IN THE SUPREME COURT OF ESWATINI

HELD AT MBABANE **CIVIL CASE NO: 53/2017**

In the matter between:

EKUHLAMUKENI FARMERS ASSOCIATION LIMITED APPLICANT

And

SIPHO DLAMINI RESPONDENT

Neutral Citation: *Ekuhlamukeni Farmers Association v Sipho Dlamini (53/2017) [2020] SZSC 68 (05 March 2020)*

CORAM: **M.C.B. MAPHALALA CJ**

S.P. DLAMINI JA

M.J. DLAMINI JA

S.B. MAPHALALA JA

J.P. ANNANDALE JA

DATE HEARD: 02 March 2020

DATE DELIVERD: 05 March 2020

SUMMARY: *Civil Law – Application for a Review of the judgment of the Supreme Court in its appellate jurisdiction dismissing Applicant's application for*

condonation for the late filing of Heads of Argument with costs and re-instatement of Applicant's appeal – Held that Applicant's application for the review of the judgment of the Supreme Court does not meet the legal requirements in order to succeed and is dismissed – Held further that the application for the re-instatement of Applicant's appeal is granted – Held that the matter is postponed for hearing in the next session of the Court - No order as to costs is made.

JUDGMENT

[1] This is an application for the review and setting aside of the judgment of this Court in its appellate jurisdiction and reinstatement of the appeal.

[2] This matter dates back to June 2017 wherein Applicant noted an appeal against a judgment of the High Court. There have been various interlocutory applications instituted by the Applicant and the merits of the appeal have not been heard and determined by this Court.

[3] This Court in its appellate jurisdiction considered and dismissed with costs an application for condonation of the late filing of the Heads of Argument filed by Applicant. The judgment was delivered on 31 October 2018. It is this judgment that Applicant now seeks to have reviewed and set aside.

[4] By way of Notice of Motion dated 17 January 2019, Applicant is seeking the following relief:

> ***"1. Reviewing and/or setting aside the judgment granted by the Supreme Court in its appellate jurisdiction on the 30th November 2018 wherein it dismissed Applicant's application for the late filing of Appellant's Heads of Argument.***
>
> ***2. Reviewing and/or setting aside the judgment of the Supreme Court it its appellate jurisdiction on the 30th November 2018 and ordering the Applicant to pay costs of suit.***
>
> ***3. Re-instatement of Applicant's appeal on the roll of this Honourable Court; upon terms and conditions as this Court deems appropriate."***

[5] Applicant, for the relief sought, relies on the Founding Affidavit deposed to by one Bheki Mngomezulu.

[6] Bheki Mngomezulu, *inter alia*, states in the Founding Affidavit that he is the Chairperson of the Board of Directors of Ekuhlamukeni Farmers Association Limited (Applicant).

[7] Mngomezulu, in support of the relief sought in the application further states in paragraphs 6 to 10 of the Founding Affidavit that:

"*JURISDICTION*

6. *The above Honourable Court has jurisdiction to entertain this matter by virtue of Section 148 (2) of the Constitution of Eswatini Act No. 1 of 2005.*

INTRODUCTION

7. *This is an application for the review of the judgment of this Honourable Court which was handed down on the 30th November 2018 in terms of Section 148 (2).*

8. *The basis of the application, briefly stated is that the Supreme Court inadvertently committed an error of law in dismissing the Applicant's application for condonation of the late filing of the Heads of Argument out of time*

8.1 The Supreme Court in the judgment complained or held that the Applicant relied on a subsidiary ground of appeal and further that Applicant's Counsel expressed no confidence in the main ground of appeal.

A copy of the judgment of the Supreme Court is annexed hereto and marked "A".

8.2 This was an obvious error in that there was no subsidiary ground of appeal. The Applicant's complaint in its Notice of Appeal was that the "Court a quo erred in holding that the Appellant was liable to pay for the use of the brick layers" when there was no evidence to show how many blocks had been made using the block making machine. This was ground of Appeal Number two.

A copy of Notice of Appeal is annexed and marked "B".

9. *The Supreme Court committed a further error of law when it held that the Appellant's Counsel had conceded that the*

condonation application cannot pass muster when no such concession was made; at paragraph 19.

10. In the circumstances, then it is clear that the decision to deny Applicant's application for condonation was based on incorrect facts or a misapprehension of the legal position."

