

IN THE SUPREME COURT OF ESWATINI

HELD AT MBABANE

CIVIL CASE NO: 90/2023

In the matter between:

DUMISANI HARRINGTON MKHONTA

APPELLANT

And

PIGG'S PEAK TOWN COUNCIL

RESPONDENT

Neutral Citation: *Dumisani Harrington Mkhonta vs Pigg's Peak Town Council (90/2023) [2024] SZSC 70/2024.*

CORAM:

MCB MAPHALALA CJ

SP DLAMINI JA

SB MAPHALALA JA

DATE HEARD:

18 MARCH 2024

DATE DELIVERD:

4 APRIL 2024

ABRIDGED JUDGMENT

S. P. DLAMINI - JA

BRIEF BACKGROUND

- [1] This is an appeal against a judgment of the High Court dated 26 October 2023.
- [2] The Appellant approached the High Court by way of Notice of Motion dated 03 March, 2022, seeking *inter alia* that an Agreement of Settlement signed by the parties dated 11 July 2019 be made an order of Court.
- [3] The High Court heard and dismissed the Appellant's Application with costs in terms of the impugned judgment.
- [4] The Appellant being dissatisfied with the decision of the High Court launched an appeal against the judgment of the High Court. In his Notice of Appeal dated 09 November, 2023 advanced several grounds of appeal. The Appeal is being opposed by the Respondent and the parties have filed Heads of Argument and Bundle of Authorities in this regard

[5] At this juncture, it is apposite to state that the Respondent filed an Application for Condonation for the late filing of Heads of Argument and Bundle of Authorities dated 13 March, 2024 which was not opposed by the Respondent. The Court in the interest of justice granted the Condonation Application and no order as to costs was made.

[6] In view of the conclusion of this Court that the matter must be referred to the High Court as setout below, it is inappropriate to traverse the grounds of appeal, the facts and arguments advanced for and on behalf of the Appellant and Respondent's response thereto before this Court. For this reason, this Court is giving an abridged judgment.

[7] At the hearing of the matter before this Court and in the papers filed before the High Court and this Court, the inescapable central issue is whether there is a balance due and payable by the Respondent to the Appellant and if so, what is the amount.

[8] In determining the issue of whether there is an amount owed by the Respondent to the Appellant, in our view disposes of the matter between

the Parties definitively. However, the proceedings instituted by the Appellant in the High Court rendered this central issue subordinate to the relief sought by the Appellant to make the Settlement Agreement between the Parties an order of Court. This approach would not settle the matter between the Parties in a definitive way irrespective of the outcome. Furthermore, it is really unnecessary to first make the settlement between the Parties an order of Court before the claim for balance that the Appellant is demanding against the Respondent is made.

[9] The High Court, therefore, was not called upon to deal with the issue of the balance principally thus the Court dealt with it indirectly in its enquiry as to whether to make the Settlement Agreement between the Parties an order of Court. Therefore, this issue remains alive irrespective of the judgment of the High Court and this Court as a Court of Appeal may not deal with it at this stage.

[10] Article 2 of the Settlement Agreement between the Parties provides as follows;

“ AND WHEREAS the parties herein have now agreed to settle the matter on the following terms:

2.1 That the amount of E783 051.50 (Seven Hundred and Eight Three Thousand Fifty One Emalangeneni fifty Cents) represents the full sum claimed against the Defendant for the refurbishment of eMahlungwane complex being the Plaintiff's immovable property being certain lot 377 situate in Pigg's Peak Town.

2.2 That the Plaintiff is indebted to the Defendant to the sum of E257 129.61 (Two Hundred and Fifty Seven thousand One Hundred and Twenty Nine Emalangeneni Sixty One Cents) in respect of rates, arrears owing by the Plaintiff over the abovementioned immovable property.

2.3 That each party shall withdraw any and all reliefs sought by either Party hereto against the other Party, and all claims that either Party may have against the other Party in respect of the above-mentioned action/legal proceedings.

2.4 That the parties hereby agree, without any admission as to liability whatsoever, to a set-off as a full and final settlement in all and every respect of all and every claims, reliefs, liabilities, loss and/or damage of whatsoever nature against or by whosoever that each Party has or may have raised, pleaded, disclosed, referred to and/or relied on in relation to action/legal proceedings or claims mentioned herein above.

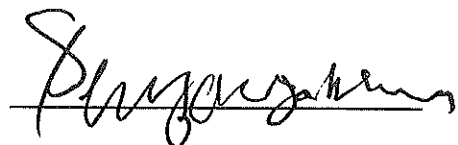
2.5 That in terms of this settlement the parties' herein record specifically that each party shall have no further claims against the other".

10.1 The issue as to whether there is a balance due for payment by the Respondent of the Appellant is raised in the papers in the context of the set-off payment under article 2.4 above.

[11] Accordingly, the matter is referred back to the High Court before a differently constituted Bench to determine whether there is a balance due and payable to the Appellant by the Respondent in view of the compromise and set off between the Parties in terms of the Settlement Agreement.

[12] In the result, the Court makes the following order;

1. The appeal partially succeeds and the matter is referred back to the High Court for hearing of oral evidence before a different constituted bench in order to determine;
 - 1.1 The effect of the set off agreed to by the Parties in the Settlement Agreement; and
 - 1.2 Whether there is a balance and if so the amount due and payable by the Respondent to the Appellant.
2. Costs to be costs in the cause.



S. P. DLAMINI

JUSTICE OF APPEAL

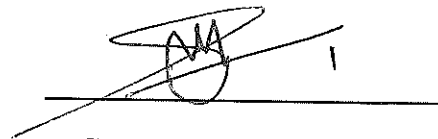
I agree



M.C.B. MAPHALALA

CHIEF JUSTICE

I also agree



S. B. MAPHALALA

JUSTICE OF APPEAL