IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO. 38/2023**

In the matter between

CYA NMABAR (PTY) LTD **APPELLANT**

AND

SIPHO MLAMBO **1ST RESPONDENT**

LINDIWE MLAMBO **2ND RESPONDENT**

Neutral Citation:
CYA NMABAR (PTY) LTD v SIPHO MLAMBO AND ANOTHER (38/2023) [2024] SZSC 109 (27 NOVEMBER, 2024).

Coram: S. B. MAPHALALA, S.J.K. MATSEBULA et M. D. MAMBA JJA.

Heard: 21 NOVEMBER, 2024

Delivered: 27 NOVEMBER, 2024

[1] Civil Law and Procedure- Appeal- Time Noting Appeal- Enforcement of Court Orders- Notice of Appeal preceded by execution of Court Order. Nothing to be suspended by Noting of Appeal in such instance. Execution of Court Order inconsistent with intent to appeal order.

[2] Civil Law- Appeal- Appellant executing and enforcing Court Order granted in its favour. Later noting an appeal against such judgment – doctrine of peremption/acquiescence invoked. Held enforcement of Order bar to or waiver of right to appeal.

MAMBA JA.

[1] The Appellant was the Plaintiff in the Court *a quo* and it sued the Respondents for payment of a sum of E256,000.00. This claim was founded on an oral building or construction contract entered into by and between the parties in August 2021. The Respondents are a married couple and have been jointly sued as such couple.

[2] In terms of the said contract, the Appellant was to

> ' construct a wall fence, install concrete pavers, install interlocking pavers, install gate motor and cabling, trellidor barriers and balustrades as an additional service', for and on the property owned by the Respondents on Plot 285, Woodlands Extension 02. The agreed fee for the works was a sum of E320,000.00 as claimed in the summons. The Appellant alleged that it was a term of the contract that during the course of the construction works, the Appellant would be entitled to issue periodic or interim certificates for payment for work already done and the Respondents would be obliged to make payment in respect of these certificates within a period of thirty days from date of issue thereof.

[3] It was further alleged by the Appellant that it had during the subsistence of the contract, issued two interim certificates for the payment of work already done by it, but the Respondents had failed to honour these and thus this claim. The Appellant averred that it had completed 80% of the work for which it was contracted to perform. The Respondents averred that the agreement between the parties was that the full contract price would become due and payable on due completion of the works,

[4] It is significant to note that each of the various aspects or works to be done was individually quantified. For example, the fee for the wall fence was a sum of E175,000.00. It is noted further that the Appellant took over the construction works after Chakaza Holdings, the original builder had abandoned the works and building site.

[5] The Respondents denied their indebtedness to the Appellant. At the end of the trial, the Court a quo partially found in favour of the Appellant and made the following order:

> '(a) The [Appellant] is entitled to the damages of E106,904.30 calculated as follows:
>
> (i) Plastering of wall fence E26,400.00
>
> (ii) Concrete paving E44,695.90

(iii) Balustrades E23,760.00

(iv) Interlocking pavers E12,048.40

. . .

(b) The [Appellant] is also entitled to interest at the rate of 9% per annum a *tempore morea* together with costs of suit at ordinary scale.'

This judgment was handed down on 28 April, 2023.

[6] It is common cause that on 03 May, 2023, a mere five days after the said judgment, Counsel for the Appellant caused a Writ of Execution to issue for the attachment of the movable properties of the Respondents to satisfy the said judgment. This Writ was followed by the filing and taxation of a bill of costs on 16 May, 2023. This was allowed in the sum of E47,851.46. It is common cause further that the Respondents paid a total sum of E112,318.56 to the Deputy Sheriff in satisfaction of the Writ of Execution. This is in addition to the bill of costs referred to herein. In the ordinary course of such matters, one would have expected that the completion of the execution of the judgment would bring the matter to an end. However, on 26 May 2023, the Appellant noted an appeal against the judgment delivered on 28 April, 2023.

