..

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

REVIEW CASE NO.25/2018

In the matter between:

ESwatini Electricity Company	Applicant
And	
Gideon Gwebu	1st Respondent
Municipal Council of	2nd Respondent
Mbabane In re:-	
Eswatini Electricity Company	Appellant
And	
Gideon Gwebu	1st Respondent
Municipal Council of Mbabane	2nd Respondent

Neutral Citation: *ESwatini Electricity Company versus Gideon Gwebu, Municipal Council of Mbabane; and In-re ESwatini Electricity Company versus Gideon ·Gwebu and Municipal Council of]yfbabane (25/2018) [2021] SZSC53(3P' May, 2021)*

Coram: **MCB Maphalala CJ,**
RJ Cloete JA,
J.P. Annandale JA,
NJHlopheJA
JM Currie AJA

Date Heard: 15th **March 2021**

Date of Judgment : **31st May 2021**

Summary:

Application for Review of Order by the Supreme Court - Section 148 (2) of the Constitutiol} - Jurisdictional requirements satisfied - Condonation application dismissed, followed by an Order to deem the appeal to have been abandoned - Rule 30 (4). - Cause of Complaint being demonstrated and actual pronouncements on the merits of the matter, expressed in the course of evaluating the prospects of success on appeal. Merits of appeal not argued or considered in the course of hearing an

appeal. Audi alteram partem principle negated. Ordered that appeal be re enrolled, for hearing on the merits. Costs decision to be made in due course;

JUDGMENT

Jacobus P Annandale JA:

[1] In this application for the review of a judgment by the Supreme Court in its appellate jurisdiction, the Court is now asked to set aside the unanimous judgment which resulted in an order that the appeal was deemed to have been abandoned. This was done under the provisions of Rule 30 (4) of the Rules and was the consequence of the dismissal of an application for condonation of the late filing of the record and Heads of Argument by the then appellant.

[2] The application for review is in terms of section 148 (2) of the Constitution, which reads:

> "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."

[3] The Constitution provides for the promulgation oflegislation and rules to deal with the implementation and application of the review jurisdiction of the Supreme Court, but to date it remains blank. Meanwhile, this _Court has developed case law which lays do the jurisdictional and procedural parameters of just when, how and under which circumstances Section 148 (2) is to be invoked and applied.

[4] Some of the cases in which applications under Section 148 (2) and the guiding principles were considered by this Court are 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. Bennett, Thabiso G. IDanze N.O., Registrar of the High Court and First National Bank Swaziland Limited (45/2015) [2015] SZSC 21 (30th May 2017); and Simon Vilane N.O.
and Others v Li pney 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.

[5] In Xolile Gruna v Foot the Bill Investments (Pty) Ltd, SP Dlamini JA enunciated the *stare decisis* principle as to how our local jurisprudence established the conditions precedent for review under the auspices of Section 148 (2). He said:

> "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 Lordslup Justice M.J Dlamini AJA, as he then was, m 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 ulti.J.nate 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 niust, 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 ofbeing the court of the last resort."

[7] In the same case of Siboniso Clement Dlamini v Walter P. Bennett and Others (supra) his Lordship Justice Odoki JA added:

> "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."

[9] In the present matter, the applicant endeavours to have this exceptional remedy to be covered under the umbrella of correcting a manifest and gross injustice as an exceptional circumstance beyond the normal court processes. The relief which is prayed for in the application is for an order in the following terms:

"1. Reviewing, correcting. and setting aside the Supreme Court Judgment dated 29 May 2019 dismissing the appeal with costs and confirming the judgment of the High Court dated 10th November 2018 under High Court Civil Case number 1387/2014.

2. The judgment of the supreme Court dated 29th May 2019 is set aside and replaced with an Order that the Appeal is remitted to the Supreme Court for re-hearing or alternatively:

2.1 That the appellant's appeal is allowed with costs.

3. The Respondents are ordered to pay costs of this application.

[10] The judgment of the Supreme Court in the appeal between the same parties culminated in the following order:

> "The application for condonation is refused, with costs to the First and Second Respondents. First Respondents' costs to include certified costs of Counsel.
>
> The appeal is deemed to have been abandoned in terms of Rule 30(4) of the Rules of this Court."

