IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No: 45/15

In the matter between:

SIBONISO CLEMENT DLAMINI **APPLICANT**

And

WALTER P. BENNET **1ST RESPONDENT**

THABISO G. HLANZE NO. **2ND RESPONDENT**

REGISTRAR OF THE HIGH COURT **3RD RESPONDENT**

FIRST NATIONAL BANK SWAZILAND **4TH RESPONDENT**

Neutral citation: *Siboniso Clement Dlamini vs Walter P. Bennet, Thabiso G. Hlanze NO., Registrar of the High Court, First National Bank Swaziland Limited (45/2015) [2015] SZSC 21 (30th May, 2017)*

CORAM: **M.C.B. MAPHALALA, CJ**
DR B. J. ODOKI, JA
M. J. DLAMINI, JA
S. B. MAPHALALA, JA
J. P. ANNANDALE, JA

Heard : **29th March, 2017**

Delivered : **30th May, 2017**

Summary

Civil Procedure – application for review in terms of Section 148(2) of the Constitution of Swaziland of 2005 – general principles of law applicable considered;

Held that the applicant has failed to establish, on a balance of probabilities, the legal basis upon which this Court could invoke its review jurisdiction under Section 148(2) of the Constitution.

Accordingly, the application is dismissed with costs and the judgment of this Court on appeal is upheld.

JUDGMENT

[1] It is common cause between the applicant and the first respondent that on the 14th September 2012, the High Court issued a judgment directing the applicant to pay a sum of E67, 000.00 (Sixty-seven Thousand Emalangeni) to the first respondent together with interest at the rate of 9% per annum from the date of the provisional sentence summons as well as costs of suit. The order was made pursuant to a provisional

sentence summons instituted by the first respondent against the applicant for the sum of E67, 000.00 (Sixty-seven Thousand Emalangeni) which is inclusive of the loan of E45, 000.00 (Forty-five Thousand Emalangeni) as well as the agreed interest of E22, 000.00 (Twenty-two Thousand Emalangeni).

[2] The background of the suit is that the applicant and the first respondent concluded an oral contract in May 2007 in terms of which the first respondent loaned an amount of E45, 000.00 (Forty-five Thousand Emalangeni) to the applicant at an agreed interest of E22, 000.00 (Twenty-two Thousand Emalangeni).

[3] The terms of the contract were that the applicant would give a post-dated personal cheque to the first respondent amounting to E67, 000.00 (Sixty-seven Thousand Emalangeni), and, that the cheque would be presented for payment on a date to be agreed upon by the parties. It is common cause that the cheque was subsequently post-dated to the 6th July 2007, which was the date of payment. However, the cheque was dishonoured on the 12th

November 2007 for want of funds when presented for payment at the bank by the first respondent.

[4] The applicant is a Senior Attorney practising as such in the courts of Swaziland. In breach of the provisions of the contract, the applicant issued a trust cheque, and, the drawer of the cheque was S. C. Dlamini and Company Trust Account. It is common cause that the applicant operates a firm of Attorneys as a sole practitioner, and, he is the signatory to the trust account.

[5] It is evident that the applicant drew the cheque from a trust account which holds funds on behalf of clients with a view to settle a personal debt; this conduct by the applicant is prohibited by the Legal Practitioners Act No. 15 of 1964. The Act draws a distinction between a trust account and a business account which are kept by an Attorney in private practice.

[6] The Legal Practitioners Act[1] confirms this position of the law:

[1]1. Act No. 15 of 1964, Section 24 (1)

"24. Every Practising Attorney, Notary or Conveyancer having an office within Swaziland shall open and keep a separate trust account at a bank lawfully established within Swaziland, in which he shall deposit all moneys held or received by him in connection with his practice within Swaziland, on account of any person; and he shall further keep proper books of account containing particulars and information as to moneys received by him for or on account of any person.

(1) The Attorney General may himself or through his nominee at public expense inspect the books of account of any such Attorney, Notary or Conveyancer to satisfy himself that subsection (1) is being observed;

Provided that, if it is found upon such an inspection that the Attorney, Notary or Conveyancer has not complied with

subsection(1), the reasonable cost of the inspection shall be paid by the Attorney, Notary or Conveyancer.

