IN THE HIGH COURT OF ESWATINI
JUDGMENT

In the matter Between:	Case No.1148/2019
SIBONISO CLEMENT DLAMINI	Applicant
And	
THE CHIEF JUSTICE OF SWAZILAND	First Respondent
SWAZILAND GOVERNMENT	Second Respondent
ATTORNEY GENERAL	Third Respondent

Neutral citation	:	***Siboniso Clement Dlamini v The Chief Justice of Swaziland and two others (1148/2019) [2019] SZHC 208 (8th November, 2019)***
Coram	:	**M. Dlamini J, T. Dlamini J and C Maphanga J**
For applicant	:	**T. R. Maseko**
For 1st respondent	:	**Z. Jele**
Heard	:	**8th August, 2019**
Delivered	:	**8th November, 2019**

Civil procedure **:** ***the principle of our law that no man should be condemned unheard is the cornerstone of the administration of both civil and criminal justice systems. This principle is a mechanism put in place by natural laws themselves to safeguard against arbitrary and capricious decision making which affect the interests and liberties of individuals –***

Adherence to the audi alteram partem principle is so vital such that O Regan J [1] ***espoused that it is not just a matter of procedural law only. It also calls for the court to take into account consideration of substantive issues in the determination of whether the functionary was informed by the party adversely affected before reaching its impugned decision - that the elements of fairness and reasonableness are the substratum of the right to be heard principle -***

There is however a caveat to this general rule and Trollip JA highlighted that where the decision maker fails to extend the invitation, the court would enquire whether there was opportunity for the aggrieved party to make his representation and if by such omission the aggrieved party was prejudiced-

Administratively, there is nothing wrong for an administrator to take an adverse decision and then have the affected party make representation thereafter -

[1] Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (CCT 59/04A) [2005] ZACC 25 (30th September, 2005) at para 847

There is therefore a clear line of demarcation between decisions taken by a person discharging his judicial functions and one exercising his administrative powers -

The right to be heard rule cannot trump public interest – Those exercising public power on the behest of public interest or policy should not be fettered by this rule - it is undoubtedly clear that the audi alteram partem principle is not a hard and fast maxim - All parties affected by a decision are protected irrespective of whether the decision was taken administratively or otherwise -

Where a decision was not taken administratively and therefore not subject to the audi alteram rule, the court is called upon to examine if the decision maker exercised his powers within the confines of the law. Was the decision taken in conformity with the principle of legality? The courts will resort to the enabling legislation for instance to determine if the decision maker did not act ultra vires for instance. It will then resort to asking if there was a basis for the decision. Did the adjudicator reached an informed decision, for instance. A decision reached not within the exercise of administrative powers is subjected to the question of whether it was taken rationally without any mala fide and arbitrariness –

Doctrine of unclean hands:

The rationale for the doctrine of unclean hand is to compel parties to comply with court orders. Where court orders are

flouted with impunity, this leads to anarchy and the law of the jungle reigns supreme. Survival of the fittest, a concept correlative to the law of the jungle has no place in our world. Public order or policy dictates therefore that where a litigant has flagrantly refused to follow orders of the court or tribunals, this doctrine stands to be invoked. It is a component of the rule of law. Its perception is that you cannot hope to get assistance from the very machinery you disregard –

Courts should be constrained to deny access to court by a litigant who is said to have unclean hands - when a court of law exercises its discretion, it does so judicially -

Outcome ***Applicant's application dismissed – applicant ordered to pay 1st respondent costs of suit -***

By M. Dlamini J: T. Dlamini J and C. Maphanga J concurring

Summary: The applicant seeks mainly, for a declaratory order of a directive issued by the Honourable Chief Justice barring him to appear in all the courts of the kingdom as unconstitutional and *void ab initio*. Although the respondent has answered on the merits, *points in limine* have been raised and the court was urged to consider them. These are that the applicant is debarred from accessing the courts of law for the reasons that he is a fugitive from justice and is in continuous contempt of orders of the Supreme Court.

The Parties

[1] The applicant described himself as:

"1. An adult Swazi male attorney of the High Court of Swaziland, practising as such under the law firm S.C. Dlamini & Company, Miller's Mansion, 4th Floor, Office 401, Mbabane."