[11] As stated in the order, it was occasioned by a refusal to grant condonation for non-compliance with the Rules. The then appellant belatedly lodged an application to be condoned for the late filing of its Heads of Arguments as well as the record on which its appeal was sought to be founded. It did not timeously seek umbrage under Rule 16 when it became clear that the record would not be availed within the stipulated time-frame. It was eventually submitted some three months after the due date.

[12] By resorting to an application for condonation for its delay, the applicant became bound to convince and persuade the Court that it must excuse the shortcoming and delay; In order to do so, our case law has an abundance of precedents dealing with the standards to be met by an applicant for such condonation. It is most unfortunate that a vast number of appeals are burdened with condonation applications, which adversely affect litigation in the Supreme Court It should only have been in the rarest of instanc s that attorneys find themselves "painted into a corner", finding themselves constrained to apply for condonation for late filing. Instead, it has almost become the nonn, rather than the exception, that lawyers who act for the parties find themselves in this invidious position.

[13] In Mfanukhona Maduna and 2 Others vs Junior Achievements Swaziland and Others.:.... Civil Appeal Case No. 105/2017, the Court had this to say:-

> "There is a plethora of authorities regarding the requirements to be met by a party applying for condonation. The Courts have formulated a triad of tests in order to grant condonation, namely: that as soon as a party becomes aware of the omission or commission the party must launch an the application for condonation, that in [the] application the

party must address the prospects of success of his or her case and that a reasonable explanation for such an omission or commission must be provided. (see De Barry Anita Belinda vs. A.G Thomas (PTY) Ltd. - Case No. 30/2015 and the other cases referred to in that judgment.)"

[14] In the course of the impugned judgment on appeal, the Court applied these criteria. When it weighed and analysed the grounds and explanation for the late filing of the record and Heads of Argument, it was held to be "inadequate and not reasonable". It went further to say that: "The explaining (sic) given by attorney Dlamini represents a most disrespectful explanation to this court". It concluded that on this ground alone the application should fail.

[15] However, the Court then proceeded to deal with the prospects of success, a crucial element of condonation application. This culminated in a finding that "....there are no prospects of another court finding that the applicant /appellant was not negligent and not liable to the Respondent". It is the manner in which this finding was reached which forms the crux of the present application to review the judgment of this court in its appeal jurisdiction.

[16] The stated grounds upon which the applicant seeks to review the judgment are ambiguous. Mu h of it centres about its lamentations of not being heard on the merits of the appeal whereas it considers the matter to be of "great importance" regarding its "statutoiy functions" to the "country as a whole" as well as duties imposed on it outside its statutory duties and functions. It seeks to blame the Court for "using a technicality" to cause "irreparable harm".

[17] It is trite that the review procedure does not open the door for a second appeal by a dissatisfied litigant. The refusal of condonation, resulting in an order of deeming the appeal to have been abandoned is not subject to appeal. The "technicality" upon which it relies is in itself a misnomer. Refusal of condonation lies within the discretion of the Court and results in a final order

- to allow or to refuse. The only available avenue to revisit such an order is on review, but only if it falls within the parameters of review under Section 148 (2) of the Constitution.

[18] The present focus of the application, stripped_ of the embellishing veneer, such as "not being heard", "national importance", "statutory duties" and such, boils down to a two facetted issue, both of which concern the person of the learned

acting Justice of Appeal who authored the unanimous judgment. The first issue is about non.;.recusal, *mero motu,* the second about perceived bias in the . form of pronouncing on the merits of the appeal itself in the course of evaluating the prospects of success in the condonation application.

[19] The first of these two facets is set out by the applicant in the review application as follows:_.