(2) No amount standing to the credit of such a trust account in the bank shall form part of the assets of the Attorney, Notary or Conveyancer concerned and no such amount is liable to attachment at the instance of any creditor of the attorney, Notary or Conveyancer.

Provided that any excess remaining after payment of the claims of all persons whose moneys have, or should have, been deposited in the trust account, shall be deemed to form part of the assets of that Attorney, Notary or Conveyancer."

[7] The High Court was correct in granting the provisional sentence summons in the sum of E67, 000.00 (Sixty-seven Thousand Emalangeni) together with interest at the rate of 9% per annum from the date of provisional sentence summons as well as costs of suit. During the hearing of the matter, the first respondent had abandoned the administrative costs of E400.00 (Four Hundred Emalangeni) which were initially agreed upon between the applicant and the first respondent.

[8] It is not disputed that during the hearing at the High Court, the applicant admitted liability for the non-payment of the cheque; however, he raised a counterclaim for E10, 000 000.00
(Ten Million Emalangeni) arising from defamation of his character by the first respondent. However, it is a trite principle of our law that a counterclaim is a separate action from the claim which forms the basis of the cause of action, and, that a counterclaim is brought together with the claim for purposes of convenience[2].

[2]2. Per Justice M. C. B. Maphalala JA, as he then was, in the case of Swaziland Polypack (Pty) Ltd v. The Swaziland Government and Another Civil Appeal Case No. 44/2011 at para 8.

[9] It is well-settled in our law that a set-off is appropriate in respect of debts which are for a liquidated amount in money, due and payable to each of the parties[3]. The applicant could not set-off his debt of E67, 000.00 (Sixty-seven Thousand Emalangeni) arising from the post-dated cheque against his claim for damages arising out of defamation because the latter is an illiquid claim. Accordingly, the High Court was correct in rejecting the counterclaim and granting the provisional sentence summons.

[10] The High Court was also correct in finding that the agreed interest of E22, 000.00 (Twenty-two Thousand Emalangeni) was not in contravention of the Money Lending and Credit Financing Act of 1991 as well as the in-duplum rule on the basis that the said interest did not exceed the amount of the loan. An adverse finding by the High Court would have offended the principle of unjust enrichment.

[3]3. Swaziland Polypack (Pty) Ltd v. The Swaziland Government (supra) at para 45

[11] The Money Lending and Credit Financing Act[4] provides the following:

> ***"3. (1) Where in respect of any money-lending or credit transaction, the principal debt –***
>
> ***(a) does not exceed E500 or such amount as may be prescribed from time to time, no lender shall charge an annual interest rate of more than 10% points, or such amount as may be prescribed from time to time, above the rate for discounts, rediscounts or advances announced from time to time by the Central Bank under Section 38 of the Central Bank of Swaziland Order, 1974.***
>
> ***(b) exceeds E500 or such amount as may be prescribed from time to time, no lender shall***

[4]4. Act No. 3/1991, Sections 3 and 6

charge an annual interest rate of more than 8% points, or such amount as may be prescribed from time to time, above the rate for discounts, rediscounts and advances announced from time to time by the Central Bank under Section 38 of the Central Bank of Swaziland Order, 1974.

(2) No lender shall calculate interest charges according to periods which are shorter or longer than those according to which the instalments or outstanding balance of the principal debt shall be paid in terms of an agreement in connection with the money-lending or credit transaction.

(3) Where in connection with a money-lending or credit transaction it is agreed by the parties that payment of the principal debt and finance

charges shall be effected in any manner other than by way of regular payments, the annual finance charge rate at which finance charges may be levied shall be calculated on the balance of the principal debt owed from time to time by the borrower or credit receiver.

(4) The provision of subsection (3) shall not be construed as prohibiting the recovery of finance charges according to periods of one month or longer in the case of a money-lending or credit transaction in respect of which the period between instalment payments or the period between the date on which the principal debt was incurred on the one hand and on the other hand the date on which the principal debt is payable, is longer than one month.

6. (1) Any agreement in connection with any money-lending or credit transaction that is not in conformity with this Act shall be null and void, and shall not be enforceable against the borrower or the credit receiver by the lender.

