IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 23/2017

HELD AT MBABANE
In the matter between:

BONGANI BAVUKILE DLAMINI **Applicant**

and

REX **Respondent**

In re:

BONGANI BAVUKILE DLAMINI **Appellant**

and

THE KING **Respondent**

Neutral Citation: *Bongani Bavukile Dlamini vs Rex* (23/2017) [2023] *SZSC* 08 (29/03/2023)

Coram: **S.P. DLAMINI JA; S.J.K. MATSEBULA JA; M.D. MAMBA JA; J.M. VAN DER WALT JA AND J.M. CURRIE JA.**

Heard: 22 February, 2023.
Delivered: 29 March, 2023.

SUMMARY: *Criminal law – Review application in terms of a section 148 (2) of the Constitution – Applicant charged with murder having stabbed deceased 20 times using an okapi pocket knife – Applicant sentenced to 23 years in prison – Applicant noted an appeal against both conviction and sentence – Appeal dismissed on both conviction and sentence – Sentence increased to 25 years – Principles governing delay in bringing review applications considered and requirements in terms of Section 148 (2) of the Constitution restated*

Held that applicant had failed to establish grounds in terms of which the Court could exercise its review jurisdiction in terms of Section 148 (2) of the Constitution.

Held that application amounted to a second appeal and was an abuse of the court process - application dismissed.

JUDGMENT

J.M. CURRIE – JA

INTRODUCTION

[1] This is an application for review brought in terms of Section 148 (2) of the Constitution of Eswatini.

[2] The applicant was charged with murder. He was arraigned before the High Court for trial and was subsequently convicted of murder without extenuating circumstances and sentenced to twenty-three (23) years' imprisonment. The judgment was delivered on 1st August 2017.

[3] The applicant appealed to the Supreme Court by way of a letter dated 10th November 2017, accepting his conviction but appealing against sentence on the basis of what the applicant maintained was undue harshness and severity, stating that he had been provoked.

[4] On 24th November 2017 a further notice of appeal was filed. For the purposes of considering this review the grounds of appeal are repeated hereunder:

"1. The court a quo erred both in fact and in law by finding and holding that the Crown had proved the charge of murder against the Appellant beyond a reasonable doubt as the evidence presented in court does not support such finding.

2. The court a quo erred both in fact and in law by not accepting the version of the Appellant and instead finding and holding that the same was false beyond a reasonable doubt when such version had been corroborated by PW9 and same was not disputed by the Crown witnesses and as such remained uncontroverted.

3. The court a quo erred both in fact and in law by finding and holding that there was no attack by the deceased upon the Appellant despite evidence that deceased woke up the Appellant who had passed out in the bedroom thereafter a physical struggle between the deceased and Appellant ensured resulting to the Appellant's t-shirt being torn and failure by the deceased to disclose to his colleagues the reason him being stabbed by the Appellant if he had not attacked the Appellant.

4. *The court a quo erred in both fact and in law by finding and holding that although the Crown's case was based on dolus eventualis there were, however, significant points towards dolus directus merely on the basis that the Appellant had a knife in his possession without the court having sought from the Appellant the reason why he was in possession of the okapi knife.*

5. *The court a quo misdirected itself in law by finding and holding that because the evidence against the Appellant was overwhelming, the difference between dolus directus and dolus eventualis is inconsequential as such a finding and holding had a great bearing in the Appellant's sentence which is clearly harsh and shocking.*

6. *The court a quo erred both in fact and in law by finding and holding that the two (2) fairly large holes on the Appellant's t-shirt could have been inflicted upon the t-shirt ex post factu, to create the impression of a two-way struggle when there was no evidence supporting such finding by the court.*

7. *The court a quo erred both in fact and in law by finding and holding that if the Appellant was under attack from the deceased he could have banged the door while shouting for help despite the Appellant's evidence that when he tried to escape the deceased blocked the way to the door, pushed Appellant back on the bed and deceased came on top of him with loud music playing, such evidence having not been disputed by Crown witnesses and such remained uncontroverted.*

8. *The court a quo erred both in fact and in law by finding and holding that deceased sustained twenty stab wounds as the evidence presented in court does not support such finding.*

9. *The court a quo misdirected itself in fact by finding and holding that the Appellant knew the deceased well when the evidence presented in court is that the Appellant and deceased were acquaintances who had recently known each other.*

10. *The court a quo erred both in fact and in law by not finding and holding that there are extenuating circumstances in the matter thus it sentenced*

the Appellant without any consideration of such extenuating circumstances such as intoxication and youthfulness of the Appellant."