> "The judge who wrote the unanimous judgment of the Court was conflicted and should not have sat in the panel that heard the matter. At the time of the hearing of the appeal then acting Judge of Appeal A.M. Lukhele was personally handling several matters against the Applican,t. One such matter is · claim by then Acting Judge Lukhele's client Justice Mayithulele Nxumalo against the Applicant which is a claim for an order ejecting the Applicant from a farm owned by Mr. Nxumalo and for payment of damages in the sum of E250 000.00 being in respect of compensation for what is claimed to be an unlawful construction of a power line on Mr. Nxumalo's farm. The facts and underlying basis of the claim in the Nxumalo matter are not different from the case on appeal which Acting Judge of Appeal Lukhele heard and decided. The

Applicant did not attend the hearing and was unaware that the then Acting Judge of Appeal Lukhele was handling the Appeal. The Applicant's Attorneys were also unaware that former Acting Judge of Appeal, Lukhele, was handling matters against the Applicant. The former Acting Judge of Appeal was conflicted and should have recused himself from the panel that heard the appeal on account of the fact that he was personally handling several litigation matters on behalf of his clients at the time he heard and determined the appeal.

A litigant in the Applicant's position would reasonably have apprehended bias on the part of a Judge hearing a matter in which the litigant is involved when the Judge is at the same time personally

- handling a matter against the litigant on behalf of another litigant in his capacity as a lawyer, in particular, where the latter matter is similar to the one the Judge is hearing involving the litigant. Sitting and hearing the appeal by the Acting Judge under the circumstances is to engage in conduct that is likely to compromise his impartiality".

[20] It is not insignificant that the applicant in the review application waited until now to belatedly take issue with the composition of the bench which heard the

condonation application. Neither the deponent to the affidavit in the review application nor its attorney of record disclose the time when the perceived problem came to the fore, apart from stating that the applicant (or its representative) was not present at the hearing. The matter was heard on the 4th March 2019 and the reserved judgment followed on the 29th May 2019. The affidavit by the applicant's managing director is dated the 16th September 2019. It follows that from the date of hearing, when it became known as to the presence of the Honourable Acting Justice Lukhele on the bench, the applicant sat back and did nothing to address the concerns about the alleged compromising position of his Lordship, for at least six months. It is only now that these concerns are so belatedly raised. Be that as it may, it is not necessary to delve into the merits or otherwise of this issue of the overly belated allegation of conflicted interest since the *ratio* for the outcome of the present application lies elsewhere.

[21] The second facet of the rationale behind this application is stated as follows by the applicant for review:

> "The Sup eme Court committed a grave error of law and an irregularity causing substantial prejudice to the Applicant by determining the merits

of the ppeal without hearing the parties. The Supreme Court made the following definitive findings on the merits:,

'In order to determine the merits of the argument of the appeal, this Honourable Court is obliged to have regard to the grounds of appeal and to consider the evidence adduced and the judgment thereto in the Court *a quo*. In considering the issue of prospects of success on the issue of liability I am of the view that:

1 The court *a quo* correctly, established the issue of *locus standi* of the First Responden· t;

2 The Second Respondent discharged its obligations in so far as the process and requirements for the approval of a building permit in respect of the property in question;

3 The court *a quo* correctly identified that the onus that lay on the Applicant /appellant to satisfy itself that the proposed structure did not constitute a source of danger in relation to its powerline;

4 The court *a quo* correctly found that the Applicant/Appellant was negligent in not processing the building application;

5 On the evidence led the negligence of Application/Appellant was correctly established in the court *a quo;*

6 The applicant/appellant therefore failed to discharge the duty of care that it had in respect of First Respondent's building application;

7 The court *a quo* correctly found that the appellant breached its duty of care in the present matter; Knop vs Johannesburg City Council 1995 (2) SA (1)' "(underlining added).

[22] It is imperative that whereas the applicant in a condonation application is enjoined to demonstrate its prospects of success, the adjudicator should deliberately refrain from pronouncement on the merits of the main matter. Condonation applications, interlocutory in nature, do not extend to any consideration and determination of the merits of the pending appeal. It may well be a tricky horse to ride, but in deciding the prospects of success in an

appeal which has not yet been heard, definitive factual and legal conclusions on the merits of the appeal must be held in abeyance until the appeal itself has been argued in due course.

[23] The problem which the applicant for review now faces is that before the appeal itself came to be decided, the Court had already expressed itself on various contentious issues in qispute. For example, *locus standi* of a litigant, the discharge of ce11ain obligations, the *onus* relating to a source of danger, negligence in a failure to process an application, that negligence was correctly established in the comt *a quo,* that.the applicant failed to discharge a duty of care and that the appellant breached its duty of care.