[2] The 1st respondent was said to be:

"3. *The Chief Justice of Swaziland, who is responsible for the administration and supervision of the judiciary and who issued the directive giving rise to these proceedings and is cited in that capacity as such."*

[3] I must hasten to point out that the 1st respondent is the Chief Justice of eSwatini and not of Swaziland. It is not clear why applicant who lodged the present application still referred this country as Swaziland after over a year His Majesty, the King declared the name of this country to be eSwatini. The Attorney General immediately issued a Legal Gazette to give force and effect to the change of the country's name. The Chief Justice followed suit by issuing a directive that all Courts in the Kingdom shall assume their names in accordance with the new name. I note further that although applicant's attorney in its Filling Notice referred to the " *High Court of eSwatini"*, in applicant's founding affidavit which was again deposed to recently, he chose to say, *"In the High Court of Swaziland."* Why, in the face of His Majesty, the King's decree, subsequent Legal Gazette and the honourable Chief Justice's directive? I do not wish to draw any adverse inference from the applicant and his attorney, except to state that lawyers are expected to be astute on current legal affairs especially of such local and international impact. This leads me to a pertinent point which I highlight immediately hereunder.

Prelude

[4] On the 22nd August, 2018, the applicant lodged an application under Case No.: 1341/2018, citing as respondents, the Minister for Justice and Constitutional Affairs, the President of the Law Society and the Chairman of the Civil Service Commission. The matter was enrolled before us for hearing on the 1st July, 2019. The main order sought was to compel the Minister of Justice and Constitutional Affairs, "*As Chairman of the Ad Hoc Committee in terms of Section 158(10) of the Constitution to forthwith and immediately within seventy two (72) hours of the Order being issued, to convene a sitting of the Ad Hoc Committee in terms of Section 158(3) of the Constitution to deliberate, consider and implement the decision on the complaint by the Applicant on the question of removing the Chief Justice in terms of Section 158(2) for the serious misbehaviour and misconduct and to recommend his suspension and replacement as the case maybe, pending the hearing in due cause."*[2]

[5] With due respect, without his joinder, scurrilous allegations were made against the Chief Justice by the applicant in his founding affidavit with the main ground to have the Chief Justice 'suspended and replaced" couched as follows:

> "*The said Chief Justice without lawful authority proceeded to issue a general notice to all members of the Judiciary including the Law Society of Swaziland and Justices debarring the Applicant and directed that he shall not appear in all Courts in the Kingdom of Swaziland.*
>
> *I submit that further damage is being done to the Judiciary and the Rule of Law by the Respondents not calling upon the*

[2] See para 2 of applicant's Notice of Motion under case number 1341/2018

Chief Justice to be suspended as envisaged in terms of Section 158 to the appointing authority as is required by them as a clear case is made by me under the cover of my letter of the 29th of June, 2018 read together with my application under case number 622/2018, challenging the Chief Justice. The Chief Justice continues to sit as a Judge in the Supreme Court and is deliberating on matters while a complaint on his conduct as a Chief Justice and a Judicial Officer is being questioned by me."[3]

[6] The applicant deposed under case No. 1341/2018 that the Registrar was refusing to enrol the present application. On the hearing date, we enquired from the applicant's Counsel on what good would the orders sought under case No.:1341/2018 be if for a second we may assume that we were inclined to grant the orders for the "ad hoc subcommittee to sit and deliberate and thereafter "suspend and replace' the Chief Justice. Would the granting of such orders do away with the Chief Justice's directive debarring the applicant once the Chief Justice is eventually suspended or removed? **Mr. L. Howe** who represented the applicant correctly responded in the negative. We pointed out that this Court was inclined to grant the applicant the right of audience in so far as case number 622/18 was concerned. **Mr. Howe** asked for an adjournment in order to consult with his client. When the matter was recalled, **Mr. L. Howe** pressed that we grant his client the right of audience under case No. 622/18. **Mr. Z. Jele** who represented the Intervening Party (Chief Justice) registered his non-objection to such an order. **Mr. L. Howe** then withdrew the application calling upon the impeachment and dismissal of the Chief Justice from office. The end result was the enrolment of case No.: 622/2018 which was

[3] See paras 6.1 and 11 *of case number 1341*

later presented by the Registrar under the present case number following the allegation that the number 622/18 was not properly sourced from the Registrar by the applicant.

