalid purely on account of the invalidity regarding his or hers appointment. The Court pointed to the chaos or injustices that would occur if the opposite view was upheld. Similarly in this case, Justice Dr. Odoki has been a Justice of the Court for several years and around the time of the Judgment concerned, he sat in many matters and wrote several Judgments. To accept the argument of the Applicant on this point would definitely lead to the chaos of the type rejected by the Court in the **Re: Nori's Application case** (*supra*).

PROSPECTS OF SUCCESS AND THE STANDARD OF PROOF

[38] I agree with Counsel for the Applicant that the Applicant is only required to make out a *prima facie* case in order to be granted the relief sought. However, even if a second review was a remedy open to the Applicant, in my view a *prima facie* case has not been made out by the Applicant to the satisfaction of this Court.

EXECUTION OF THE ORDER OF THIS COURT

[39] Courts must not only make orders that are capable of being executed but where appropriate they ought to ensure that the orders they make are actually followed.

[40] Accordingly and in terms of previous judgments where this Court has made orders that are not specifically sought or debated yet in the interest of justice granted them; this Court orders that the Sheriff or his or her lawful deputy for the Shiselweni District forthwith execute or sign all the necessary papers in order to effect transfer of the property in question in favour of the Respondents.

COSTS

[41] Counsel for both sides agreed that costs must follow the cause. Accordingly, the Respondents being successful must be awarded costs. Such costs must include duly certified costs of Counsel.

COURT ORDER

[42] In view of the aforegoing the Court makes the following order:

1. That the Application for leave to launch a second review by the Applicant be and is hereby dismissed.

2. That there is no second review pending before this Court and that the judgment of this Court on review is accordingly confirmed.

3. That the Sheriff or his or her lawful deputy for the District of Shiselweni is hereby ordered to forthwith sign or execute all necessary documents in order to give effect to the transfer of the property, being the subject matter of these proceedings, in favour of the Respondents.

4. That the Respondents are awarded costs at the normal scale and such costs to include the duly certified costs of Counsel.

S.P. DLAMINI JA

I agree

M.J. DLAMINI JA

I also agree

J. MAVUSO AJA

For the Applicant: **ADV. G. O. VAN NIEKERK**
(Instructed by Howe Masuku Nsibandze Attorneys)

For the Respondents: **ADV. D. SMITH**
(Instructed by Sibusiso B. Shongwe and Associates)

For Attorney General: **MR. M. SIMELANE**