[24] Each of these findings and pronouncements are pertinent issues that would be considered and detennined by a Court of Appeal in the course of deciding a matter on the merits before it and only then to base its judgment on the presence or absence of these issues. I am very much aware that having held these issues to be favouring the respondent, the pending appeal was then declared to be deemed as abandoned, the end of the line, so to speak. But this came about because condonation for the late filing of the record and Heads of

Argument was refused which then resulted in abandonment, which means that the merits of the appeal never crune to be decided. Yet, at the same time, various crucial issues came to be pronounced upon, such as negligence, breach of a duty of care, and so on.

[25] In the end result, the most unfortunate definitive findings on the merits of the appeal without hearing the actual appeal, but in the course of a condonation application, flies in the face of *audi alteram partem* and the principles of a fair hearing, the right to be heard.

[26] I am therefore constrained to hold that this patent irregularity brings the application for review squardy within t e ambit and purpose of Section 148 (2) of the Constitution, as expounded in the relevant judgments already referred to. The applicant has no other effective remedy to salvage its insidious situation. Also, it may well suffer a significant injustice; as· is emphatically alleged, that its appeal was not determined on the merits, but with the merits already decided in no small measure during the course of its condonation application.

[27] In the result, it is hereby ordered that:

1 On review, the Supreme Court Judgment dated the 29th May 2019 with the attendant order of the pending appeal between the parties being deemed as abandoned under the provisions of Rule 30 (4), is hereby set aside.

2 The appeal may be enrolled afresh and set down for hearing of the merits.

3 Costs are ordered to be costs in the cause, to be determined in the appeal.

JACOBUS P. ANNANDALE

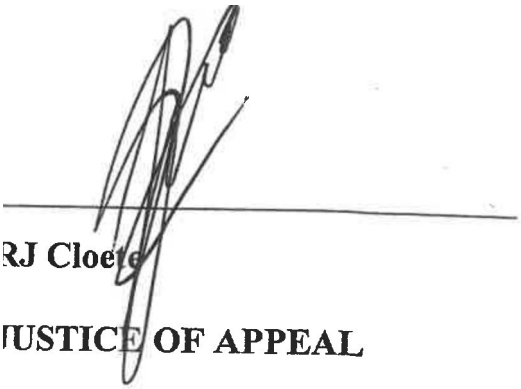
JUSTICE OF APPEAL

I agree

MCB Maphalala

CHIEF JUSTICE

I agree



RJ Cloete

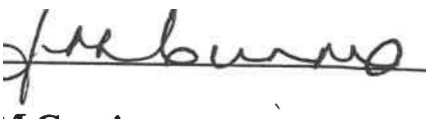
JUSTICE OF APPEAL

I **agree**

NJHlophe

JUSTICE OF APPEAL

I **agree**



JMCurrie

ACTING JUSTICE OF APPEAL

Counsel for the Appellant: Mr M. Magagula - Magagula Hlope Attorneys

Counsel for the First Respondent:	Mr Z Magagula - Mlangeni and Co.
Counsel for the Second Respondent:	Mr Z Jele - Robinson Bertram Attorneys

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IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Civil Appeal Case No. 49/20

In the matter between:

TAKHAMUTI FARMERS INVESTMENTS (PTY) LTD **Appellant**

And

ROBINSON BERTRAM **Respondent**

Neutral citation: *Takhamuti Farmers Invesiments (Pty) Ltd (49/20) [SZSCJ 09 [2021] (2nd June, 2021)*

Coram: **S.B MAPHALALA JA**
N.J. HLOPHE JA
S.J.K. MATSEBULA JA

Heard: **25th March, 2021**

Delivered: **2nd June, 2021**

Summary: *Appeal - Civil Procedure - on costs - in arguments before the Supreme Court Appellant conceded that Respondent is entitled to costs - as attorney for Appellant was granted costs' in the court a quo - therefore the whole*

appeal is dismissed with cost to be costs at the attorney and own client scale in accordance with the agreement of mandate between the parties.

JUDGMENT

S.B. MAPHALALA JA

Introduction

Serving before this court is an appeal against the judgment delivered by the Learned J.S. Magagula On the 6th August, 2020 wherein the Learned Judge *a quo* granted an order for Summary Judgment for p yment of the sum of E235,096.16 (Two Hundred and Thirty five Thousand and Ninety Six Emalangeni Sixteen Cents) representing legal fees rendered to the Applicant at the latter's instance and request, interest thereon and costs of suit.