(2) No lender shall in connection with any money-lending or credit transaction obtain judgment for or recover from a borrower or credit receiver an amount exceeding the sum of –

(a) the principal debt owed by the borrower or credit receiver,

(b) the interest charges on the principal debt;

(c) the additional finance charges calculated in the manner prescribed by Section 7;

[12] His Lordship Justice Tebbutt JA delivering a unanimous judgment of the Court of Appeal of Swaziland, as it then was, in the case of Reckson Mawelela v. M. B. Association of Money Lenders and Another[5], had this to say:

> ***"9. ... It is a principle of our law which comes from the Roman law on which, of course, our law is based, that no interest and therefore is claimable after the amount of interest is equal to the amount of capital. At that stage the right to further interest is extinguished.***

[13] De Villiers J P in Union Government v. Jordan's Executor[6], delivering a unanimous judgment of the full bench of three Judges was also emphatic on the general principles governing the running of interest in respect of a debt. He had this to say:

[5]5. Civil Appeal Case No. 43/199 at para 9

[6]6. 1916 TPD 411 at 413

"The Roman law is quite clear, and our law is based upon the Roman law in this respect ….. No interest runs after the amount is equivalent to the amount of the capital …. the right is extinguished, that the interest does not run after it amounts to the capital sum."

[14] It is not disputed that subsequent to the judgment of the 14th September 2012 in respect of the provisional sentence summons, the applicant made payments amounting to E20, 000.00

(Twenty Thousand Emalangeni). It is common cause between the parties that on the 20th February 2015, the Deputy Sheriff executed a writ in respect of the balance of the judgment debt and attached a tractor belonging to the applicant. However, on the 15th July 2015, the applicant obtained a court order for a stay of execution; and, it was served upon the respondents on the 27th July, 2015.

[15] Notwithstanding the court order aforesaid, the respondents issued a Notice of Sale of the tractor, and, it was published in

the Times of Swaziland on the 14th August, 2015; the sale was scheduled to take place in Manzini on the 21st August, 2015.

[16] On the 17th August 2015, the applicant lodged an application before the High Court seeking an order for a stay of the public auction and further committing the respondents to gaol for contempt; the application was opposed by the respondents who in turn lodged a counter-application for rescission of the court order for a stay of execution issued by the High Court on the 15th July, 2015.

[17] It is not apparent from the evidence whether the High Court dealt with the counter-application. However, the High Court heard and dismissed the application for an order staying the auction sale and committing the respondents to gaol for contempt; the effect of the dismissal of the application was the continuation of the sale in execution.

[18] On the 21st August, 2015 the applicant lodged an appeal to this Court challenging the dismissal of the application for a stay of the sale by the High Court as well as its failure to dismiss the counter-application. The court dismissed the appeal on two grounds: Firstly, that there were no written reasons for the judgment of the High Court dismissing the application for a stay of the auction sale and committing the respondents to gaol for contempt. It is well-settled in our law that an appellant should prepare a record of proceedings on appeal and lodge it with the Registrar of the High Court for certification as correct within two months of noting the appeal[7]. Any failure by the appellant to prepare, lodge and submit the record for certification as provided by this rule, the appeal is deemed to have been abandoned[8].

[19] It is not disputed that the applicant did not submit the written reasons for the judgment but merely furnished a transcript which was not certified as correct by the Registrar of the High Court.

[7]7. Rule 30 (1) of Court of Appeal Rules

[8]8. Rule 30 (4) of Court of Appeal Rules

It is well-settled in our law that a failure to file written reasons for the judgment appealed against renders the appeal incompetent and consequently dismissable[9]. A record of proceedings is incomplete without the written judgment containing the reasons for the judgment; the basis for this principle is that the grounds of appeal should be formulated pursuant to the written judgment. The grounds of appeal should relate to the basis of the impugned judgment.

[20] Her Ladyship Justice E. A. Ota JA in Ezishineni KaNdlovu v. Ndlovunga Dlamini and Another[10] had this to say:

> ***"9. … the grounds of appeal constitute the most important part of the appeal. It is the error of law or fact alleged by an appellant as the defect in the judgment appealed against and relied upon to set it aside. Grounds of appeal are thus the reasons why the decision on appeal is considered by the aggrieved party to be wrong.***

[9]9. Ezishineni KaNdlovu v. Ndlovunga Dlamini and another Civil Appeal Case No. 51 of 2012 para 9, 10 and 13; Silence Gamedze and Others v. Thabiso Fakudze Civil Appeal Case No. 52 of 2012

[10]10. ibid footnote 9

10. They isolate and accentuate for attack the basis of the reasoning of the decision challenged. A ground of appeal must therefore be fixed and circumscribed within a particular issue in controversy and emanate from the judgment of appeal. It should constitute a challenge to the ratio decidendi of the decision. If the grounds of appeal arise from matters not contained in the decision, they are incompetent, except where leave to argue them is sought from and granted by the appellate court.

