IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No: 464/09

In the matter between

CHRISTOPHER VILAKATI	**APPLICANT**
And	
THE PRIME MINISTER OF SWAZILAND	**1st RESPONDENT**
THE COMMISSIONER OF POLICE	**2ND RESPONDENT**
SUPT. M.D. DLAMINI	**3RD RESPONDENT**
THE ATTORNEY GENERAL	**4TH RESPONDENT**

Neutral citation: *Christopher Vilakati v The Prime Minister of Swaziland and 3 Others (464/09*) [2013] SZHC 66

(21 March 2013)

Coram: **OTA J**

Heard: **15 March 2013**

Delivered: **22 March 2013**

Summary: **Order striking off appeal by Supreme Court: effect thereof on the impugned judgment: civil contempt proceedings in the wake of striking off order: appeal still pending and operates as an automatic stay of the impugned decision: personal service of initiating contempt process on contemnor statutorily required: application dismissed.**

[1] In this case the Applicant **Christopher Vilakati** who was a police officer, stood trial as defaulter, in a disciplinary hearing held before a board of Senior Police Officers in terms of Section 13 (1) of the Police Act No. 29 of 1957 as amended, by Act No. 5 of 1987. The disciplinary hearing was the outcome of investigations which the police had conducted into the Applicants implication in the theft of a motor vehicle, a white Nissan Sentra which the Applicant had purchased in September 2003 from one **Peace Mabuza** for the sum of E18,200-00. The Applicant subsequently resold the said vehicle to one **Nkosinathi Dlamini** for E16,000-00, a year later. It was

thereafter, and following the apprehension of the vehicle by the Matsapha police at a road block, that it was discovered the said vehicle was infact stolen at the time the Applicant purchased it. It was against the aforedetailed background that the investigations and disciplinary hearing ensued.

[2] The fall out from the disciplinary hearing was that the Applicant was found guilty of two out of the three counts in respect of which he stood trial and was fined a total of E300.00. The Board also recommended his dismissal from the Police Service and indeed he was dismissed on the 30th of August 2007, as recommended. Aggrieved, the Applicant approached the High Court per **MCB Maphalala J,** contending for an order reviewing and setting aside his dismissal from the Swaziland Police Service.

[3] Suffice it to say that on 30th of April 2012, **Maphalala J,** granted the review sought, upon the following terms:

> "a) The application to review and set aside the decision of the Respondents dismissing the Applicant as a police

officer pursuant to his disciplinary hearing is hereby granted.

b) The Respondents are directed to reinstate the Applicant as a police officer forthwith with effect from the date of dismissal on the 30th August 2007.

c) The Respondents are directed to pay the Applicant his arrears of salary from the date of dismissal on the 30th of August 2007.

d) The second Respondent is directed to pay costs of suit to the Applicant on the ordinary scale".

[4] The Respondents were not happy with the foregoing orders. Their dissatisfaction elicited an appeal against same under Appeal Case No. 30/2012; wherein as is the tenor of all appeals, the Respondents as Appellants, criticized the said orders on grounds that the High Court erred in issuing them. We need not concern ourselves with the details of the grounds of the said appeal as they have no bearing whatsoever on the issues at hand.

[5] Suffice it to say that Appeal Case No. 30/2012 eventually served before the Supreme Court for argument on the 20th of November 2012, on which date Crown Counsel **Mr Vusi Brian Kunene,** moved an application on behalf of the Respondents/Appellants for condonation of the late filing of the record of appeal.

[6] The Supreme Court after canvassing the affidavit in support of the application for condonation and juxtaposing same with the Applicant /Respondents answering affidavit, stated as follows in paragraph [6] of its judgment rendered on 30 November 2012,

> "[6] No replying affidavit has been filed on behalf of the appellant refuting the foregoing assertions. The application for condonation must accordingly fail for the above reasons as well as for those set out in the following paragraphs"

[7] The record shows that after making the pronouncement in paragraph [6], the Supreme Court went further to consider the record of appeal, which it condemned in its entirety for failing to scale all the 10 hurdles posted in its path by Rule 30 (6) of the Court of Appeal Rules.

[8] In conclusion, the Supreme Court held as follows in paragraphs [12] and [13] of its judgment:-

> "CONCLUSION
>
> [12] The record which was presented to this court was illegible, incomplete and as has been said earlier totally inadequate for use by this court in determining the appeal. It is to be hoped that the record in this case is not replicated in any future cases. There being in essence no record before this court the appeal must accordingly be struck from the roll.
>
> ORDER
>
> [13] It is the order of this court that the appeal be and is hereby struck from the roll with costs"

[9] It appears that premised on the aforegoing orders of the Supreme Court, the Applicant commenced the application instant, wherein he seeks the following reliefs against the 2nd Respondent:-

"1. Committing the 2nd Respondent (Commissioner of Police) to prison for Thirty (30) days, or such other periods until the contempt is purged, as per Supreme Court judgment of 30th November 2012 and the High Court judgment of 30th April 2012.

