IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Civil Appeal Case No: 102/2017

In the appeal between:

IMVUSELELO INVESTMENTS (PTY) LTD APPELLANT

And

USUTHU FOREST PRODUCTS LIMITED RESPONDENT

Neutral citation: *Imvuselelo Investments (Pty) Ltd vs Usuthu Forest Products Limited (102/2017) [2019] SZHC 30 (2019)*

Coram: **JUSTICE M. C. B. MAPHALALA, CJ**
JUSTICE J. P. ANNANDALE, JA
JUSTICE S. MATSEBULA, AJA
JUSTICE J. CURRIE, AJA
JUSTICE J. M. MAVUSO, AJA

Heard : 15th July, 2019

Delivered : 13th August, 2019

SUMMARY

Civil Procedure - review jurisdiction of the Supreme Court in terms of section 148 (2) of the Constitution of 2005 – application to review the judgment of the appellate court on the basis that the appellate court misdirected itself in law – the applicant's contention is that the respondent terminated their contract without giving them thirty days' notice to rectify the breach as provided in the contract - exceptional circumstances required for review applications under section 148 (2) of the Constitution – it is trite law that the object of such application is the need to prevent gross miscarriage of justice resulting from serious irregularities as well as to correct a substantial misdirection of law;

Held that the alleged grounds of review reflected in the application were dealt with decisively during the appeal proceedings;

Held further that the grounds of review do not constitute exceptional circumstances warranting the Court to invoke its review jurisdiction under section 148 (2) of the Constitution;

Held further that the present application seeks to re-open the appeal which was dismissed by the appellate court, and, that there is the need to respect finality in litigation;

Held further that the applicant has failed to satisfy the requirements of section 148 (2) of the Constitution;

Accordingly, the application is dismissed with costs including certified costs of Counsel

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JUDGMENT

M. C. B. MAPHALALA, CJ:

[1] This is an application to review, correct and set aside the judgment of the Supreme Court on appeal delivered on the 20th September, 2018. Ironically the applicant further seeks an order that the appeal against the judgment of the High Court should be upheld with costs. In addition the applicant seeks an order for costs in the event of

opposition to the application. The respondent opposes the application and has filed opposing papers.

[2] It is common cause that the parties concluded a written contract on the 31st July, 2015. The agreement was effective from the 1st September, 2015 and terminating on the 31st August, 2020.

[3] The material terms of the contract were, *inter alia,* the following: Firstly, that the applicant would harvest gum trees at the forests owned by the respondent. Secondly, that the respondent would in turn weigh the harvested trees at the weighbridge and pay the applicant for work done in terms of the invoice generated at the weighbridge. Thirdly, that the applicant would harvest and fell thirty thousand weighbridge tons of gum trees per year as well as two thousand five hundred weighbridge tons monthly.

[4] It is not disputed that the applicant performed its contractual obligations during the month of September 2015, and, it was paid for the services rendered. During the following month the applicant failed to pay salaries to its employees timeously. Consequently, the

employees, as an act of revenge, burnt one of the forests owned by the respondent causing extensive damage.

[5] It is apparent from the evidence before this Court, that the applicant's employees burnt and destroyed the forest on the evening of the 13th October, 2015. The applicant's defence is that of vicarious liability, that the employees did not burn the forest during the course and within the scope of their employment. Furthermore, it is not in dispute that the applicant was obliged to pay salaries of its employees; hence, the failure to pay the employees cannot be attributed to the respondent.

[6] Pursuant to the destruction of the forest, the parties had a meeting on the 14th October, 2015 where it transpired that the source of dissatisfaction of the applicant's employees was the failure by the applicant to pay their salaries timeously; in addition, the employees complained that the applicant had failed to communicate with them timeously with regard to the non-payment of their salaries. The meeting was attended by the Director, Management and some

employees of the applicant. The notice of termination of the contract was communicated to the applicant after that meeting.

[7] The damaged forest was located opposite the compound which the respondent had allocated to the applicant. The destruction of the forest by the applicant's employees constitutes gross negligence resulting in malicious damage to the respondent's property; and consequently, the contract was terminated with immediate effect on the 15th October, 2015 upon written notice to the applicant.

[8] The applicant has argued during the Court proceedings that it was entitled in terms of the contract to thirty days' notice which would enable it to rectify any breach after due notice. The basis of the review proceedings is that it was never given such notice as provided in clause 17.2.2 of the contract. The applicant's contention is that the appellate court misdirected itself in coming to the conclusion that it was not entitled to the notice. It is against this background that the applicant instituted legal proceedings against the respondent in the High Court claiming damages in the sum of E13, 775 000.00

(Thirteen Million Seven Hundred and Seventy-Five Thousand Emalangeni) in respect of the termination of the contract.

[9] In its legal proceedings the applicant argued that the contract provided that it would be paid E237, 000.00 (Two Hundred and Thirty Seven Thousand Emalangeni) per month for a period of five years and this translate to the amount claimed of E13, 775 000.00 (Thirteen Million Seven Hundred and Seventy-Five Thousand Emalangeni). The applicant further claimed interest on the amount of E13, 775 000.00 (Thirteen Million Seven Hundred and Seventy-Five Thousand Emalangeni) at the rate of 9% *per annum a tempore morae* to date of payment together with costs of suit.

