IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Held at Mbabane Case No. 31/22

In the matter between:

THE CLERK OF PARLIAMENT **APPLICANT**

AND

BHUTANA SAMUEL DLAMINI **RESPONDENT**

In re:

THE CLERK OF PARLIAMENT **APPELLANTS**

AND

BHUTANA SAMUEL DLAMINI **RESPONDENT**

Neutral citation: *The Clerk of Parliament vs Bhutana Samuel Dlamini [31/22] [2023] SZSC 13 (29 May 2023)*

Coram: S. B. MAPHALALA, JA
J.P. ANNANDALE, JA
J.M. VANDER WALT JA
J.M. CURRIE, JA
M.R. FAKUDZE AJA

Heard: 27th April, 2023

Delivered: 29th May, 2023

Summary: *Review in terms of Section 148 (2) of the Constitution – Applicant seeks to review a judgment of Supreme Court – Review based on two grounds (a) that the Court committed an error in concluding that the Respondent qualified as a Senator in terms of Section 96 (c) of the Constitution; (b) that the court committed an error in declaring that the Respondent is not a Returning Officer in terms of the Constitution – On the day matter was heard, Applicant withdrew ground (a) – Since Supreme Court made its finding in terms of ground (a), there is nothing to review because ground (b) of the review application was obiter – Application for review dismissed with costs.*

JUDGMENT

FAKUDZE A.J.A

Background

[1] This is an Application filed by the Applicant seeking a review of the decision of the Supreme Court delivered on 22nd September 2022 in Civil Appeal 31/2022.

[2] Initially, the matter started as High Court Case 1640/2021 in which the present Respondent sought an Order declaring him as qualified for Senate elections. The Application was instituted on an urgent basis on the 9th

September, 2021. The High Court delivered its Judgment on the 12th April, 2022 and its finding was that the Applicant qualified as a candidate for Senate elections.

[3] Dissatisfied with the decision of the High Court, the Applicant appealed the decision and the Appeal was heard by the Supreme Court on the 16th and 17th August, 2022. Judgment was delivered on the 22nd September, 2022.

[4] The Supreme Court dismissed the Appeal on the same grounds as the High Court.

[5] Still not being satisfied with the decision of the Supreme Court, the Applicant then filed the present Review Application in terms of Section 148 (2) of the Constitution.

The Review

[6] The basis for the Review is captured in the Notice of Application for Judicial Review dated 21st November, 2022 in which the Applicant sought the following relief:

1. Reviewing and correcting or setting aside the Appellate decision of the Court delivered on 22nd September, 2022;
2. Staying the impugned decision;
3. Granting further and/or alternative Relief.

[7] The Review Application is vigorously opposed by the Respondent.

[8] Paragraphs 9 to 13 of the Founding Affidavit clearly sets out the grounds and same can be summarised as follows:

1. The Appellate Judgment is fraught with a patent error of law in the application of Section 96;

2. The Appellate Bench held that the Clerk of Parliament (Applicant as Appellant) had no power to verify or vet Respondent's qualification for Senate elections. This is a grossly unreasonable decision that no reasonable Court would have come to on the facts and law.

[9] When the parties appeared before the Court to argue the Application, the Applicant informed the Court that it is abandoning the finding relating to the misinterpretation of Section 96. The remaining issue is that of the finding that the Applicant has no power to verify or vet the Respondent's qualification for Senate elections.

The parties' contention

The Applicant

[10] The Applicant contended that the Court *a quo* made a finding on the issue of the Clerk of Parliament (Returning Officer for purposes of Senate Elections) that he is not qualified to verify or vet the nomination of candidates for purposes of those elections.

[11] The Applicant further contended that it was grossly unreasonable for the Supreme Court to hold that the Applicant had no authority to verify or vet candidates for purposes of Senate elections qualifications in terms of Sections 96 and 97 of the Constitution.

[12] The Applicant argued that Section 94 (2) of the Constitution provides that "the Senators elected by the House of Assembly shall be elected in such manner prescribed by or under any law...". The Senate (Elections) Act,

2013 is a product of this Constitutional provision. Therefore the finding that the Constitution does not provide for the vetting powers of the Returning Officer for purposes of Senate elections is wrong in law and the finding should therefore be set aside.

