



IGH COURT OF ES  
IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CIVIL CASE NO. 1134/19

In the matter between

GABRIEL GODHINO

APPLICANT

AND

PHETSILE NDZABNDZABA

I<sup>ST</sup> RESPONDENT

SENIOR MAGISTRATE

DONALD MAVUSO

2<sup>ND</sup> RESPONDENT

ATTORNEY GENERAL

3<sup>RD</sup> RESPONDENT

*In re:*

PHETSILE NDZABNDZABA

APPLICANT

AND

GABRIEL GODHINO

1<sup>ST</sup> RESPONDENT

SENIOR MAGISTRATE

DONALD MAVUSO

2<sup>ND</sup> RESPONDENT

ATTORNEY GENERAL

3<sup>RD</sup> RESPONDENT

Neutral citation: *Gabriel Godhino v Phetsile Ndzabandzaba & others (1134/19)*  
*SZHC-179[2019} (17 September 2019).*

CORAM : D Tshabalala J

Heard : 13/09/19

Delivered : 17/09/19

## JUDGEMENT: APPLICATION FOR EXECUTION PENDING APPEAL

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[1] This is an application brought under a certificate of urgency for an order for the relief, *inter alia*,

"

2.

(a) *Granting the applicant leave to execute this...court's order of the 16<sup>th</sup> August 2019 pending finalization of the appeal against same or any other appeal against the said order.*

(b) ... "

[2] The background to this matter is that the applicant and the 1<sup>st</sup> respondent were live-in lovers. Their relationship later soured and they became estranged whereupon the 1<sup>st</sup> respondent left their joint rented residence and went to live at her parental home. The 1<sup>st</sup> respondent subsequently returned and removed household items from the house, leading to the spoliation application launched before Siteki magistrate court by the applicant herein. The 2<sup>nd</sup> respondent issued an interim order against the 1<sup>st</sup> respondent for restoration of the goods to the applicant pending finalization of the spoliation proceedings. The items included a car, fridge, pots, etc.

[3] Following the 1<sup>st</sup> respondent's failure to restore the *status quo ante* per the 2<sup>nd</sup> respondent's interim order of the 5 July 2019, contempt proceedings were also

initiated against the I<sup>st</sup> respondent. The I<sup>st</sup> respondent on her part verbally moved before the 2<sup>nd</sup> respondent's application for his recusal from the matter, citing his alleged close relationship or friendship with the applicant. The 2<sup>nd</sup> respondent declined to hear the I<sup>st</sup> respondent until she complied with the interim order. The matter was postponed for hearing to the IO July 2019. However, on the 11 July the first respondent filed an urgent application before this court seeking review and setting aside of the interim order of the 2<sup>nd</sup> respondent made on the 5 July 2019.

[4] The relief sought on review by the I<sup>st</sup> respondent before this court on the 11 July 2019 was *inter alia* per prayers 3 - 8 of the Notice of Motion, as amended. Prayers briefly stated are:

*I ....*

*2 ... ..*

*3. Reviewing and setting aside the 2<sup>nd</sup> respondent's decision of the 5 July 2019 ordering and directing the applicant (therein) to restore to the J8<sup>1</sup> respondent all items removed from the parties 'residence, and further order the Clerk of court a quo to release forthwith record of proceedings in the court a quo in respect of the matter for review.*

*4. Stay of proceedings between the parties before the court a quo pending finalization of the review application*

*5. Operation of prayer 4 with immediate interim effect.*

*6 ....*

*7....*

*8....*

[5] On the 11 July 2019 an interim order was granted by this court in terms of prayers 3 - 4 of the Notice of Motion. A *rule nisi* was issued returnable on the 25 July. The review application was eventually argued on the 16 August 2019, on which date the review application was dismissed with costs and the *rule nisi* discharged.

[6] The logical consequence of dismissal of the review application was that the stay of spoliation proceedings before the court *a quo* and or any ancillary proceedings thereto was lifted and could proceed unhindered. The order of the High court dismissing the review application related to the prayers and relief sought before this court per the applicant's papers.<sup>1</sup> There was no directive made by this court to the court *a quo*.

[7] The applicant's case is that it set the spoliation case down for the 5 September 2019 in response to which pt respondent's attorneys advised that an appeal<sup>2</sup> has been filed against the High court's review judgment and that all related proceedings before the court *a quo* have been automatically stayed pending the outcome of the appeal. The Applicant's view is that the substance of the appeal does not necessarily automatically suspend the pending proceedings in the court *a quo*, that the spoliation case can be heard on the merits and without prejudice to the 1<sup>st</sup> respondent whichever way the appeal is decided.

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<sup>1</sup> See Paragraph [4] of *this* judgment for the summarized relevant prayers

<sup>2</sup> Served with the applicant's attorney's correspondents on the 20 of August 2019.