[10] The respondent has denied that it was obliged to give thirty days' notice in terms of clause 17.2.2 of the contract which allows rectification of the breach after due notice. The respondent contends that the applicant breached a material term of the contract and that it was only required to terminate the contract upon written notice. It is the respondent's further contention that clause 7.4.4 constitutes a material term of the contract; this clause provides that the applicant

should ensure that its employees do not damage property belonging to the respondent.[1] The contract further provides that the applicant as the contractor would be responsible for any damage caused to the respondent's property by or attributable to the negligent or other wrongful act or omission of the applicant or any person employed or engaged by the contractor during the performance of its obligations.[2] Consequently, the respondent denied liability to pay the amount claimed by the applicant.

[11] The question for determination is whether the respondent was justified in law to terminate the contract between the parties without giving notice to the applicant as required by the contract. The contract obliges the respondent to give thirty days' notice to the applicant where there is a general breach of the contract; however, where the breach is material and going to the root of the contract, the respondent becomes entitled to terminate the contract upon written notice to the applicant. It is apparent from the contract that the giving of thirty

[1] Clause 7.4.4

[2] Clause 13.1.4

days' notice depends upon whether or not the breach of contract is material and goes to the root of the contract.

[12] The contract also provides that should the applicant breach a material term of the contract or fail to perform any obligation under the contract or its inability to perform such obligation, then the respondent shall be entitled to terminate the contract upon written notice given to the applicant.[3]

[13] It is not disputed that the objective of the contract between the parties was the provision of harvesting services by the applicant to the respondent by cutting the gum trees, preparing the timber in accordance with the market specifications provided by the respondent and transporting the timber to designated areas. The business of the respondent was the planting, harvesting and sale of timber products. The burning and consequent damaging of the forest by the applicant's employees constitutes a material term of the contract which goes to the root of the contract; hence, the respondent was entitled to cancel the contract upon written notice given to the applicant. In the

[3] Clauses 17.2.1 and 17.2.3 and 17.2.4

circumstances and in view of the evidence before me, the High Court was entitled to dismiss the applicant's cause of action with costs of suit including certified costs of Counsel.

[14] Her Ladyship Justice Mumcy Dlamini when dismissing the application had this to say:[4]

> **"It was not disputed that Imvuselelo's employees became rowdy and that they staged a protest outside Usuthu Forest's Mill. It was not refuted that they threatened to burn the plantation following Imvuselelo's failure to pay them when their salaries fell due. The trained dogs that were used to sniff the culprit who set the fire alight led Usuthu Forest's investigation team to one of the rooms occupied by Imvuselelo's employees. The evidence before Court is that this room had four occupants. Some of these occupants pointed at one Flavo Khumalo who was among them. The evidence stood unchallenged . . . ."**

[4] Paragraph 49 of the High Court judgment

[15] Her Ladyship Mumcy Dlamini J further made the following finding which is pertinent to this judgment:[5]

> **"In the result the only plausible and highly probable likelihood is that failure by Imvuselelo to comply with the implied term to pay its employees in time led to the combustion of the plantation belonging to Usuthu Forest. This combustion at the hand of Imvuselelo was a breach of an expressed material term of the contract as pointed out above. Obviously, therefore this breach went to the root of the contract. It followed therefore that the only remedy available to Usuthu Forest was to throw the contract between Imvuselelo and itself out of the window branch and root as it manifestly did on the 14th October 2015 by service of notice dated 14th October 2015 upon Imvuselelo. After all, upon Imvuselelo burning the trees there was nothing to "fell" for the reason that the said trees provided as the core basis for the written contract. In fact, Imvuselelo correctly pointed out in its particulars of claim and *viva voce* evidence**

[5] Paragraph 53 of the High Court judgment

that its prime obligation under the contract of service was to "fell gum trees". It follows therefore that the alternative submission by Imvuselelo that Usuthu Forest ought to have served it with a three months' notice of termination cannot be sustained under the circumstances of this case."

[16] Pursuant to the dismissal of the application by the *court a quo,* the applicant lodged an appeal to the Supreme Court on the 6th December 2017. However, the appeal had no merit, and, the appellate court was justified in dismissing the appeal. The first ground of appeal was that the damage to the forest resulted from the failure by the respondent to provide financial assistance to the applicant to pay salaries for its employees; however, this ground of appeal is misdirected on the basis that it was the applicant who was obliged in law to pay salaries for its employees and not the respondent; similarly, the respondent was not obliged to give financial assistance to the applicant in terms of the Contract.

[17] The second ground of appeal was that the applicant was not given three months' notice before cancellation of the contract; however, the

contract expressly provides that the respondent was entitled to terminate the contract upon written notice given to the applicant where the applicant had breached a material term of the contract. The breach committed by the applicant was material as reflected in the preceding paragraphs of this judgment.