[5] During the hearing of the Appeal, the Court gave notice in terms of Section 5 of the Court of Appeal Act, 1954 that it intended considering increasing the sentence imposed on the applicant by the trial court and the defence counsel was given an opportunity to address the Court on the possibility of increasing such sentence. The applicant's counsel merely reiterated the personal circumstances of the applicant namely, his youthfulness and intoxication, which had been previously considered by the trial court when imposing sentence, and did not request more time to make further submissions in this regard.

[6] On 21st April 2020 the Supreme Court delivered its judgment in terms of which the appeal against both conviction and sentence was dismissed and the sentence imposed by the court *a quo* was set aside and substituted with a sentence of twenty-five (25) years' imprisonment.

[7] On 4th July 2022, over two years after judgment had been delivered by the Supreme Court, the applicant filed this review application in terms of section 148 (2) of the Constitution.

[8] Despite the requirements of the Rules of this Court and several express pronouncements by this Court on the issue, no application for condonation for the late filing of the review application was filed and this presents a major obstacle in applicant's path to have the judgment set aside. This aspect will be reverted to later hereunder.

[9] The applicant, in his founding affidavit in support of his application for review, does not give any satisfactory reasons for the inordinate delay in bringing the application. He states that following the Supreme Court judgment he was advised by his erstwhile attorney that there was no other remedy available to him. Only last year, he states, whilst reading an article in a local newspaper involving a fellow inmate of his at the Matsapha Correctional Centre did he become aware of the review jurisdiction of this Court whereupon he decided to pursue the current application. No dates of when he became aware of this are given in his founding affidavit, nor is there any confirmatory affidavit from his erstwhile attorney.

[10] The respondent filed an affidavit opposing the application for review and the applicant filed a replying affidavit thereto.

GROUNDS OF REVIEW

[11] The challenge is now directed to this Court on virtually the same grounds as the Appeal. The salient points of applicant's case are that the Supreme Court, sitting as a Court of Appeal misdirected itself on the following grounds:

"*(a) In finding that the Crown had established mens rea beyond reasonable doubt having regard to the nature of the lethal weapon used by the deceased and the number, extent and area of the injuries inflicted by the accused on the deceased. With regard to the issue of intoxication the Court and came to the conclusion that the issue of intoxication was not raised as a defence in the trial court.*

(b) By failing to take into account the fact that there were extenuating circumstances and sentenced him without taking into account his youthfulness and the fact that he was intoxicated at the time.

(c) In failing to take cognizance of the fact that the deceased attacked him by unlawfully attempting to sodomise him and he was therefore entitled to defend himself and defend his sexual integrity.

(d) Not finding that the injuries inflicted on the deceased were as a result of the sustained conduct of the deceased in his relentless assault which resulted in the applicant being forced to continue stabbing him in order to ward off the attack.

(e) Drawing an adverse inference from the fact maintained that he always carried the knife with him in order to protect himself in the event of an unexpected and unlawful attack by anyone. Applicant was not afforded an opportunity to explain why he always carried such a knife and was thus not accorded a fair trial.

(f) In not considering the fact that there was a struggle between the applicant and the deceased which resulted in him being blood stained.

(g) In finding that the extent of the injuries suffered by the deceased were extensive which defeats the notion of self defence.

(h) Not taking into account that only two of the injuries inflicted on the deceased were fatal and only taking into account the number of injuries inflicted

(i) Concluding that when considering the totality of the evidence of the accused that there was no possibility of his explanation being true."

[12] The applicant relied on the cases of **President Street Properties (Pty) Limited v Maxwell Uchechukwa and Four Others, Appeal Case No. 11/2014** and the Ghanaian case of **Ellis Tamakloe v. The Republic (unreported) Case No. CM No: J7A/1/2010** and submitted that, if important evidence was adduced and overlooked by the Court of Appeal, such a situation would qualify as an exceptional circumstance.