2. Ordering the 2nd Respondent to pay Applicant's arrear salary from September 2007 to February 2013 in the sum of E488,400.00

3. Interest thereon at the rate of 9% per annum being E43,956.00 as at February 2013.

4. Awarding costs against the Respondents on the scale of attorney and own client.

5. Further and/or alternative relief".

[10] The facts on which the Applicant premised these reliefs are contained in a founding affidavit which he filed simultaneously with the application.

[11] The Respondents who are opposed to this application filed an answering affidavit in which they raised the following points of law seeking to defeat the application *in limine,* namely:-

1. Constitutionality of the Common Law of Contempt.
2. Irregular service.

[12] The Respondents also opposed the application on the merits.

[13] Now, having carefully considered the totality of the papers serving before Court, the first and paramount question deserving of my attention to my mind, is, what is the effect of the Supreme Court judgment on the impugned decision of the High Court? I raised this question *mero motu* when this application was heard and invited argument from the parties in respect thereto.

[14] **Mr M. P. Simelane** who appeared for the Applicant, whilst agreeing that generally, the effect of the order striking off the appeal in paragraph [13] of the Supreme Court decision is that the appeal was not extinguished, thus entitling the Respondents to seek leave from

the Supreme Court to re-instate it, however contended, that the effect of the striking off in this case is specialized and must be distinguished from the general practice.

[15] In support of this proposition, **Mr Simelane** submitted, that the striking off order cannot be read in isolation, but must be taken in the context of the earlier pronouncement of the Supreme Court in paragraph [6] of its judgment, where it had held that the application for condonation of the late filing of the record must fail for want of a replying affidavit from the Respondents/ Appellants, controverting the facts contained in the Applicant/Respondents answering affidavit. Counsel's contention, which I must state here is also the grounds upon which the application is founded, is that since the Supreme Court determined that the application was lacking and accordingly declined the condonation, implicit from this is that the appeal was abandoned. Therefore, there was no appeal *strictu sensu* to be determined by the Supreme Court and the only route left for the Supreme Court was to strike the appeal off the roll in the circumstances. Therefore, an application for a re-instatement of the

appeal in these circumstances would amount to an academic exercise serving no useful purpose.

[16] It was argued *au contraire* for the Respondents by **Mr Kunene**, that the effect of the striking off order was that the appeal remained alive and pending before the Supreme Court. That the proper procedure in the circumstances is for the Respondents to approach the Supreme Court by way of motion for its leave to re-instate same, which procedure the Respondents have already availed themselves of.

[17] I have carefully considered the judgment of the Supreme Court and I am inclined to agree with the Respondents that what we are faced with is an order striking off the appeal. Such an order does not emasculate the appeal and a party affected thereby is still entitled to approach the Supreme Court for its leave to re-instate it.

[18] Let me at this juncture, disabuse the Applicants entreaties for this court to go beyond the striking off order which the Supreme Court made, to investigate the effect of the courts failure to condone the said record of appeal on such an order. By these entreaties the

Applicant calls upon me to interprete the judgment of the Supreme Court in these respects. Certainly, this is an exclusive preserve of the Supreme Court which I fear to thread. It is common cause that the Respondents have urged an application for leave to re-instate the appeal before the Supreme Court, that to my mind, is the proper forum for these issues to be raised, canvassed and determined.

[19] Since I have determined that the striking off order did not emasculate the appeal, it follows that the appeal is pending, moreso in the face of the application launched by the Respondents for its re- instatement.

[20] The effect of such on appeal is that it acts as an automatic stay of execution of the impugned decision. This is the Common Law position which holdsway in this jurisdiction, which is in turn underscored by the consideration of a potential of irreparable harm being done to the appellant in case his appeal succeeds.

[21] I had occasion to consider this principle in the case of **Swaziland Water and Agricultural Development Enterprises Ltd V Doctor Lukhele and Another Case No. 1504/2011, para [46]** with reference

to the **South African Case of Reed and Another Vs Godart and Another 1938 AD 513,** where **De Villers JA** stated as follows:-

> "---The foundation of the common law rule as to the suspension of a judgment on a noting of an appeal, is to prevent irreparable damage from being done to the intending appellant, whether such damage be done by a level under a writ or by the execution of the judgment in any other manner appropriate to the nature of the judgment appealed from".

[22] It is worth mentioning, that it is this selfsame principle that underpines stay of the operation and execution of an order or judgment in the face of an application for leave to appeal against, or to rescind, correct, review or vary such order or judgment, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.