[7] In its Notice of Appeal the Appellant complains that the Court *a quo* erred

> '1. . . .and or misdirected itself by not awarding the Appellant the full sum of E175,000.00 . . . for the construction of the wall fence notwithstanding the unchallenged evidence of the representative of Chakaza Holdings Company who testified to the fact that the wall was constructed by the Appellant from inception and not Chakaza Holdings Company.
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> 2. and or misdirected itself in accepting the evidence of the Respondents' Quantity Surveyor to the effect that payment for the construction of the wall was made to Chakaza Holdings Company, contrary to the testimony of Chakaza Holdings Company's representative and the First Respondent who both testified to the fact that the payment initially intended for the wall construction was redirected to cater for escalation on the construction project and that a new quotation for the wall construction was prepared pursuant to which the Appellant was engaged and hired to carry out the work.
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> 3. both in law and in fact by coming to the conclusion that payment to the Appellant of the full amount would constitute unjust enrichment on the part of the Appellant when there was no proof of payment that the Appellant and or Chakaza Holdings Company had

been paid for construction of the wall in terms of the new quotation for which Appellant was engaged.

4. in law and in fact by accepting the Quantity Surveyor's evidence in relation to the wall construction notwithstanding that the Quantity Surveyor admitted and testified that he was never on site during the time the Appellant undertook construction work and neither did he measure the Appellant's work while they were on site and before they abandoned site.'

[8] The original record of appeal that was prepared by the Appellant did not include documents or material that were executed or generated after the delivery of the judgment by the High Court. This exclusion necessitated the Respondents to file an application in terms of Rule 33 of the Court of Appeal Rules to adduce or lead further and fresh evidence. This application was filed on 30 September, 2024.

[9] The material or evidence that was sought to be submitted or incorporated into the Record of Appeal relates to the Writ of Execution in respect of the relevant judgment and the satisfaction thereof by the Respondents. These issues or events occurred after the judgment and in consequence of such judgment but before the Appellant noted this appeal. The Respondents have

stated that this material or evidence is acutely relevant in this appeal inasmuch as it constitutes a complete defence to this appeal. The Respondents state that by executing or enforcing the judgment of the Court *a quo*, the Appellant is deemed to have accepted or acquiesced to the said judgment and cannot, in law, appeal against it.

[10] The application to adduce further evidence was not opposed by the Appellant and it was accordingly granted by the Court at the commencement of this appeal. The Court granted the application based on its apparent or *prima facie* relevance or efficacy in these proceedings. Additionally, the filing or granting of the said interlocutory application resulted in an application by the Appellant to supplement its Heads of Argument by incorporating its response on the question or defence of peremption or acquiescence. Again, this application was not opposed and was granted by this Court.

[11] As already stated above, the Appellant executed or enforced the judgment of the High Court before it filed and served the Notice of Appeal. The said judgment was enforced in full; that is to say, inclusive of costs and interest on the capital amount awarded by the Court. The Respondents submitted that this conduct by the Appellant is an unequivocal or deliberate sign that

the Appellant accepts the relevant judgment. Such conduct is totally inconsistent with an intention to appeal the said judgment. It is based on this conduct that the Respondents submit that the Appellant, who was at all times material hereto represented by Counsel, waived its right to appeal against the said judgment. That is the defence of peremption or acquiescence as it is generally known in our law.