[13] The Applicant further argued that the procedure relating to the conduct of Senate elections is then dealt with in terms of the enabling legislation which is the Senate (Elections) Act, 2013.

[14] Finally, the Applicant argued that even if there is no mention of the term "vetting" in the Constitution and the enabling legislation, the Interpretation Act No. 21/1970 envisages that where power is not explicitly provided for, that such power can be implied. This is in accordance with Section 10 of the Interpretation Act. By virtue of the Clerk being the Chief Administrative Officer in the conduct of Senate elections in terms of Section 3 (1) of the Senate (Elections) Act, 2013, he has all the powers to ensure the proper conduct of the elections in accordance with Sections 96 and 97 of the Constitution read together with the Senate (Elections) Act.

[15] The substance of the Applicant's Review Application, in this Court's view, is the correction of an alleged error made by Supreme Court in holding that the Applicant has no implied power to verify or vet candidates for Senate elections and that the Respondent was unlawfully verified or vetted by the Applicant, leading to the Respondent being disqualified by reason of him owing tax in terms of Section 96 (c) of the Constitution. The Applicant also argued that the issue of its power to verify or vet candidates for Senate elections was abandoned by it when the matter came before the Supreme Court. There was no need for Supreme Court to make a finding on it.

The Respondent

[16] The Respondent stated that the Applicant has noted the present Review application following the dismissal of its Application at both the High Court and the Supreme Court.

[17] The Respondent pointed out that initially, there were initially three grounds of Appeal before the Supreme Court. The first two grounds were abandoned by the Applicant before that Court. The issue that remained for determination was whether the Respondent was tax compliant or not for the purposes of Section 96 of the Constitution.

[18] The Respondent stated that the foundation for a review of Supreme Court cases is premised on Section 148 (2) of the Constitution. It is to be exercised in rare and compelling or exceptional circumstances. Its effect is to remedy manifest injustice in a matter that is *res judicata*. It is not an open door for further appeals disguised as reviews. In the present circumstances, the Applicant is seeking to re-open the same issues raised in the Court *a quo* in its Appellate jurisdiction and now on Review. This is not permissible.

[19] The Respondent further stated that it appears clearly that the facts and evidentiary material placed before both the High Court and the Supreme Court on appeal, were each intensively dealt with before each Court made its finding.

[20] The Respondent noted that the only initial ground upon which the Supreme Court heard the Appeal was abandoned by the Applicant on the day the matter was argued before this Court. There is therefore nothing to review because the issue of the Applicant having power to verify or vet the Respondent was abandoned on appeal. Even though the Supreme Court said

something on this abandoned issue, it was not the substance of its finding. It was *obiter*. The substance of its finding was that the Respondent had been tax compliant and it therefore confirmed the finding of the Court *a quo*.

[21] Furthermore, when the matter was heard on appeal, the Applicants conceded that the first two grounds were reasons for the judgment and no appeal lies against these grounds. Therefore, this issue cannot now be pursued on review.

[22] The Respondent implored the Court to dismiss the Application with costs at a punitive scale because the Applicant's intention was to delay the process so that Section 137 (3) of the Constitution or: could come into effect. This Section does not allow the election or appointment of a Senator or member of Parliament if the period of nine (9) months is left prior to the holding of national elections.

The law

[23] The Constitution lays a foundation for the power of the Supreme Court to review itself in certain circumstances. Section 148 (2) provides for this as follows:

> *"148 (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 Rule of Court."*

[24] The landmark case of **President Street Properties (Pty) Ltd v Maxwell Uchechukwa and Four Others, Supreme Court Case No. 11/2014** at paragraphs 26 and 27 laid down the parameters for the interpretation of Section 148 (2). The Learned Justice M. J. Dlamini stated the following:-

"[26] In its appellate jurisdiction the role of the Supreme Court is to prevent injustice arising from the normal operation of the adjudicative system, and with its newly endowed review jurisdiction, this court has the power 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 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 flood gates of re-appraisal of a case otherwise res judicata. As such the review power is to be invoked in rare and compelling or

exceptional circumstances..... It is not review in the ordinary sense."