[2] The grounds of appeal are as follows:

1. **The court *a quo* erred in law in granting summary judgment against the Defendant (now Appellant) without applying the law on summary judgment applicable to the>Kingdom of Eswatini, in terms of rule 32 of the High Court Rules.**

2. **The court of *a quo* erred in law by not applying an open mind when deliberating on and adjmlicating the matter by ignoring the defence disclosed by the Defendant (now Appellant) and the existence of triable issues that were exhibited in the affidavit resisting summary judgment.**

3. **The court *a quo* erred ijn law and in fact by granting summary judgment against the Ii,efendant (now Appellant) ignoring the**

judgment issued by his Lordship Hlophe J. when he dealt with matter which has eventually lead t•? the Respondent's application for summary judgment. His Lordship Hlophe J. ruled that each party must pay its own costs. The Learned Ju1ge a quo per Magagula J. therefore seemed to have now indirectly revjewed the judgment delivered by Hlophe J; the court a quo does not have jurisdiction (in that regard).

4. The court a quo erred in law and in fact by overriding the Chief Justice standing practice directive by proceeding to hear the matter that was initially heard and determ1ned by the Principal Judge Q.M Mabuza. Alternatively, the matte r:: should have at least been heard and determined by His Lordship Hlophe who issued the first judgment in this matter. By so doing, this eventuated the current state of confusion that the matte has found it ,e lf.

5. The court a quo erred in law in finding that the office of Sithole & Magagula Attorneys was ' instructed by a faction of the company (Appellant) but yet they w re instructed by the substantive Appellant's executive committee. This jinding by the court *a quo* at paragraph 4 of the ruling *a quo* would hare been ventilated through trial hence the court should grant the Defendant leave to file a plea with the matter
being referred to trial.

6. The court *a quo* misdirected itself by ruling that by virtue of the fact that the Plaintiff (Respondent) was instructed by shareholders of Appellant, the Appellarit was therefore obliged to pay for the Respondent's legal fees. The Appellant cannot in law and logically by operation of company law; pay for any shareholder that approached the court without its mandnte.

7. The court *a quo* further erred in law and in fact and it misdirected itself by wrongly applying 't he turguand rule where such rule was not applicable more so becauis e the Plaintiff (Robinson Bertram) was instructed by aggrieved individuals not the company (Appellant) and or executive committee of the company.

8. The court *a quo* further erred in law and in fact, whereby it failed to exercise its discretion judic ously by granting costs at attorney and own client's scale. The order t? costs at a higher scale was unwarranted (with due respect) because,,his Lordship Hlophe J. had already issued an order that each party must pay its own costs. There was further nothing warranting granting of an order of costs at attorney and own clients scale. The court also did not issue reasons why such costs of such a higher scale were avrarded to the Plaintiff.

9. The court a quo erred in llaw and in fact by making a declaration at paragraph 8 of the judgment *a quo* per his Lordship J.S. Magagula, that is when His Lordship Hlophe J. granted the order that each party must pay its own costs he id consider the source of the funds. Such a declaration should been referred to His Lordship Hlophe J. to clarify what he meant by that each party should bear its own costs per his judgment delivered on the ;?1 st August, 2015.

The background

[3] A brief background of the matter is outlined in Appellant's Heads of Arguments at paragraph 2 thereat to be the following:

2.1 The matter before court is as a result of dispute between members of the Appellant (Takhamud Farmers Investments (Pty) Ltd) who had taken each other to court t nder case no. 1440/4. For ease of reference,

a judgment was delivered by the High Court as fully appears at page 131 up to page 145 of the record of proceedings.

2.2 The members who instituted the proceedings were aggrieved by the results of elections of the executive Committee for Takhamuti Farmers (Pty) Ltd. As per the judgment at page 145 of the record of proceedings, the court had ordered that each party shall bear its own costs. It should be brought to light that the aggrieved members of the appellant were the ones who were challenging the newly elected executive.

2.3 It should also be brought to light that it was the aggrieved members who had appointed the Respondent to represent them in their matter challenging the newly elected executive committee of the Appellant.