[18] The third ground of appeal was a denial by the applicant that the forest was burnt by its employees. However, in papers filed before the High Court, the applicant pleaded vicarious liability, that the employees were not acting during the course and within the scope of their employment when they burnt the forest; this constituted an admission that the forest was burnt by its employees contrary to the provisions of clauses 7.4.4 and 13.1.4 of the contract. Accordingly, the appellate court did not misdirect itself in dismissing the appeal.

[19] The applicant seeks to review the judgment of the Supreme Court on appeal in terms of section 148 (2) of the Constitution. It is trite law that the review jurisdiction of the Supreme Court under section 148 (2) of the Constitution is an exceptional remedy; and, that it is available in very limited circumstances where there is a need to prevent a gross

miscarriage of justice as well as to correct a substantial misdirection of law. The review jurisdiction of this Court is not intended to afford a second opportunity to an appellant who has not been successful in the appellate court to reopen the appeal and argue the matter for the second time; otherwise, if this is allowed, it would be a flagrant abuse of the court process.

[20] Section 148 (2 of the Constitution provides the following:

> **"148 (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."**

[21] The leading case in this jurisdiction with regard to the review jurisdiction of the Supreme Court under section 148 (2) of the Constitution is President Street Properties (Pty) Ltd v Maxwell Uchechukwu and Another[6] where Justice M. J. Dlamini AJA, as he then was, delivering a majority judgment of this Court had this to say:

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[6] Civil Appeal Case No. 11/2014, para 26 and 27

"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 for 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 flood gate of reappraisal of cases otherwise _res judicata_. As such this review power is to be invoked in a rare and compelling or exceptional circumstances . . . . It is not review in the ordinary sense."

[22] Justice Dr B. J. Odoki JA when delivering a unanimous judgment of the full bench of this Court in Swaziland Revenue Authority v. Impunzi Wholesalers (Pty) Ltd had this to say with regard to the review jurisdiction of this Court under section 148 (2) of the Constitution:[7]

> "45. **The critical issue in cases of this nature is whether the applicant has established grounds to bring the applicant within section 148 (2) of the Constitution, having regard to the emerging jurisprudence on the review jurisdiction in this country and other similar jurisdictions. Regard must always be had to the need to respect the principles of finality in litigation on one hand, and the need to do justice where serious irregularities have occurred resulting in a gross miscarriage of justice on the other. This is why in most cases the Court will look for exceptional circumstances as recognised from time to time. Indeed this process requires a delicate balance."**

[7] Civil Appeal Case No. 6/2015 at para 45

[23] The issues raised by the applicant as grounds of review were fully canvased before the appellate court and the court correctly dismissed the appeal. The applicant seeks to re-open the appeal in the guise of a review under section 148 (2) of the Constitution.

[24] The first ground of review is that the appellate court's finding that the applicant was not entitled to be given notice to remedy the breach was grossly unreasonable, and, that it constitutes misdirection of law. I have dealt with this issue fully in the preceding paragraph. It suffices to say that giving the notice was not required on the basis that the breach is material and goes to the root of the contract. The respondent was only required to terminate the contract upon written notice, which it did; hence, there was no misdirection in law.

[25] The other ground of review is that the appellate court committed an error of law by narrowing the issues for determination to the breach of contract and notice. The applicant further contend that the finding by the appellate court that the forest was burnt by the applicant's employees was not supported by the evidence and that it was therefore prejudicial to the applicant. I have dealt with this issue in the

preceding paragraphs and it is not necessary to repeat what has been said. Suffice to say that the evidence before Court has established that the burning of the forest was caused by the applicant's employees. Initially the applicant admitted this fact and pleaded vicarious liability; subsequently, it denied that the forest was damaged by its employees. The applicant was obliged in terms of the contract, to protect the respondent's property against damage; and, this clause constitutes a material term of the contract, the breach of which entitles the respondent to terminate the contract upon written notice to the applicant.

[26] Another ground of review is the alleged failure by the respondent to assist the applicant financially to pay salaries for its employees. The applicant contends that if the respondent had provided the necessary financial assistance, its employees could not have burnt the forest. This contention is misdirected on the basis that the respondent was not obliged to pay salaries to the applicant's employees.

[27] Consequently, the applicant has failed to satisfy the legal requirements of section 148 (2) of the Constitution for a review of the judgment of the appellate court.

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

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

(b) The judgment of the Supreme Court on appeal delivered on the 20th September, 2018 is confirmed

(c) The applicant is ordered to pay costs of suit including certified costs of Counsel

For Applicant : Attorney Banele Gamedze

For Respondent : Advocate Flynn instructed by Attorney Henwood

JUSTICE M. C. B. MAPHALALA
CHIEF JUSTICE

I agree

JUSTICE J. P. ANNANDALE, JA

I agree

JUSTICE S. MATSEBULA, AJA

I agree

JUSTICE J. CURRIE, AJA

I agree

JUSTICE J. M. MAVUSO, AJA