



**IN THE HIGH COURT OF ESWATINI**

**HELD AT MBABANE**

**CIVIL CASE NO. 2130/2021**

**In the matter between**

**MDUDUZI BACEDE MABUZA**

**1<sup>ST</sup> APPLICANT**

**MTHANDENI DUBE**

**2<sup>ND</sup> APPLICANT**

**And**

**THE REGISTRAR OF THE SUPREME COURT  
OF ESWATINI N.O.**

**1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE CHIEF JUSTICE OF  
ESWATINI N.O**

**2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL**

**4<sup>TH</sup> RESPONDENT**

Neutral citation: *Mduduzi Bacede Mabuza & Another v The Registrar of the Supreme Court of Eswatini N.O. & 3 Others (2130/21) SZHC 246 [2021] (29 December 2021)*

Coram : D Tshabalala J

Heard : 20/12/21

Delivered : 29/12/21

*Summary: Administrative law –Civil procedure- Ruling on points of law raised on the jurisdiction of the High Court to hear and determine an application for a writ of mandamus to compel the Registrar of the Supreme Court and the Honourable Chief Justice to enrol the Applicants’ urgent bail appeal for hearing by the Supreme Court – issue for determination whether the High Court, as inferior court has jurisdiction to entertain an application concerning a matter that is pending before the Supreme Court. The court finds that it has jurisdiction to hear the matter. Points in limine dismissed*

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## JUDGMENT

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[1] On the 8<sup>th</sup> of December 2021 the Applicants filed an urgent application on Notice couched in the following terms:

“1.....

2.....

3. Directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to take all measures to enrol the Applicants’ urgent bail appeal Supreme Court case number 19/2021 and 20/2021 for hearing by the Supreme Court;

4. Granting costs of application, only in the event this application is opposed 5. Granting such further and or alternative relief.”

[2] Counsels for the parties<sup>1</sup> appeared before court on the 08/12/20 and time lines were set for filing of opposing papers. Respondents undertook to file answering affidavits<sup>2</sup> on Friday 10 December; Applicants' reply on Tuesday 14<sup>th</sup>; heads of arguments by both parties no later than Wednesday 16, and arguments to be heard on Monday 20<sup>th</sup> December 2021. However, there was no adherence to the time lines. A notice to raise points of law on jurisdiction was filed on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents a week late on the 17 December, without answering affidavit, and the heads on the day of the hearing of the matter. No papers were filed by the 3<sup>rd</sup> – 4<sup>th</sup> Respondents. The matter proceeded on the 20<sup>th</sup> for arguments on the points of law raised.

### **Applicants' application**

[3] The 1<sup>st</sup> Respondent is the Registrar of the Supreme Court, cited in her official capacity, and the 2<sup>nd</sup> Respondent is the Honourable Chief Justice cited in his official capacity as the head of the Judiciary, (herein after collectively the Respondents). The Applicants allege in support of their application that they were arrested in July 2021 and were refused bail by the High Court on the 6<sup>th</sup> August 2021. A second bail application was also dismissed on the 14<sup>th</sup> September 2021 wherein the court ruled that it was *fanctus officio*. Subsequently the Applicants noted and filed two appeals under a certificate of urgency against both judgments of the High Court.<sup>3</sup>

[4] The Applicants aver that as of the 5<sup>th</sup> October 2021, a duly certified record of proceedings and all pleadings and heads of arguments by both sides in the opposed bail appeal, had been filed.

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<sup>1</sup> Representative for Applicants, 1<sup>st</sup> and 2<sup>nd</sup> Respondents, and 3<sup>rd</sup> Respondents.

<sup>2</sup> Together with Notice to oppose.

<sup>3</sup> Respectively Appeal case nos. 19/2021 and 19/2021. Appeal against the first judgment was accompanied with application for condonation for late filing.

- [5] The Applicants assert that as of the 5<sup>th</sup> October 2021 the appeal was ripe for hearing and therefore should have been placed on the roll to be heard by the Supreme Court. Applicants aver that the certificate of urgency set out circumstances and reasons why they believe their appeal should be heard urgently and allocated an early hearing date. The Applicants allege that dates amenable to the parties<sup>4</sup> in respect of October were furnished to the 1<sup>st</sup> Respondent, but no response was received. In addition, letters were addressed to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, in October and November, respectively, by the Applicants' former attorney and the Applicants personally, inquiring about enrolment of the appeal for hearing, to which no responses were received.
- [6] The Applicants aver, that two months have elapsed since their matter was ripe for hearing without advice of the reasons why it is not enrolled for hearing before the Supreme Court.
- [7] The Applicants aver that they have a constitutional right to be admitted to bail, and that their bail appeal is urgent by reason, among others, the presumption of their innocence, that they are members of the National Assembly as well as businessmen, and that prolonged incarceration is prejudicial to their businesses as well as their role in parliament.
- [8] The Applicants aver that this court has jurisdiction to hear and determine the application, deriving from provisions of the constitution and the Criminal Procedure and Evidence Act No.67/1938.
- [9] The founding affidavit is deposed to by the 1<sup>st</sup> Applicant and the 2<sup>nd</sup> Applicant deposed to a confirmatory affidavit.