2.4 It should be stated that the court further ordered fresh elections for the Executive committee. The Judgment was appealed as it fully appears at page 146 of the record. It was unfortunate that the appeal was dismissed for non-compliance with the Rules of the Honourable Court as per the judgment at page 148 of the record.

2.5 The Respondent in the present matter then instituted action proceedings against the Appellant for payment of legal fees. Same was defended by the Appellant in the present matter (Defendant at court *a quo).* It was then that the Respondent (Plaintiff at the court *a quo)* under case no. 340/2019 made an application for summary judgment which application was resisted by the Appellant (Defendant at court *a quo).* Same was argued and judgment was delivered on the 6th August 2020 as it fully appears on page 251 of the record of pleadings.

The arguments of the parties

For the Applicant:

[4] The main thrust of the Appellant's ca ..e is that the court *a quo* erred in law in granting Summary Judgment against the Defendant (now Appellant) without applying the law on Summary Judgment in terms of Rule 32 of the High Court Rules. In support of this argument the A] pellant's Counsel cited the Supreme Court case of **Azman Investments (Pty) Ltd vs the Government of Swaziland and Another, Civil Appeal no. 12/2011** where the court held that Summary Judgment is an extraordinary remedy and that the ; ourt should be slow to close the door to a defendant if a reasonable possibility exists that a defendant has a good or *bona fide* defence. That the court *a quo* erred in no1;.considering the evidence by the Appellant wherein it denies ever authorising the R1;:spondent to legally represent itself. In this
regard Learned Counsel directed the co1:1rt's attention to paragraphs 4, 5, 6, 7 and 8 of the affidavit resisting Summary Judg:rnent at pages 234 and 235 of the Record of Appeal.

[5] Further it is contended for the Appellaht that in its affidavit resisting Summary Judgment it demonstrated that it has a good and *bona fide* defence to the claim by the Defendant. Moreso in that, it was the members who were aggrieved by the elections results who mandated the Rei;_pondent in their personal capacities to be their legal representatives. Thus the Respondent should seek payment of its fees from them.

[6] Various submission are canvassed in par;=tgraphs 7 to 22 of the Heads of Arguments.

[7] Finally, the Appellant prays that the appctal be upheld with costs at attorney and own clients scale.

Respondent's arguments

[8] Counsel for the Respondent Mr Jele also filed Heads of Arguments advancing the case for the Respondent on a number of:topics and in paragraph 11 thereof stating the following:

> **11. The important aspect ofth, matter is that the above Honourable Court should note that Sithole** & **Magagula Attorneys rendered their fees also to the Appellant's and / or; its shareholders and they were paid by the Appellant. This fact has no1t been disputed by the Appellant or the other shareholders of the Appellant. Sithole** & **Magagula Attorneys were instructed by the other shareholders on behalf of the Appellant.** In the **Respondent's case it was: instructed by the Appellant through its shareholders. We will revert to this later on below.**

[9] I must mention that this paragraph beca/ne crucial in the determination of this case because when Counsel for the Appellant was confronted with this state of affairs by the Court readily conceded that indeed Counsel for the Respondent is also entitled to the fees he was seeking. This therefor put paid to the determination of the whole appeal.

[10] Furthermore on the argument of the Resi,ondent at paragraph [8] above stated in his Replying Affidavit at paragraph 6 thereat the following:

> **The Deponent does not further de 1y that both attorneys for the Board and the Shareholders submitted fee notes but only one fee note was paid. That is for the Board. Sithole** & **Magagula ttorneys were paid despite that they lost the matter in all our Courts. This was clearly unfair. Sithole** & **Magagula** Attorneys represented the Board and not the company.

(11] As a result of this it became pointless ihr the Respondent's Counsel to make any submissions in his defence on the merits of the appeal. Therefore, the appeal is dismissed with costs at attorney and OWJ.l client scale as provided in the agreement of mandate between the parties.

S.B. MAPHALALA JA

I AGREE

N.J. HLOPHE JA

I ALSO AGREE

S.J.K. MATSEBUJ

For the Appellant: Mr. M Sithole
(from Sithole & Magagula Attorneys)

For the Respondent: Mr. D.N. Jele
(from Robinson Bertram)