. . . .

13. … it was imperative for Plaintiff's counsel to obtain a written judgment for the purposes of this appeal. Where that is not done, we cannot aid the Plaintiff in his adventure. This is because the court is not clairvoyant. It is not a soothsayer with the ability to gaze into a crystal ball to know what was decided a quo. Its operational

parameter lies in the assailed decision. The court most certainly cannot engage in prophesy."

[21] Similarly, Justice E. A. Ota JA in Silence Gamedze and Others v. Thabiso Fakudze[11] had this to say:

"19. …. The requirement that the Notice of Appeal contains grounds of appeal is not merely cosmetic. It is underscored by the fair hearing rule which is expressed by the maxim *audi alteram partem.* ***This is because the object and purpose of the grounds of appeal just like pleadings, is to give the respondent adequate notice of the issues in controversy in the appeal. That is why Rule 6(4) requires that the grounds shall be numbered consecutively and shall be concise i.e. be specific and clear not couched in general terms.***

This is to ensure that the element of notice is not defeated by vague and general statements of complaints.

[11]11. Civil Appeal Case No. 14/2012 at para 19 and 20

It is also for this reason that the grounds of appeal must relate to issues decided in the impugned judgment. They must be fixed and circumscribed within a particular issue in controversy, if not, they cannot be said to be related to that decision."

[22] The Court of Appeal Rules are explicit that the Notice of Appeal should be filed within four weeks of the impugned judgment[12], and, that the period runs from the date of the delivery of the written judgment[13]. The rules underline the importance of the written judgment; and, invariably, a written judgment contains the reasons or the basis of the impugned judgment. The grounds of appeal are formulated on the basis of the written judgment[14], and, the appellant is confined to the grounds of appeal set out in the Notice of Appeal[15].

[12]12. Rule 8 of the Court of Appeal Rules

[13]13. Rule 8 of the Court of Appeal Rules

[14]14. Rule 6 of the Court of Appeal Rules

[15]15. Rule 7 of the Court of Appeal Rules

[23] The second ground for dismissing the appeal was that the appeal was against an interlocutory order of the High Court, and, that no leave of this Court was sought and granted before filing the appeal. In coming to this conclusion, the Supreme Court on appeal did not misdirect itself. The Court of Appeal Act[16] deals with the civil jurisdiction of the Supreme Court, as follows:

> ***"14. (1) an appeal shall lie to the Court of Appeal –***
>
> ***(a) from all final judgments of the High Court; and,***
>
> ***(b) by leave of the Court of Appeal from an interlocutory order, an order made ex parte or an order as to costs only.***
>
> ***(3) The rights of appeal given by sub-section (1) shall apply only to judgments given in the***

[16]16. No. 74 of 1954 Section 14

exercise of the original jurisdiction of the High Court.

15. A person aggrieved by a judgment of the High Court in its civil appellate jurisdiction may appeal to the Court of Appeal with the leave of the Court of Appeal or upon the certificate of the judge who heard the appeal, on any ground of appeal which involves a question of law but not a question of fact.

16. An appeal shall lie to the Court of Appeal where provision is expressly made in an Act for such appeal."

[24] It is common cause that the applicant had appealed againstthe dismissal of his application for an order staying the auction sale, committing the respondents to gaol for contempt as well as the failure by the High Court to dismiss the counter- application. The orders appealed against are interlocutory in nature and do not dispose the main action relating to the debt of E67, 000.00

(Sixty-seven Thousand Emalangeni). The applicant did not appeal the judgment of the High Court in the main action where the court upheld the provisional sentence summons to pay the sum of E67, 000.00 (Sixty-seven Thousand Emalangeni) plus interest at the rate of 9% per annum from date of judgment as well as costs of suit.