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<sup>4</sup> That is to the Applicant's legal representatives and the prosecution.

**Respondents' points *in limine***

[10] On the 17<sup>th</sup> December the 1<sup>st</sup> Respondent filed a notice to raise points of law, objecting to jurisdiction of the High Court to hear the matter, in the following terms:

*“AD JURISDICTION*

1. *On the 15<sup>th</sup> September, the first and second applicants noted an appeal at the Supreme Court of Eswatini under case no.19/21 wherein they fundamentally sought to appeal the decision dismissing their bail application at the High Court case no. 218/2021.*
2. *The appeal on bail and all other incidental matters arising under Supreme Court of Eswatini case no.19/2021 are before the Supreme Court and the High Court lacks the necessary jurisdiction to hear and determine any matter arising from the bail appeal.*
3. *In the present matter the first and second applicants seek relief relating to matters within the realm of the Supreme Court in so far as they are pending in the bail appeal. The Supreme Court is autonomous from any other court and therefore the High Court has no power to direct the enrolment and hearing of matters before the Supreme Court.*

*Wherefore the second respondent prays that it may please the Honourable Court to dismiss the application with or alternatively grants the second respondent an opportunity to file comprehensive answering affidavits.*

[11] The Respondents frame the question for determination by this Court thus: whether the court is vested with the necessary jurisdiction to hear and

determine the present application. Put differently the question is whether this Court has the power to direct the Supreme Court and/or its officers to enrol matters.

[12] The main grounds advanced on behalf of the Respondents for objection on jurisdiction can be broken down as follows:

- 1) **Lack of power by the High Court to give effect to the order of mandamus in the matter.** The guiding principle is that a court will not exercise jurisdiction unless effect can be given to the judgment.
- 2) **Absence of *ratio jurisdictionis*, or a recognisable ground for jurisdiction,** described as a link between the court and the matter sufficient to give an interest to the court to consider and decide the matter. Such a ground for jurisdiction depends on the nature of the right or claim.<sup>5</sup> The view expressed is that this court lacks sufficient link to the matter to ground jurisdiction.
- 3) **Hierarchy of the courts and doctrine of precedent:** stature of the Supreme Court at the apex of the structure and as appellate court, has been recognized in court decisions in this country, to the effect, among others, that the Constitution “... enjoins subordinate courts to uphold and apply the decisions of the Supreme Court as it stipulates: *‘If that decision is the subject of an appeal to the Supreme Court, in accordance with the decision of the Supreme Court... This court in my view does not therefore have the power or jurisdiction to make any determination and issue an order on the matter as it is pending before the Supreme Court.’*”<sup>6</sup>
- 4) **Supreme Court’s inherent powers to protect and regulate its process,** includes determination of enrolment of matters. In terms of section 149 of

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<sup>5</sup> See paragraph 8 of the Respondents Heads of argument.

<sup>6</sup> Extract from a quote from a High Court judgment in *Siboniso Clement Dlamini v Phindile Ndzinisa & others*, case No.1007, taken in part from paragraph 18 of Respondents’ heads.

the Constitution read with section 3 of the Court of Appeal Act, the present application can be heard by a single Justice of Appeal.

[13] The Respondents acknowledge that the nature of relief sought by the Applicants is an order for *mandamus* compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, and/or directing them to take all necessary measures to enrol the Applicants' urgent bail appeal under Supreme Court Case Nos 21/2021 and 20/2021.<sup>7</sup> They submit that at the heart of this matter, the enquiry is whether the High Court has jurisdiction to issue a *mandamus* in respect of a matter that is pending before the Supreme Court. The Respondents assert the Supreme Court is seized with the matter, and therefore only the Supreme Court can deal with the enrolment claim of the Applicants.