[8] Before dealing with the merits or demerits of Applicant's application, the Court noted that there is no transcript of the proceedings before this Court in its appellate jurisdiction, yet certain concessions made on behalf of Applicant are being disputed. This actually renders the record before this Court incomplete.

[9] The application for the review and setting aside of the judgment of this Court is opposed by Respondent. It is apposite at this stage to place it on record that at the hearing of the matter Respondent through his Counsel withdrew his opposition to the application for the reinstatement of the appeal hence the Court made an *ex tempore* order, *inter alia*, reinstating the appeal.

[10] Respondent in his opposition to the application has raised some points *in limine*. Essentially the points raised by the Respondent are to the effect that Applicant's application fails to meet the legal requirements for a review and setting aside of a judgment of this Court as envisaged in Section 148 (2) of the Constitution of Eswatini Act No. 1 of 2005.

[11] Counsel for Applicant when asked by the Court during his submissions whether the application satisfies the requirements of Section 148 (2), responded by saying that Respondent had issued a writ and sought to execute the judgment of the High Court being appealed against on the strength of the impugned judgment of this Court. On his part Counsel for the Respondent did not dispute this but said in his reading of the impugned judgment by refusing the application for condonation for the late filing of the heads of argument by Applicant, Respondent was entitled to proceed and execute a writ upon Applicant.

[12] The impugned judgment of this Court per His Lordship Matsebula AJA at pages 11 and 12 states that;

> ***"[17] THE DECISION/ JUDGMENT***
>
> ***For an application for condonation to succeed, it may satisfy, at least, the following elements-***
>
> ***(a) as soon as a party realizes that he or she has not complied with the rules of court, that party should apart from remedying the fault immediately, also apply for condonation without delay;***
>
> ***(b) must also give a full explanation for the delay. In addition, the explanation must cover the entire period of delay and the explanation must be reasonable;***

(c) must address the importance of the issues to be raised in the main appeal and the prospects of success in the main appeal; and

(d) the effect of delay in the administration of justice and to the other litigants (prejudice).

[18] The present application (notwithstanding that the applicant at the hearing conceded) does not satisfy the requirements, as stated above and stands to be dismissed. At the hearing, Counsel also conceded that the Condonation application cannot pass muster.

[19] On the question of costs being visited on the person of the Applicant's attorney, Mr. DuPont pleaded illness on the part of the Applicant and non-deliberate and non-intentional flagrant beach of the rules of this Court. The Court is mindful of the dictum of Steyn CJ in Saloojee & Another v The Minister of Community Development 1965 (2) SA 135 at 141 C-E where it is stated –

> ***"There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have disastrous affect upon the observance of rules of this court."***

This Court is sympathetic to the submission by Mr. DuPont and the Applicant shall shoulder the costs.

[20] In the result the application for condonation is dismissed with costs."

[13] As already indicated above, Applicant and Respondent laboured under different interpretations of the judgment. Respondent interpreted the

judgment to allow him to execute the judgment of the High Court. On turn, in order to neutralize the execution launched by the Respondent, it caused the Applicant to launch the application to review and to set aside the judgment of this Court under Section 148 of the Constitution.

[14] It is trite law that where a dispute arises regarding a judgment, the affected parties are at liberty to approach the Court that issued the judgment to have the Court clarify or interpret the judgment.

[15] Instead of approaching the Court to clarify or interpret its judgment, Applicant misguidedly launched proceedings under Section 148 (2) of the Constitution in response to the equally misguided attempt at execution by Respondent.

[16] As to how the judgment of this Court was interpreted to mean that Respondent was entitled to execute the judgment of the High Court against the Applicant is very bizarre to say the least. The appeal is yet to be determined on the merits by this Court. Therefore, such interpretation was both bad and erroneous at law. The impugned judgment only dismissed (with costs) the application for condonation for the late filing of Applicant's Heads of argument, it went no further.

[17] There are legitimate instances where the failure by a litigant to comply with the Rules of this Court prompts the Court to dismiss an appeal without hearing the merits of the appeal such as where a litigant has failed to file a record or Notice of Appeal timeously and such a failure is not condoned by the Court. However, the present matter does not fall under such rubric and the Court in its judgment did not dismiss the appeal.

[18] Therefore, it was the parties that were labouring under an erroneous view and not the Court. The jurisprudence regarding Section 148 (2), after some judicial teething problems, is now settled in our law.