ISSUES FALLING FOR CONSIDERATION BY THE COURT

[13] The issues falling for consideration and argued before this Court, are whether the late filing of the application for review, without an application for condonation, should be condoned and whether the present review application by the applicant meets the requirements of Section 148 (2).

SUBMISSIONS OF THE APPLICANT

[14] At the commencement of the hearing before this Court the applicant's counsel was requested to address the Court on whether this application met the requirements for review as laid down by this Court. He submitted that the Court of Appeal overlooked very important and decisive issues and that judgment was issued *per incuriam.* Further, that there are exceptional circumstances which he would demonstrate to the Court in argument and

which would persuade it to exercise its review discretion in terms of section 148 (2) in favour of the applicant.

[15] The applicant's counsel had filed comprehensive heads of argument and concentrated on certain key issues. In particular, the applicant submitted that the Court of Appeal gave inadequate consideration to the fact that the applicant allegedly had been unlawfully attacked by the deceased who was attempting to sodomise him and that in the circumstances he was entitled to defend himself against such unlawful attack.

[16] The applicant contends that he was not given an opportunity during the trial to explain why he carried a dangerous knife and that the Court of Appeal committed an error by drawing an adverse inference from the fact that the applicant did not furnish such an explanation.

[17] The applicant further contends that the reason the deceased was stabbed many times was because the applicant tried to leave the room and the deceased prevented him from doing so. As a result there was a struggle and the applicant, acting in self defence, had no alternative but to stab the

deceased many times in order to ward off the attack. The applicant's sole purpose was to free himself from the deceased and escape his unlawful attack. He did not foresee the possibility of killing the deceased as he was intoxicated and had just woken up from a deep sleep which affected his mental ability in appreciating that his conduct could result in the death of the deceased. Thus, the Court committed an error in finding no extenuating circumstances but found, in fact, that there were aggravating circumstances. The fact that the Court gave notice, during the trial, of its intention to consider an increased sentence deprived him of an opportunity to adequately prepare for the possibility of it imposing an increased sentence.

[18] In summary, it was submitted, the Court gave its judgment *per incuriam* without due consideration of the relevant and decisive facts and law and without carefully considering every aspect and as a result the applicant suffered a manifest injustice.

[19] In particular, the applicant submits that he should be acquitted in that he acted in self defence. At the very least, if the Court of Appeal found that the

applicant exceeded the bounds of self defence, he should have been found guilty of culpable homicide and not murder.

[20] The applicant submitted that if this Court arrives at the conclusion that the applicant was correctly convicted of murder it should reconsider and reduce the sentence imposed on the Applicant as the Court of Appeal misdirected itself in "*slightly*" increasing the sentence imposed by the trial court. In the end result the applicant suffered an injustice as a result of the errors of the Court of Appeal.

SUBMISSIONS OF THE RESPONDENT

[21] The respondent contends that whilst the applicant has based his application on the provisions of Section 148 (2) of the Constitution, his application is misconceived and is tantamount to a second appeal disguised as a review, is without merit and ought to be set aside. He relied on the cases of **Simon Vilane N.O. and Others v Lipney Investments (Pty) Ltd, in re Simon Vilance N.O Mandlenkhosi Vilane N.O, Umfomoti Invetments (Pty) Ltd, Civil Case No. 78/2013** where Ramodibedi CJ stated as follows:

"It remains to add that a Review Court is not concerned with the merits of the decision under review. It follows that a misdirection or error of law is not a review ground. It is a ground of appeal."

[22] The respondent further referred to the case of **President Street Properties (Pty) Ltd v Maxwell Uchechuku & Four Others** *supra***,** where J.M. Dlamini AJA, as he then was, said *inter alia*:

*"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 power is to be invoked in rare and compelling or exceptional circumstances…"* and further on states: *"from the above authorities some of the situations already identified as calling for supra judicial intervention are an exceptional circumstances, fraud, patent error, bias presence of some most unusual element, new facts, significant injustice or absence of alternative remedy."* (my underlining).

[23] With regard to the issue of the increased sentence imposed on the applicant at the hearing of the appeal, the respondent submitted that there is nothing that would induce this Court to tamper with the increased sentence imposed by the Court of Appeal as this application does not meet the requirements for review as laid down by these Courts.