[14] Reference was made to judgment of the South African Constitutional Court in **Turnbull-Jackson v Hibiscus Coast Municipality and Others**<sup>8</sup> wherein the court addressed the issue of judicial hierarchy under the rubric of the doctrine of precedent. Respondents believe that the principle raised in that matter find application in the matter before court, as partly quoted below:

*“The doctrine of precedent, which requires courts to follow the decisions of coordinate and higher courts in the judicial hierarchy, is an intrinsic feature of the rule of law, which is foundational to our Constitution.”*

#### **Applicant's answer to points raised in *limine on jurisdiction***

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<sup>7</sup> Respondent's heads at paragraphs 14, 15 and 17.

<sup>8</sup> 2016 (6) SA 592.

- [15] The Applicants hold contrary view from the Respondents' preliminary point on lack of jurisdiction of this Court based on the view that the Applicants' bail appeal is pending before the Supreme Court and therefore the Applicants should approach the Supreme Court.
- [16] It is submitted on behalf of the Applicants that the court has jurisdiction on the strength of Sections 151(1)(a) and (2) (a) and (b) of the Constitution.<sup>9</sup>
- [17] Applicants submit that the provisions of Section 35 of the Constitution are also relevant with regard to the protection of the rights enshrined in Chapter 3 of the Constitution, *inter alia*, their right to be released on bail and their right to be afforded a speedy trial.
- [18] The Applicants submit that this Court has jurisdiction to hear this matter as the relief sought against the first Respondent, in particular, in liaison with the second Respondent, is to compel the first Respondent to enrol the Applicants' bail appeal to be heard by the Supreme Court. As such, the first Respondent should be directed to carry out her official duties as a government official, as she is required to perform by virtue of her employment as Registrar of the Supreme Court.
- [19] It is highlighted on behalf of the Applicants that the 2<sup>nd</sup> Respondent, the Honourable Chief Justice as head of the judiciary may in terms of Section

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<sup>9</sup> Jurisdiction of the High court:

"151. (1) The High Court has-

- (a) Unlimited original jurisdiction in civil and criminal matters as the High Court possesses at the date of commencement of this Constitution.
- (b) ....
- (c)...
- (d)...
- (2) Without derogating from the generality of subsection (1) the High Court has jurisdiction –
  - (a) to enforce the fundamental human rights and freedoms guaranteed by this Constitution; and
  - (b) to hear and determine any matter of a constitutional nature."



142 of the Constitution, *inter alia* make rules to regulate the practice and procedure of the Superior Courts. That, in terms of Rule 3 of the Rules of the Supreme Court, the Honourable Chief Justice is responsible for determining the date, time and place of the sitting of the Supreme Court.

[20] The Applicants submit that jurisdiction of the Supreme Court per Section 146 (1) of the Constitution is appellate:

*“146. (1) The Supreme Court is the final court of appeal. Accordingly, the Supreme Court has appellate jurisdiction and such other jurisdiction as may be conferred on it by this Constitution or any other law.”*

[21] Applicants argue that in terms of Section 146(2)(a) and (b)<sup>10</sup> of the Constitution, the Supreme Court has jurisdiction to hear appeals from the High Court and that no other matter or case can be heard by the Supreme Court as a court of first instance.

[22] The Applicants submission is that the present application is not governed or regulated by Section 147,<sup>11</sup> which deals with appeals only. Their argument

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<sup>10</sup> “146 (2) Without derogating from the generality of the foregoing the Supreme Court has -

- (a) such jurisdiction to hear and determine appeals from the High Court of Swaziland and such powers and authority as the Court of Appeal possesses at the date of commencement of this Constitution; and
- (b) such additional jurisdiction to hear and determine appeals from the High Court of Swaziland and such additional powers and authority, as may be prescribed by or under any laws for the time being in force in Swaziland.”

<sup>11</sup> “147 (1) An appeal shall lie to the Supreme Court from a judgment, decree or order of the High Court -

- (a) as of right in a civil or criminal cause or matter from a judgement of the High Court in the exercise of its original jurisdiction; or

is that Applicants' bail appeal is a matter which arose from two judgments and/or orders of the High Court, which judgments and orders are on appeal to the Supreme Court. The Applicants seek relief that their bail appeal be enrolled. That there is no provision in the Constitution or the Rules of the Supreme Court dealing with the present application. It is argued that the hierarchy of the Supreme Court and its supremacy to all subordinate Courts excludes a hearing of an application of this nature.

[23] The Applicants' case in support of the jurisdiction of the court can be summarised thus:

- i. The relief sought is administrative in nature and competent for the court to determine against the Respondents as public officers in relation to performance of their statutory administrative functions;
- ii. The High Court has competent jurisdiction to hear the matter by virtue of its unlimited original jurisdiction.
- iii. The Supreme Court has no original jurisdiction;
- iv. The Supreme Court is not a Court of first instance; The Application is a new matter related to but detachable from the pending bail appeal;
- v. Supreme Court is a Court of Appeal only; Matters emanating from the High Court lie on appeal to the Supreme Court;
- vi. The Supreme Court does not entertain or hear urgent applications of any nature.