[19] The groundbreaking judgment of this Court in **PRESIDENT STREET PROPERTIES (PTY) LTD v MAXWELL UCHECHUKWU & 4 OTHERS (11/2014) [2015] SZSC 11 (29th July 2015) Appeal Case No. 11/2015** per His Lordship M.J. Dlamini, AJA (as he then was, now a permanent judge of this Court), at pages 17-18 this Court had this to say:

> ***"[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 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. As such this review powers is to be invoked in a rare and compelling or exceptional circumstance as Yebisi (page 45) says. It is not review in the ordinary sense."***

This judgment has been cited with approval in a host of subsequent judgments echoing and confirming the test to be applied in applications in terms of Section 148 (2) of the Constitution.

[20] **In the case of VMB INVESTMENTS (PTY) LTD v BOY BOY NYEMBE AND ANOTHER (22/2014) [2016] SZCS 60 (30 June 2016)** per his Lordship Manzini AJA, this Court cited with approval the dictum of **President Street** case *(supra)*;

> ***"[12] The view I take of this matter is that the central issue is whether the Applicants have established that there is/are patent error(s) of law which is/are reviewable. This involves a determination of what constitutes a patent error of law for review purposes. There are several decisions of this Court which are relevant for this exercise.***
>
> ***[13] Once the general principles have been outlined, I will then deal with the question whether the Applicant's grounds of review pass muster, that is, whether a case for review has been made out.***
>
> ***[14] In the context of section 148, and concerning errors of law, this Court in President Street Properties (Pty) Ltd v Maxwell Uchechukwu and 4 others (11/2014) [2015] SZSC 11 (29th July, 2015) per Dlamini AJA stated the following:***
>
> > ***"From the following authorities some of the situations already identified as calling for judicial intervention are exceptional circumstances, fraud, patent error, bias, presence of some most unusual element, new facts, significant injustice or absence of alternative effective remedy"*** (my own underlining)

[21] The grounds advanced by Applicant for the review and setting aside of the impugned judgment do not meet the legal requirements adumbrated in the President Street Properties case *(supra)* and other subsequent judgments. In the circumstances, Applicant's application

seeking to review and set aside the judgment of the Court stands to be dismissed.

[22] There is absolutely nothing in the papers filed of record pointing to a patent error that would cause manifest injustice which could not be rectified other than resorting to Section 148 (2) of the Constitution. In similar situations, parties have had appeals heard without their Heads of argument. Therefore, this appeal must proceed accordingly.

[23] When the matter was heard on the 2nd March 2020 an *ex tempore* order reinstating the appeal was made. The said *ex tempore* order forms part of and must be read as one with this judgment.

[24] In view of the fact that Respondent's opposition to the application for reinstatement was abandoned and other factors including that the appeal has not been determined on its merits, the appeal is reinstated.

[25] Needless to say, but to avoid repetition, the Respondent shall refrain from attempting to execute on the judgment pending finalisation of this appeal.

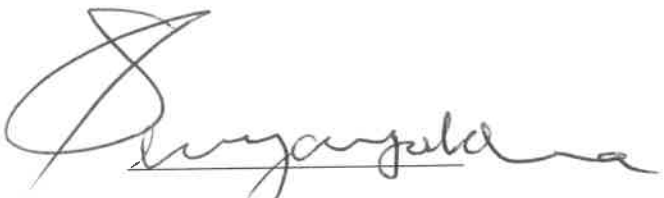
[26] Accordingly, the Court orders that:

1. The Application by Applicant for the review and setting aside of the judgment of this Court in terms of Section 148 (2) of the Constitution be and is hereby dismissed.

2. The Application for the reinstatement of the appeal by Applicant is hereby granted.

3. The hearing of the appeal on the merits is postponed to the next session of this Court.

4. No order as to costs is made.



S.P. DLAMINI JA

I agree

M.C.B. MAPHALALA CJ

I agree

M.J. DLAMINI JA

I agree

S.B. MAPHALALA JA

I agree

J.P. ANNANDALE JA

FOR THE APPLICANT: **MR ZONKE MAGAGULA**

(Zonke Magagula and Company)

FOR THE RESPONDENT: **MR M. NXUMALO**

(Lucas B.K. Dlamini Attorneys)