[12] In *Master of the High Court N.O. & Another v Sun International Management Ltd & Others (45/2022) [2924] SZSC 64 (29 February 2024)* at 23, this Court had this to say

> '[23] A helpful exposition of peremption referencing a series of authoritative cases going back more than a century ago is to be found in *Theodosiu & Others v Schindlers Attorneys 7 Others 2022 (4) SA 617 GJ at 77;*
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> > "[77] Peremption (not to be confused with pre-emption) is not a word we hear everyday and means at common law that a party must make up his mind and cannot equivocate by acquiescing in a judgment and later on deciding to appeal such a judgment. The general rule is that a litigant who has deliberately abandoned a right to appeal will not be permitted to revive it. Peremption is one aspect of a broader policy that

there must be finality in litigation in the interest of the parties and for the proper administration of justice. It is open to a Court to overlook the acquiescence if it would not be in the interest of justice, bearing in mind the policy underlying the rule. In *President of the Republic of South Africa v Public Protector & Others 2018 (2) SA 100 (GP) [2018] 1 All SA 800; 2018 (5) BCLR 609,* the full Court held . . . that the President's acceptance of and acquiescence in the remedial action amounted to a peremption of his right to review the remedial action, and held:

'[176] The legal principles pertaining to peremption are well established. In *Dabner v South African Railways and Harbours 1920 AD 583 at 594, Innes J.* stated;

"The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the

party alleging it. In doubtful cases acquiescence, like waiver must be held non-proven.

[177] In *Gentiruco AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A) at 600A-B Trollip* JA said:

"The right of an unsuccessful litigant to appeal against an adverse judgment or order is said to be perempted if he, by unequivocal conduct inconsistent with an intention to appeal, shows that he acquiesces in the judgment or order . . . ."

[178] What emerges from these cases is that the common law doctrine of peremption applies to judgments or orders of Court. Peremption like waiver, is not lightly presumed, and the onus upon the party alleging peremption to establish conduct that clearly and unconditionally demonstrates acquiescence in and a decision to abode by the judgment or order.'

[13] The party who raises the defence of peremption bears the burden of showing that the conduct complained of shows clearly or indubitably that the other party made a deliberate and conscious election not to challenge the Court decision. (Vide *Natal Rugby Union v Gould 1999(1) SA 432 (SCA) Mphetseni Cooperative Society Limited v L.R. Mamba & Associates*

(22/2016) [2016] SZSC 02 (30 June, 2016) and Jimson Jeke Tfwala v Swaziland Development Finance Corporation (17/2015) [2016] SZSC 72 (30 June, 2016).

[14] In *Jimson (supra),* this Court restated the doctrine of peremption in the following terms:

> '[47] The Respondent argued that the principles of the doctrine of acquiescence were canvassed in the case of *Botha v White 2004 (3) SA 184* where the Court stated;
>
> > "[31] The doctrine of acquiescence is competent to halt cases where its application is necessary to attain just and equitable results. The test for inferred acquiescence is the impression created by the Plaintiff or Applicant on a Defendant or Respondent. It can be proven by some act, conduct or circumstances on the part of the Plaintiff or Applicant, for example, by the Applicant's delay in taking action, so that the Respondent is lulled into a false sense of security. Then, in such circumstances the enforcement of a right would cause a real iniquity and the Applicant's conduct [would] amount to unconscionable conduct.

> [48] The Respondent also relied on the case of *Hartley Bergshaw & Another v First Rand Limited & Another, Case No.27612/2010* where the Court held that according to the common law doctrine of peremption a party who has acquiesced to a judgment cannot subsequently seek to challenge that judgment because he cannot be allowed to opportunistically endorse two conflicting positions or both approbate and reprobate, or to blow hot and cold. In other words a party cannot be allowed to have his cake and eat it too. The conduct of the applicant must be unequivocal and inconsistent with any intention to appeal. See *Bhekiwe Vumile v Standard Bank Swaziland, Appeal 13/2005."*

[15] The Appellant has rather bizarrely stated that it 'was the overall successful party in the suit and that it rightfully executed the Writ of Execution to recover a portion of what legally belonged to it in accordance with the valid Court Order.' This is not an answer to the defence raised, the nub of the defence is that by enforcing the judgment of the Court *a quo* the Appellant unequivocally signalled its own acceptance thereof and was therefore barred from thereafter challenging it. That the judgment was valid and capable of being enforced is common cause but irrelevant in this instant. There is no

merit in this submission. In terms of the common law, the Noting of an Appeal automatically suspends the execution of the judgment appealed against. The execution having taken place in this case, there was nothing to be suspended. The Appellant cannot have its cake and eat it too. In any event, the award of E106,904.30 is less the 50% of the amount claimed by the Appellant in the summons.