### **Findings and Decision**

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(b) with the leave of the High Court, in any other cause or matter where the case was commenced in a court lower than the High Court and where the High Court satisfied that the case involves a substantial question of law or is in the public interest."

- [24] A strong argument has been made on behalf of the Respondents that the High Court cannot have jurisdiction to hear and determine the matter because it is pending before the Supreme Court. It is pertinent to inquire what it means that the matter is pending before the Supreme Court. It is understood that the mere fact of a matter pending before the Supreme court may not *per se* be an automatic bar to High Court jurisdiction in all circumstances, it depends on the set of facts in each case.
- [25] The stage of the matter is relevant, that is whether proceedings have commenced at the apex court, whether the matter is partly heard or judgment has been issued. Also, the relation of relief sought in the matter launched before the High Court to the matter pending in the Supreme Court should be considered. Of grave importance is the nature of relief sought before the High Court, whether assuming jurisdiction is likely to undermine the Supreme Court, in the sense that it will infringe judicial hierarchy and disturb the rule of law. The court is called upon and must consider these factors in coming to a decision in this matter.
- [26] From the acknowledgment by both sides in this matter that the nature of relief sought in this application is a *mandamus*, I think it is proper to approach the matter from that perspective. I propose to proceed with the matter by way of inquiry into whether the court has jurisdiction to grant the order of mandamus in this case. Definition of *mandamus* according to Black's Law Dictionary, is a writ issued by the court to compel performance of a particular act by a lower court or governmental officer or body, to correct a prior action or failure to act.<sup>12</sup> (Emphasis added).

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<sup>12</sup> [www.legal servicesindia.com/article/592/analysis-Of-Writ-Of-Mandamus.html](http://www.legal servicesindia.com/article/592/analysis-Of-Writ-Of-Mandamus.html) Accessed 20.12.22.

[27] *Mandamus* or mandatory interdict as is also commonly known, is a discretionary remedy available at common law to provide a means of enforcing performance of public duties by public authorities of all kinds. It deals with wrongful inaction as it were.<sup>13</sup>

[28] I now proceed to consider representations and legal arguments advanced for Respondents against jurisdiction and those advanced by the Applicants in favour thereof. The thrust of the case of the Respondents as I understand it is that assuming jurisdiction in this matter is wrong on multiple grounds, the foremost being that it would go against judicial hierarchy in the country, that is established by the Constitution and Court of Appeal Act, the doctrine of judicial precedent entailing that the lower courts defer to the superior court. It was submitted that the Supreme Court is autonomous and clothed with power to deal with the application within its procedures, and that the application concerns a procedural issue of enrolment and as such can be heard by a single Justice of Appeal.<sup>14</sup> Further that previous High Court judgments in which it declined jurisdiction have confirmed that the court has no authority to interfere with or in a matter that is pending before the Supreme Court. The court was referred to a few judgments which I deal with shortly.

[29] There are two High Court decisions involving one litigant, Siboniso Clement Dlamini, case numbers 1007/2017 and 1024/2017 wherein the court decided on separate occasions that it had no jurisdiction to hear and determine the applications. In the first case **Siboniso Clement Dlamini v Phindile Ndzinisa and 4 Others**<sup>15</sup> the applicant sought before the court an order for stay of execution of two orders one by the High Court and the by the Supreme Court, pending review of the High Court judgment. The court affirmed the import of sections 151(1) and 35(1) of the

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<sup>13</sup> Wade, *HWR Administrative Law* Fifth edition at p 629 - 630

<sup>14</sup> See paragraph [12] above.

<sup>15</sup> High Court Case No. 1007/2017.

Constitution which provide for the general powers of the High Court and its original jurisdiction. The court found that none of those provisions granted the High Court powers to interfere with judgments of the Supreme Court, or the consequences of its judgment. That Section 35(4) of the Constitution enjoined the High Court to uphold decisions of the Supreme Court.