[8] The applicant submits that the appeal is a farce and has been filed simply to frustrate him by delaying the hearing of the merits of the spoliation proceedings. The applicant argues that the ground of appeal lacks merit and prospects of success in so far as it is directed at an *obiter dicta* as opposed to decision of the court on the relief that was prayed for, namely the finding of the court that the 5 July 2019 interim order was made after affording the respondent a hearing. The ground of appeal reads thus:

*"The court a quo misdirected himself both in law and in fact by ordering that the learned magistrate was within his powers in ordering that the compliance with the court order that he issued on the 5 July 2019 yet he ought not to have granted it in the first place but recused himself from the matter because the F<sup>1</sup> respondent is a close friend to the learned magistrate. "*

[9] The applicant submits that the purpose of the general rule that an appeal stays the operation of the order being appealed is to prevent irreparable prejudice to the appellant whose successful appeal could be rendered academic. The applicant submits that this is not applicable in the present case.

[10] The 1<sup>st</sup> respondent's case is firstly that the court has no jurisdiction to hear the application, alleging that the magistrate's court is the rightful forum. The respondent also denies that the applicant suffers any prejudice from non prosecution of the pending spoliation application. She submits that the applicant is living a comfortable *life* because she only took away what belonged to her from the house and left what belonged to him.

(11) The 1<sup>st</sup> respondent avers that her appeal on the interim order was erroneously granted against her, therefore her appeal against it has prospects of success. It is a bit confusing whether the appeal referred to is the same one canvassed in this matter by the applicant. The confusion in the 1<sup>st</sup> respondent's assertion arises from the fact that as far as this application is concerned, she appealed against this court's order affirming the court *a quo*'s right to require her compliance with its order before granting her audience. On the face of the notice of appeal, there is no indication for an appeal against the 2<sup>nd</sup> respondent's interim order of the 5<sup>th</sup> July. Nonetheless as the 1<sup>st</sup> respondent rightly points out this court has no interest for the purpose of this application to assess or decide the prospects or otherwise of the appeal.

### **Jurisdiction**

[12] At the first hearing of this application the 2<sup>nd</sup> respondent raised a point *in limine* concerning jurisdiction of this court to hear the execution application. It is averred that the order sought to be enforced is not the order of this court but that of the court *a quo* and therefore the court is incompetent to hear it. As noted earlier, the 1<sup>st</sup> respondent appears to be referring to the interim spoliation order of the 5 July issued by the 2<sup>nd</sup> respondent. There can be no doubt of the court's jurisdiction in that regard. However according to the applicant's papers and submissions, relief sought is for this court to order that its order of the 16 August be given effect to, pending the pt respondent's appeal. Immediate effect of the said order of the 16 August in relation to the senior magistrate's interim spoliation order of the 5 July 2019,<sup>3</sup> was that the latter case could be heard on the merits. This is the limited opportunity the applicant had which was short-lived when an appeal was filed. What the applicant seeks in these proceedings is the outcome that will enable him, despite the appeal, to set the spoliation application down for

<sup>3</sup>The interim order which the 1<sup>st</sup> respondent I yet to comply with.



hearing and possible finalization on the merits. The point in *limine* is misdirected. It is therefore dismissed.

[13] This court expressed its opinion in its written *extempore* judgment of the 16 August that the courts jealously guard their authority and therefore frown upon defiance of court orders without good cause. This court registered its observation that the "*court a quo properly and within its rights required the applicant to purge the alleged contempt of the court before the court could hear her.*" <sup>4</sup>

[14] I tend to agree with applicant's analysis that the above opinion of the court constitutes *obiter dictum*, regard being had to the fact that the 1<sup>st</sup> respondent had not sought relief concerning the court *a quo*'s decision made on the 9 July 2019 on the contempt issue. It did not form any part of specific reliefs she prayed for.

[15] It is the view of this court that in the absence of an amicable settlement by the parties of their differences, justice would be served for both parties through ventilation of the issues arising in the spoliation case before the court seized with that matter. The merits of that application should be argued and the matter adjudicated. There is no doubt that parties have each a right to appeal decisions of the lower courts within the provisions of the law. However, it is not helpful while asserting one's rights to attempt to avoid legal consequences of one's actions as it is apparent from the relentless efforts of the 1<sup>st</sup>

<sup>st</sup> respondent.

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<sup>4</sup> At paragraph [10] of *extempore* judgment.

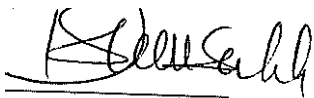
<sup>5</sup> See paragraph [4] in this judgment for the specific substantive prayer sought in the review application.

[16] Having taken into account the notice of appeal to the Supreme Court filed as an annexure herein, and the overall factors involved in this case as highlighted by counsels for both parties, it is my considered view that the 1<sup>st</sup> respondent will suffer no prejudice by the granting of the order sought herein. Therefore, the application succeeds with costs. It is up to the parties with advices of their legal representatives, what give-and-take concessions they may make concerning how the pending spoliation case proceeds.

### **Order**

16.1 The applicant is granted leave to enforce the order made by this court on the 16 August 2016, pending appeal lodged by the 1<sup>st</sup> respondent. The consequence of this order is that the applicant is at liberty to cause to proceed, the hearing of magistrate's court *case no. 229/2019*.

16.2 Costs of suit against the 1<sup>st</sup> respondent at ordinary scale.



Tshabalala

D Tshabalala  
Judge of the High Court

For Applicant: T  
Bhembe For First Respondent: S  
Jele