[25] An interlocutory order is issued by a court pursuant to an interlocutory application, during the course of litigation between the parties, and, it does not settle the main suit arising from the cause of action; such an order is not appealable without leave of court unless it disposes an issue in the main action. It is apparent from the evidence that the applicant appealed an order refusing a stay of execution of the sale. Such an order has no bearing in the main action regarding his liability to pay the debt owed to the first respondent. The applicant was obliged to seek leave of this Court to appeal such an order.

[26] Similarly, the Supreme Court on appeal did not misdirect itself with regard to the order for punitive costs. In concluding its judgment, the court made a correct finding as follows:

> ***"15. After consideration of the whole case and the fact that it commenced in 2008 and judgment was issued in 2012 but to date hereof the judgment debt has not been settled when liability to pay the same is not disputed, I have come to the conclusion that there was serious abuse of court process in this matter. The conduct of the case by the appellants warrant that costs should be awarded against them on the punitive scale."***

[27] Herbstein and Van Winsen[17] also deals with interlocutory orders:

> ***"An interlocutory order is an order granted by a court at an intermediate stage in the course of litigation, settling***

[17]17. The Civil Practice of the Supreme Court of South Africa, fourth edition, Louis & Villiers Van Winsen *et al*, published by Juta & Co. Ltd 1997 at pages 877 – 878

or giving directions with regard to some preliminary or procedural question that has arisen in the dispute between the parties. Such an order may be either purely interlocutory or an interlocutory order having final or definitive effect."

[28] Schreiner JA in Pretoria Garrison Institutes v. Danish Variety Products (Pty) Ltd[18] held that:

" … a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to dispose of any issue or any portion of the issue in the main action or suit … unless it irreparably anticipates or precludes some of the relief which would or might be given at the hearing."

[18]18. 1948 (1) SA 839 AD at 870

[29] Corbett JA in South Cape Corporation (Pty) Ltd v. Engineering Management Services (Pty) Ltd[19] defined an interlocutory order as well as the test for determining it as follows;

> ***" (a) In a wide and general sense the term interlocutory refers to all orders pronounced by the court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes: (i) those which have a final and definitive effect on the main action; and (ii) those known as simple or purely interlocutory orders or interlocutory orders proper, ….***
>
> ***(c) Statutes relating to the appealability of judgments or orders whether it be appealability with leave or appealability at all, which use the word interlocutory, or other words of similar import, are***

[19]19. 1977 (3) SA S34 (A) at 549 - 550

taken to refer to simple interlocutory orders that the statute is read as prohibiting an appeal or making it subject to the limitation of requiring leave, as the case may be. Final orders including interlocutory orders having a final and definitive effect, are regarded as falling outside the purview of the prohibition or limitation."

[30] Subsequent to the dismissal of the appeal on the 30th June 2016, the applicant lodged an urgent application before this Court seeking two orders: firstly, a stay of execution of the order of this court granted on the 30th June 2016 pending finalization of the review application under section 148(2) of the Constitution. Secondly, a review of the judgment of the Supreme Court on appeal under Section 148(2) of the Constitution.

[31] Section 148 of the Constitution provides the following:-

"148. (1) The Supreme Court has supervisory jurisdiction over all courts of judicature and over any

adjudicating authority and may, in the discharge of that jurisdiction, issue orders and directions for the purposes of enforcing or securing the enforcement of its supervisory power.

(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 rules of court.

(3) In the exercise of its review jurisdiction, the Supreme Court shall sit as a full bench.

[32] His Lordship Justice M. J. Dlamini AJA, as he then was, in President Street Properties (Pty) Ltd v. Maxwell Uchechukwu and Others[20] had this to say with regard to the review jurisdiction of this Court under Section 148(2) of the Constitution:

[20]20. Civil Appeal Case No. 11/2014 at para 26, 27 and 28

"26. In its appellate jurisdiction the role of this Supreme Court is to prevent injustice arising from the normal operation of the adjudicative system; and in its newly endowed review jurisdiction this court has the purpose 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 in our courts of justice, in particular, the apex court with the advantage of being the court of the 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 a floodgate of reappraisal of cases otherwise *res judicata.* ***As such this review power is to be invoked in a rare and compelling or exceptional circumstances as …. It is not review in the ordinary sense.***

28. I accept that this inherent power of review, has always been with the Court of Appeal, hidden from and

forgotten by all concerned. Now, the Constitution has reaffirmed it to be so. It is nothing new. The fear and hesitation to invoke it or invoke it frequently, has been a fear of the unknown. Once unleashed, how was it to be regulated or controlled and exercised only for the greater good in the administration of justice? But judges in their 'eternal' wisdom have always been able to open and shut legal doors and windows unless somehow stopped and controlled by superior authority. In this the courts have otherwise relied on their inherent discretionary authority."