[25] Emphasizing the point that the Section 148 (2) review should not be used as a mechanism for a second appeal, the Supreme Court said in the case of **M.P. Simelane Attorney v Beauty Build Construction (Pty) Ltd and 2 Others Supreme Court Case No. 68/2016 (15th May 2017)** at paragraph 25 that:

"..... It is important to observe at the outset that the review jurisdiction, while it is an exception to the doctrine of res judicata and functus officio, is not intended to provide another avenue for a second appeal....."

[26] The court further elucidated the guiding principles in invoking Section 148 (2) of the Constitution in the Supreme Case of **First National Bank of Swaziland Ltd and Another V Swaziland Union of Financial Institutions and Allied Workers Case No. 47/2018** at paragraph 33 as follows:-

"..... This court has always been acutely aware that the provision even in its bare formulation could not have meant a simple unencumbered re-opening of its decision. To that extent, Section 148 (2) was understood to be a statutory articulation of the court's inherent power as a court of appeal. Thus, apposite statements from other jurisdictions were freely referred to and accepted as persuasive. From these authorities it was evident that the application of Section 148 (2) could not be 'business as usual'; there had to be something unusual, something exceptional, some significant injustice

in the decision for the Court to review and set it aside or correct it, and there had to be 'no alternative effective remedy'. In other words, there had to be a sting in the patent error. In such circumstances "the need to maintain confidence in the administration of justice [made] it imperative that there should be a remedy."

Court's Analysis and conclusion

[27] As observed by this Court earlier, the issue for determination in the Supreme Court on review was the finding by the Supreme Court regarding the qualification of the Respondent for purposes of Section 96 (c) of the Constitution. Since the Applicant has now withdrawn this ground of review there is nothing left to review. This is based on the fact that the finding of the Supreme Court related to the issue of tax compliance with Section 96 of Constitution and not whether or not the Applicant had the powers to verify or vet Senate candidates. The stated ground of review was *obiter* in the cause of appeal The Applicant also abandoned this issue on appeal. It is surprising that the Applicant is now seeking to bring it up again by way of a review.

[28] Furthermore, the Respondent rightly pointed out that the very same Applicant conceded on appeal that the first two grounds were reasons for the judgment and that no appeal lies against same. That being the case, it cannot then be pursued now by way of review.

[29] This Court wishes to further observe that the Applicant has failed to establish any ground for review in terms of Section 148 (2) of the Constitution. Nothing in the papers filed by the Applicant suggests that there is any miscarriage of justice or any exceptional circumstances calling

for judicial intervention by way of a review by this Court. There is nothing in the Applicant's papers that establishes that there is any fraud, patent error, bias, presence of some unusual elements, new facts, significant injustice or absence of an effective remedy which may call for this court to invoke its review powers. (See **President Street Properties (Pty) Ltd v Maxwell Uchechukwu and Four Others** (*supra* at paragraph 15).

[30] The Application for review by the Applicant therefore stands to be dismissed.

[31] On the issue of costs, the Applicant did not address this Court. The Respondent urged this Court to grant costs on an attorney and client basis, reason being that the Applicant put the Respondent out of pocket by bringing up a matter for review that had already been abandoned by it. Further, the Respondent stated that the Applicant brought up the matter for review fully aware that one/ or he can only appeal against a finding of a Court *a quo* as opposed to the reasons for the finding. The case of **George Green v Swaziland Royal Insurance Corporation, Supreme Court Case No. 26/2012** confirms this legal position.

[32] It is this Court's considered view that Section 148 (2) applications are still growing and maturing in this jurisdiction. The Court must not be seen to be discouraging litigation in this area. It does not vitiate the fact that frivolous litigation should not be encouraged and that where an abuse of court process is manifest, the Court should likewise make an order for costs at a punitive scale. It is trite that the granting of costs is discretionary. In the exercise of its discretion, this Court is of the view that costs at the ordinary scale should be awarded in favour of the Respondent.

[33] Taking into account all that has been said above the following order is made:-

1. The Application for review is dismissed.

2. The costs on review are awarded to the Respondent at the ordinary scale.

M.R. FAKUDZE AJA

I agree

S.B. MAPHALALA JA

I agree

J.P. ANNANDALE JA

I agree

J. M. VANDER WALT JA

I agree

J.M. CURRIE JA

For the Applicant: N.D. Jele

For the Respondent: N. Dlamini

M. Dlamini