[24] The respondent further submitted that, in any other circumstances, this application would warrant an order for costs, due to the fact that it is a baseless application. He relied on the case of **Zanele Vilakati and Rex [27/2015) [2018 SZSC 20,** where M.C.B Maphalala, CJ stated the following:

"It would be remiss of me not to place on record that the disturbing trend of bringing baseless review Applications before this Court continues unabated and as such it has now become imperative that Rules are urgently promulgated to give itemized guidelines relating to such review Applications."

THE APPLICABLE LAW

[25] The Constitution provides the following:

"148. (1) The Supreme Court has supervisory jurisdiction over all courts of judicature and over any adjudicating authority and may, in the discharge of that jurisdiction, issue orders and directions for the purposes of enforcing or securing the enforcement of its supervisory power.

(2) 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) In the exercise of its review jurisdiction, the Supreme Court shall sit as a full bench."

[26] The Constitution was promulgated on the 26th July 2005 but Parliament has not yet executed its mandate in accordance with section 148 (2) of the Constitution which requires that Parliament should enact legislation prescribing the conditions under which the Supreme Court would exercise its review jurisdiction. No Rules of Court in respect of the exercise by the Supreme Court of its review jurisdiction in terms of section 148 (2) of the Constitution have yet been formulated.

[27] In the absence of any statutory time limits this Court has inherent powers to regulate its own procedures and has the power to consider an application brought by a party after an unreasonable lapse of time. The enquiry is a factual one and the court must consider whether as a fact the proceedings were instituted after an unreasonable delay and if so, whether the unreasonable delay should be condoned

[28] Notwithstanding the absence of the Act as well as the Rules of Court as envisaged by Section 148 (2) of the Constitution, the Supreme Court has since laid down the general principles applicable in the exercise of its review jurisdiction in numerous judgments of this Court. See again **President Street Properties (Pty) Ltd vs. Maxwell Uchechukwu case *supra*** wherein Justice J.M. Dlamini said:

"[26] In its appellate jurisdiction the role of this Supreme Court is to prevent injustice arising from the normal operation of the adjudicative system; and, in its newly endowed review jurisdiction, this Court has the purpose of preventing or ameliorating injustice arising from the operation of the rules regulating finality in litigation whether or not attributable to its own adjudication as the Supreme Court. Either way, the ultimate purpose and role of this Court is to avoid in practical situations gross

injustice to litigants in exceptional circumstances beyond ordinary adjudicative contemplation. This exceptional jurisdiction must, when properly employed, be conducive to and productive of a higher sense and degree or quality of justice. Thus, faced with a situation of manifest injustice, irremediable by normal court processes, this Court cannot sit back or rest on its laurels and disclaim all responsibility on the argument that it is* functus officio *or that the matter is* res judicata *or that finality in litigation stops it from further intervention. Surely, the quest for superior justice among fallible beings is a never ending pursuit of 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 power is to be invoked in a rare and compelling or exceptional circumstances . . . It is not review in the ordinary sense.

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

[29] Section 148 (2) of the Constitution does not provide any limits within which review proceedings must be launched but in terms of the common law, same must be brought within a reasonable time in order to bring finality to judicial proceedings. If such application is not brought within a reasonable time, a condonation application must be filed setting out a full and reasonable and acceptable explanation for the delay in bringing such application as well as the prospects of success.

[30] In the matter of **Ntsetselelo Hlatshwako v Commissioner General of the Correctional Services (067/2009) [2021 SZSC 40 (18/01/2022)** the Court

held that in terms of the common law litigants must institute review proceedings within a reasonable time in the absence of any specific time limits prescribed by the Rules of Court. The court dismissed the application, taking into account the explanation proffered in an application for condonation. Justice M.J. Manzini AJA, articulated the principle as follows:

"There are two principal reasons for this rule. The first is that unreasonable delay may cause undue prejudice to other parties. The second is that it is both desirable and important that finality should be reached within a reasonable time in respect of judicial and administration decisions."

[31] The applicant has not filed an application for condonation and has given no reasonable or credible explanation for the delay in launching the review proceedings whatsoever. On the face of it, long after judgment of the Appeal Court was delivered, he read about a criminal review application in the local newspaper and decided that he could possibly have another opportunity at having his conviction and sentence set aside. In the circumstances the explanation in the founding affidavit of the review application is not satisfactory and the application stands to be dismissed on this point alone.