See **Swaziland Water and Agricultural Development Enterprises Ltd v Doctor Lukhele and Another (supra) Betlane Vs Shelly Court CC 2011 (1) SA 388 (cc).**

[23] In the light of the pendence of the appeal, it behoved the Applicant, if he was desirous of executing the assailed judgment, to move an application for leave to execute same pending the appeal, premised on special circumstances which would entitle him to such leave.

[24] This is however not such a case, The application instant is not for leave to execute the said judgment but one for the 2nd Respondent to be cited for contempt for non-compliance with the impugned decision, premised on the erroneous supposition of the Applicant, that he is entitled to proceed to execution in the wake of the Supreme Court decision. The application is thus unsustainable and must fail.

[25] Another insuperable obstacle I find in the path of this application, and as rightly contended by the Respondents in paragraph 2.1 of their heads of argument, is that the 2nd Respondent was not properly served with the initiating application *in casu*, in view of its legal connotations. The Respondents made this assertion with reference to Rule 4 (2) (j) of the High Court Rules which states

"when the process or application to the court is for an order affecting the liberty of the Respondent ----the process or application therefore shall be served by delivery of a copy thereof to the Respondent personally, unless the court for good cause shown gives leave for such process or application to be served in some specified manner". (emphasis added)

[26] The use of the word "shall" in the above legislation makes personal service in proceedings such as *in casu*, a mandatory command, unless the court otherwise directs for good cause shown. It is thus a condition precedent in committal proceedings that the contemnor is served personally. If this is not done the court will not have jurisdiction.

[27] Furthermore, it is also a requirement of fair hearing. It is such a condition of fair hearing that it cannot be regarded as a procedural irregularity. Rather, it is a constitutional fundamental requirement of fair hearing. This is because the case against the contemnor will involve a criminal type punishment, like imprisonment, monetary fine and the like, following a finding of guilt. As Article 21 (2) (b) of the Constitution provides, a person who is charged with a criminal

offence shall be informed as soon as reasonably practicable, in a language which that person understands and in sufficient details of the nature of the offence or charge.

[28] Little wonder then **LTC Harms,** in the text **Civil Procedure in the Supreme Court, 1990 (Butterworths) at page 152 paragraph F6**, which was cited with approval by the Respondents, states as follows.

> "In divorce proceedings and application for imprisonment, it is the practice to insist on personal service for the initiating process".

[29] *In casu*, the indisputable and common cause fact is that the initiating application was not served on the 2nd Respondent personally but was served on the Attorney General's Chambers.

[30] Even though **Mr Simelane** contended that service on the Attorney General's Chambers was proper service on the 2nd Respondent because, he chose the Attorney Generals Chambers as his *domicillium* this allegation is however not borne out of the record. **Mr Simelane** has referred me to the Respondents letter (annexure CV5) (page 43 book) which was in reply to the letter from

Applicants Counsel (annexure CV4) (pages 41-42 book), which hardly demonstrates this fact. In any case, even if I were to uphold the contention that the 2nd Respondent chose the Attorney Generals Chambers as *domicillium*, this cannot derogate the fact of personal service in cases of this nature which is statutorily required. For service on such *domicillium*, to constitute proper service within the terms of the statute, leave of the court must first be sought and obtained. I cannot go against such clear words of statute. This contention must therefore fail.

[31] Similarly, the contention that the application which has now been personally served on the 2nd Respondent has effectively regularized the hitherto irregular procedure, holds no water. Such a subsequent personal service cannot in my view regularize the initial irregular step of non personal service, which rendered the proceedings a nullity.

The statutory condition of personal service in my view, cannot be satisfied if the 2nd Respondent is informed personally mid stream after the case against him had commenced. In that case there is no compliance with that requirement as is envisaged by statute

[32] I do not wish to concern myself with the constitutional question raised *in limine* by the Respondents, in view of the entrenched position of our law, that a court will not determine a constitutional issue where a matter may properly be decided on another basis. As stated by the Supreme Court in the case of **Daniel Didabantu Khumalo v The Attorney General, Civil Appeal No. 31/2010, per Ramodibedi CJ,**

> "It is strictly not necessary for this court to reach a concluded view on whether or not the learned judge a quo was correct in relying on lack of jurisdiction in terms of Section 151 (8) of the Constitution. It shall suffice merely to stress a fundamental principle of litigation that a court will not determine a Constitutional issue where a matter may properly be determined on another basis. See ***Jerry Nhlapho and 24 Others v Lucky Home NO (in his capacity as liquidator of VIP Limited in liquidation Civil Appeal No. 37/07"***

[32] It is by reason of the totality of the aforegoing, that this application fails and is accordingly dismissed.

[33] No order as to costs.

For Applicant: Mr M.P. Simelane

For the Respondents: V. B. Kunene
(Crown Counsel)

DELIVERED IN OPEN COURT IN MBABANE ON THIS

……DAY OF ……..….2013

OTA J

JUDGE OF THE HIGH COURT