[30] In the second case of **Siboniso Clement Dlamini N.O v Phindile Ndzinisa & 3 others**<sup>16</sup> the Applicant sought to invoke remedy of *mandamus* compelling the Registrar of the Supreme Court to accept and register a Section 148<sup>17</sup> review application, as well as enrol it before the Supreme Court. The High Court sitting as a full bench, found that the applicant simultaneously, in a separate application, petitioned the Supreme Court directly for leave to enrol the contemplated section 148 review application, the fact which he had not disclosed to the court, along with other pertinent facts. The court also found that the applicant had a myriad of applications, some of them interlocutory and related with the one before it and before the Supreme Court. The court found against this background that it had no jurisdiction to order writ of *mandamus* against the Registrar of the Supreme Court, where the Supreme Court had pronounced itself by dismissing the application for leave to review its own judgment. The Court cited the principle that the High Court must defer to the decisions of the Supreme Court. In upholding the points of law raised on jurisdiction, the court had this to say:

*“[24] Whilst the decision of the Supreme Court is extant it is binding upon this Court and this Court lacks the competence pronounces upon its subject matter and the issues determined therein. Besides the very matter much as the applicant has sought to conceal this material fact is essentially the same issue or matter pending before the Supreme Court in the applicant’s*

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<sup>16</sup> Ibid.

<sup>17</sup> Of the Constitution.

*application in terms of Section 149 (3) of the Constitution. This is so regard being had to the provisions of the constitution as it is in light of the hierarchy and jurisdictional status of the courts. This application therefore clearly lacks merit.*

*[25] It is apparent that the applicant is seeking to abuse of the court process. It is also evident that he is, by concealing the full fact circumstances and history of this matter, he seeking to countermand the Supreme Court and thus bring the counts into disrepute.”*

[31] Clearly the High Court declined jurisdiction because it was asked to countermand judgment of Supreme Court. It is clear to me that the facts of the two **Clement Dlamini** cases are distinguishable from facts in the present application. The grounds upon which the court in both instances declined jurisdiction are distinct and are not applicable to the present matter.

[32] It is argued on behalf of the Respondents that enrolment of the matters falls within the procedural aspect of the bail appeal and therefore ought to be brought before a single Judge of the Supreme Court in terms of Section 149 of the Constitution. In **Tswlōkgotso (Pty) Ltd v Riv & 4 Others**<sup>18</sup> the Supreme Court declined jurisdiction and asserted that it was not vested with the power of a court of first instance. The Court ruled that the High Court was the proper court in terms of the Constitution. This was an urgent application before a single Justice of Appeal, wherein the Applicant sought restoration of *status quo* pending appeal noted against a High Court order. The single Justice of Appeal dealt with a point of law raised that the Supreme Court had no jurisdiction because it was not a court of first instance, and that the High Court was a proper forum. The Supreme Court held that it was apparent from sections 14, 15, and 16 of the Court of Appeal Act 74/1954

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<sup>18</sup> Civil Appeal Case No. 07/2019

and sections 146, 147 and 148 of the Constitution that “*jurisdiction of the Supreme Court is wholly statutory and appellate in nature.*”<sup>19</sup>

[33] The Supreme Court stated thus in **Tswelokgotso**:<sup>20</sup>

“ [23]...*The Supreme Court, in general, is not possessed of any power to grant interim or injunctive or mandatory relief and in particular any power to order operation of a judgment pending appeal.*”

[34] The matter before court is a simple application to grant a mandatory order directing the Respondents to perform their public or statutory functions, that of enrolling or ensuring enrolment of the Applicants’ bail appeal for hearing on urgent basis before the Supreme Court. The application is based on assertions that there has been inordinate delay since October when the urgent matters are said to have been ripe for hearing, with no date set. There are allegations of non-response to inquiries on the delay.

[35] It is the view of this court that it has jurisdiction in the matter. The court’s jurisdiction derives, as it has been stated above, from its unlimited original jurisdiction conferred by the constitution, and further from the nature of the relief sought. It is trite that the Respondents hold public office and that their functions which are the subject of this application, are both administrative and prescribed by law. For instance, Rule 14 titled 'Notice of hearing' provides at subrule (1) that “*The Registrar shall, after obtaining directions from the Judge President, cause notice of the date of hearing to be served upon the appellant and the respondent.*”

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<sup>19</sup> See paragraph [12] of the judgment.

<sup>20</sup> Supra, at paragraph [23].

[36] From the foregoing analysis and findings, the points of law raised on jurisdiction of the court are dismissed with costs.

[37] Respondents' prayer to file answering affidavits is granted.

A handwritten signature in black ink, appearing to read 'D Tshabalala', is written over a horizontal dashed line. The signature is cursive and somewhat stylized.

**D Tshabalala**  
**Judge**

For Applicants: Mr B. Simelane

For 1<sup>st</sup> & 2<sup>nd</sup> Respondents: Mr Z. Jele (Robinson Bertram)

For 3<sup>rd</sup> & 4<sup>th</sup> Respondents: No representation