[32] At the hearing of the matter, the Court made an order that the parties file additional authorities, pertaining to the delay in instituting an application for review and as a result both parties filed additional authorities but were not granted permission to file additional heads of argument in this regard.

FINDINGS OF THIS COURT

[33] *In casu*, there is no application for condonation for the late filing of the review application and no satisfactory explanation has been given for the delay in bringing the application for review. In such circumstances a court has a discretion whether to refuse or entertain any review application not brought within a reasonable time. The enquiry is a factual one and the court must consider whether as a fact the proceedings were launched after an unreasonable delay and if so whether the delay should be condoned. See **Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa (5th edition) 2009, page 129 and the Ntsetselelo Hlatshwako case** (*supra)*.

[34] In my view, the application for the delay in launching the review application without an application for condonation is unacceptable and stands to be dismissed on this point alone.

[35] The applicant has filed two authorities in support of when an application should be brought in the absence of a statutory period of prescription. He relied on two cases, the first being the **Ntsetselelo Hlatshwako** case *supra.* This case does not support the argument of the applicant in that the Court held that, taking into account the failure of the applicant therein to provide an adequate explanation for the delay, the failure to file an application for condonation for the late filing of the review application and the fact that the application was brought on tenuous grounds with very little prospects of success, the application fell to be dismissed.

[36] He relied further on the case of **Radebe v Government of the Republic of South Africa & Others 1995 (3) SA 787 (N) 1995 (3) SA** where it was held that, in the absence of a statutory time limit, the courts, in terms of their inherent power to regulate procedure, require proceedings to be brought within a reasonable time. The enquiry is a factual one, depending on the circumstances of each case. If the court were to come to the conclusion that the delay has been unreasonable, it exercises a discretion as to whether or not to condone the delay. As the applicant has not taken the Court into his confidence and has not provided full and satisfactory particulars for the

reason for the delay, there is nothing to support excusing his failure to bring an application for condonation.

[37] The application for review does not show "**any gross and manifest injustice"** or any exceptional circumstances necessitating the intervention of the Court envisaged in Section 148 (2) taking into account the requirements prescribed in numerous judgments of this Court - **President Street Properties (Pty) Ltd v Maxwell Uchechukwu and Others** *supra*, **Swaziland Revenue Authority v Impunzi Wholesalers (Pty) Ltd (06/2015) [2015] SZSC 06 (9th December 2015), Xolile Gama v Foot the Bill Investments (Pty) Limited (68/2018) [2019] SZSC 35 (11 September 2019) First National Bank Swaziland Limited (45/2015) [2015] SZSC 21 (30th May,** 2017 and **Kukhanya (Pty) Limited v Maputo Plant Hire (Pty) Limited and Another (11/2020) /2022/- SZSC 05(12/02/2022)** to mention but a few.

[38] I am in agreement with the submission by the respondent that this application is nothing more than a second appeal, disguised as a review and that the applicant has not set forth any grounds that would induce this Court to interfere with the Judgment of the Court of Appeal. I therefore find that

there had been no misdirection on the part of the court sitting in its appellate jurisdiction. The applicant in essence has repeated and amplified the grounds of appeal and the application amounts to a "**second bite at the cherry**".

[39] If this had not been a criminal matter where costs are not normally granted, I am of the view that it would warrant the grant of costs as the bringing of this application for review without any application for condonation amounts to an abuse of the court process. An award of costs against the applicant might deter other future applicants from pursuing baseless applications, out of time, without any application for condonation.

[40] Accordingly the following order is made:

1. The application for review brought in terms of Section 148 (2) is hereby dismissed.
2. No order as to costs.

J. M. CURRIE
JUSTICE OF APPEAL

I agree

S.P. DLAMINI
JUSTICE OF APPEAL

I agree

S.J.K. MATSEBULA
JUSTICE OF APPEAL

I agree

M.D. MAMBA
JUSTICE OF APPEAL

I agree

J.M. VAN DER WALT
JUSTICE OF APPEAL

For the Applicant: PM DLAMINI ATTORNEYS

For the Respondent: BHEKIWE NGWENYA (DPP'S CHAMBERS)