[7] When the Court ordered the Registrar to enrol the present case, the Registrar was not afforded the opportunity to make presentation on the reasons she was declining to enrol it. It is therefore not clear to the Court whether she was in compliance with the Chief Justice's impugned debarment or that the applicant had referred to her Court as "*the High Court of Swaziland*," a defunct court, following Legal Gazette No. 80 of 2018 issued on 19th April 2018 to the implied effect that this court shall henceforth be referred to as the High Court of Eswatini.

Applicant's Prayers

[8] The applicant seeks for a *rule nisi* in the following terms:

> *"Calling upon the respondents to show cause why:*
>
> *(i) The directive/letter of the 9th April, 2018 barring the applicant from appearing before all the courts of Swaziland should not be declared to be unconstitutional and unlawful and invalid.*
>
> *(ii) Such a directive as described in (i) above should not be set aside as being of no force and effect.*
>
> *(c) the execution of the directive/letter should not be stayed pending the finalisation of this application."*

Urgency

[9] Although the matter was enrolled as an urgent application, on the hearing date, the matter was argued as an ordinary application, without any urgency attached to it. Further, prayer (c) above was not pursued on behalf of the applicant.

Applicant's case

[10] The applicant asserted that on 9th April, 2018, he appeared before the Supreme Court, representing **Sifiso Vusumuzi Sikhondze** who was challenging a decision in favour of **Mbabane City Council**. When he stood up to introduce himself as representing the appellant, the following transpired:

> *" 8.2 The Honourable Chief Justice, the 1st respondent then addressed me by saying that as the Chief Justice of Swaziland he had taken a stand to bar me from appearing in all the courts of Swaziland until I comply with an order of the Supreme Court granted on the 24th May, 2017.*
>
> *9. The 1st respondent then advised me that he would issue a written statement to this effect and such a statement was to be issued without delay."*

[11] Applicant continued to depose:

> *" 9.1 Indeed a letter/ directive addressed to myself and copied to all judges and the magistracy together with all other stakeholders was sent to me on the 10th April, 2018.*

9.2 The said directive erroneously refers to the Supreme Court having ordered that I must be committed to goal for contempt of paying an amount of E910 018.99…to one Phindile Ndzinisa when in actual fact I was committed for failure to pay an amount of E8,000.00 (Eight thousand Emalangeni) per month pending the filing of a liquidation and distribution of an estate in which I am an executor.

9.2.1 The liquidation and distribution account was filled on the 7th December, 2012 as ordered by the court.

9.2.2 Erroneously to all parties including this Honourable Court an order calling upon me to pay a sum of E 8,000.00 per month pending the finalisation of the main matter was issued despite the fact the main matter had been finalised some two years earlier, the effect of which was that the order of the Honourable Court was already academic when it was issued.

[12] He proceeded to expatiate both on the 1st respondent directive and the Supreme Court's orders against him as follows:

*"11. Despite that the obligation to pay the monthly maintenance to the said **Phindile Ndzinisa** being was extinguished upon the filing of the Liquidation and Distribution Account, which was filed on the 7th December, 2012 as aforesaid, the 1st respondent has been firm that I be committed to goal."*

The 1st Respondent's Answer

[13] The 1st respondent, under the hand of the Registrar of the Supreme Court gave a synopsis of the events confounding applicant's application. It is highlighted hereunder.

[14] **Martin Musa Ndzinisa** (**Mr. Ndzinisa**) met his death in 2001. He had been employed by Royal Swaziland (Eswatini) Sugar Corporation. Subsequently, the applicant together with one **Mzamo Nxumalo** (an admitted attorney of this court who died not long after **Mr. Ndzinisa's** demise) were appointed co-executors of the estate of late **Mr. Ndzinisa**. Royal Swaziland (Eswatini) Sugar Corporation paid out death benefits for the deceased to the total tune of E875 477.14. The said sum was deposited to the trust account of applicant's firm of attorney's, namely **Siboniso Dlamini and Company**. A further sum of E34 541.85 which had accrued to deceased estate was remitted by the Master of the High Court to applicant's firm. The total sum received into applicant's trust account was E910 018.99.