[33] It is well settled in our law that this Court has review jurisdiction over its previous decisions in accordance with Section 148(2) of the Constitution[21]. In exercising this jurisdiction, the Court has to sit as a full bench[22]. This constitutional jurisdiction is exercised and invoked upon such grounds and subject to such conditions as may be prescribed by

[21]21. Section 148 (2) Constitution

[22]22. Section 148 (3) Constitution

an Act of Parliament or Rules of Court[23]. However, it is common cause that currently neither an Act of Parliament nor Rules of Court have been promulgated prescribing the grounds and conditions upon which the review jurisdiction may be exercised. However, this Court faced with legal suits requiring urgent legal remedies to disputes instituted by members of the public could not fold their arms in the absence of the requisite Act of Parliament or Rules of Court. General principles guiding this Court when exercising its review jurisdiction under section 148(2) of the Constitution have since been formulated[24].

[34] The review jurisdiction of this Court under section 148(2) of the Constitution is an exceptional remedy to the well-known legal principles of *functus officio* and *res judicata* whose object is to ensure finality in litigation. This legal remedy does not allow for a second appeal to litigants whose appeals have been heard and determined. Being an exceptional remedy, the review is

[23]23. ibid footnote 21

[24]24. President Street Properties (Pty) Ltd v. Maxwell Uchechukwu and Others (supra); Commissioner of Police and Another v. Dallas and Four Others Civil Case No. 39/2015; Vilane NO. and Another v. Lipney Investments (Pty) Ltd (2014) SZSC 62; Swaziland Revenue Authority v. Impunzi Wholesalers (Pty) Ltd (2015) SZSC 6; NUR & SAS (Pty) v. Galp Swaziland (Pty) Ltd (13/2015) SZSC 04;

intended to prevent, ameliorate and correct a manifest and gross injustice to litigants in exceptional circumstances beyond the normal court processes.

[35] From a reading of the Constitution, it is apparent that only a single review by this Court is envisaged under section 148(2) of the Constitution. A subsequent review is not envisaged by the law unless leave of court has been sought and granted in very extreme and exceptional circumstances.

[36] The grounds for the present review application are the same as the grounds of appeal; they were heard and determined by the Supreme Court on appeal, and, they may be summarized as follows: Firstly, that the Supreme Court on appeal misdirected itself by focusing on the non-payment of the judgment as directed by the High Court. The applicant contends that the appeal court should have focused on the dismissal for a stay of execution of the writ. Secondly, that the Supreme Court on appeal, by launching a scathing attack against him personally as

an Attorney, meant that the court had failed to approach the appeal with an open mind. Thirdly, that the Supreme Court on appeal misdirected itself by holding that the record of proceedings was incomplete in the absence of written reasons for the judgment. His contention was that the transcript which was certified by the transcriber suffices for purposes of the record of proceedings on appeal. Lastly, the applicant contends that he was not given adequate notice to deal with the issue of punitive costs, and, that he only learnt at the hearing of the appeal that such an order would be sought.

[37] It is apparent from the review application that the applicant has failed to establish on a balance of probabilities the basis upon which this Court should invoke and exercise its review jurisdiction under section 148(2) of the Constitution. The applicant has failed to establish the existence of a gross and manifest injustice which requires to be prevented, ameliorated or corrected by this Court exercising its review jurisdiction under the Constitution. What the applicant has presented to this

Court is another appeal disguised as a review under Section 148(2) of the Constitution. It would be a failure of justice for this Court, on review, to grant the application challenging an interlocutory order when the judgment on the main action remains legally effective and enforceable.

[38] Accordingly, the Court makes the following order:

(a) The application for review under section 148(2) of the Constitution is hereby dismissed with costs.

M.C.B. MAPHALALA CJ

DR. B.J. ODOKI, JA

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M. J. DLAMINI, JA

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S. B. MAPHALALA, JA

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J. P. ANNANDALE, JA

For Applicant: Advocate Lucas Maziya instructed by
Attorney S. C. Dlamini

For First Respondent: Attorney Sabela Dlamini