[16] The other point raised by the Appellant was that the appeal only challenges the award in respect of the costs for erecting the wall fence and not the whole award. This submission is, however, unsustainable. It ignores the fact that the Appellant enforced the award of E26,400.00 in respect of the wall fence and consequently waived its right to challenge this award.

[17] For the above reasons, I would dismiss this appeal on the ground that by enforcing the judgment of the Court *a quo*, the Appellant unequivocally waived its right to appeal against the said judgment.

[18] Just for the sake of completeness of this appeal, one point bears mention herein and it is this: Although the parties were able to specify the scope of the works to be undertaken by the Appellant, as shown in the interim certificate dated 24 September, 2021 (P2), the value of each piece of work

was not quantified or priced. Instead, a globular sum of E320,000.00 was agreed upon. This was the highest amount that the Respondents could afford, they said. Consequently, the amount claimed by the Appellant was 80% of the contract price (320,000.00 x 80% = E256,000.00). It is also not insignificant to note that this assessment or evaluation of the work allegedly done by the Appellant was not done by an independent Quantity Surveyor or Project Manager but by the Appellant itself. It is common ground that when the Respondents refused to honour this certificate, the Appellant repudiated the contract, and locked the premises and abandoned the construction site.

[19] As a direct consequence of the repudiation aforesaid, the Respondents had to engage the services of other service providers to complete the construction works. The costs paid to these service providers were thus subtracted or debited from whatever amount was due to the Appellant. It stands to reason, I think, that by engaging these service providers, the Respondents tacitly accepted the repudiation of the contract by the Appellant.

[20] The contract price agreed to between the Respondents and Chakaza for the erection of the wall fence was the sum of E150,000.00 and was subsequently

increased to E180,752.95 to cater for escalation of the costs occasioned by COVID 19 lockdown. This sum was duly paid to Chakaza and both the First Respondent and Mr. Mduduzi Lukhele of Ngwenya Wonfor & Associates testified that this amount was then 'repurposed to become part of meeting Chakaza half-way for the costs of escalations that were brought forward.'(Page 292 line 4-5 of Record). This "repurposing" does not, however, detract from the central premise that Chakaza built a major portion of the wall fence. Mr. Lukhele stated that '[the] wall fence had been constructed fully [but] a small portion was incomplete near the neighbour's area.' (Page 333 line 11-12 of Record). This evidence was accepted by the Court *a quo* and it has not been shown in this appeal that the said Court was in error in this regard. Again, the repurposing or redirection of the funds referred to above may be a credit to Chakaza's account but the Appellant may not lay claim to it. The accepted evidence is that the Appellant only did the plastering of the wall fence.

[21] The balustrades installed by the Appellant were unsuitable or not – fit - for - purpose and had to be removed and replaced by another service provider. So, what the Appellant did in this regard cannot be financially rewarded by the Respondents. The Court a quo accepted this evidence but for some inexplicable reason found for the Appellant. (See para. 24 of the judgment).

For this reason, I do not think that the Appellant was entitled to be paid for this task. I would also dismiss this appeal on this ground, in the event I am wrong in my assessment of the appeal regarding the doctrine of peremption.

[22] For the foregoing reasons, I would make the following Order:

(a) The appeal is dismissed.

(b) The Appellant is ordered to pay the costs of appeal.

M. D. MAMBA
JUSTICE OF APPEAL

I AGREE

S. B. MAPHALALA
JUSTICE OF APPEAL

I ~~ASLO~~ AGREE

S.J.K. MATSEBULA
JUSTICE OF APPEAL

FOR THE APPELLANT: **MR. M TENGBEH**

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