[15] The statutory period of six months for winding up of deceased's estate lapsed without applicant completing his duties as an executor. This precipitated a series of pleas to the applicant from the deceased's widow, **Phindile Ndzinisa** who is a beneficiary to the deceased's estate. It appears that all her effort to have the applicant file a liquidation and distribution account where he would account for *inter alia*, cash received, fell on deaf ears. She resorted to litigation. The Master of the High Court also moved an application to remove the applicant as an executor. The result was that the parties took a consent order to the effect that applicant would lodge with the Master the liquidation and distribution account not later than 7th

December, 2012. This date came and went by without any account from the applicant.

[16] It appears that in 2014, the widow resuscitated her application as an order against the applicant was issued by this court under **Case No.: 3761/2010** to file the liquidation and distribution account. An interim order was granted in favour of **Phindile Ndzinisa** that the applicant should pay her the sum of E8000 per month as maintenance, pending lodging of the account. These orders were granted on 2nd April, 2014. By October 2014, no account had been lodged on behalf of applicant and no single payment of E8000.00 per month as maintenance was made to the widow. The widow returned to court and on 10th October, 2014, the interim order was made final.

[17] The applicant noted an appeal under **Case No. 67/2014**. The Supreme Court dismissed applicant's appeal. The matter was referred back to the High Court to deal with the question of lodging the liquidation and distribution account. Applicant challenged the Supreme Court's decision by filing a review application. The reviewing court (under the auspices of the Supreme Court) dismissed applicant's review application. This meant that applicant had to pay the sum of E8000.00 per month as maintenance fee to the widow pending finalization of the lodging of the account.

[18] Applicant returned to this court by filling an application seeking for the suspension of the Supreme Court decision to pay maintenance to **Phindile Ndzinisa.** This application was dismissed as per judgement dated 21st July, 2017 under **Case No. 1007/2017**. The widow **Phindile Ndzinisa** then moved for contempt of court orders following that applicant was refusing to comply with the order of maintenance. This application was moved before

the Supreme Court. The widow's application was granted. The applicant was committed to gaol for a period of thirty days which was wholly suspended for the same period on the *proviso* that applicant pays the sum of E8000.00 as maintenance.

[19] Thirty days lapsed without compliance at the instance of the applicant. The sum of E910 081.99 remained unaccounted for despite the High Court order that the sum of E8000.00 per month be paid pending lodging of the account with the Master. With the widow having successfully shown that applicant was in contempt of court over both the payment of E8000 per month and lodging of the liquidation and distribution account, and the thirty days grace period of purging his contempt having lapsed without compliance, the Deputy Sherriff, **Nkosingiphile Dlamini** was engaged to effect arrest and take applicant to gaol. The Deputy Sheriff has deposed as follows:

> *"3. In terms of the instructions, I was required to apprehend and hand over attorney **Siboniso Clement Dlamini** to gaol. I have since been diligently searching for attorneys **Siboniso Dlamini** and I confirm that he has been evading arrest. I have also enlisted the assistance of the Royal Eswatini Police (both Ezulwini Police Post and Lobamba Police Station) to no avail. It appears that the applicant enters and leaves the country clandestinely.*
>
> *4. In the course of my search for him, I have left several messages at his home in Ezulwini, and confirm that to date, he has not contacted me nor have I been advised by his family of his whereabouts. The Police have also failed to locate **Mr.***

Dlamini *and have also in my presence left their details at his residence"*.

[20] On the above historic outline by the 1st Respondent, the applicant replied as follows:

> *"8* ***AD PARAGRAPH 7.1 TO 7.10***
>
> *Contents hereof are hearsay and irrelevant, inadmissible evidence. As such, they must be struck out"*.

[21] The short of it is that the background behind the application was not denied. In fact these events as alluded by the 1st respondent are correct as they are supported by the various written judgements. In reply, the applicant raised a number of points in *limine*. The first point taken was that the entire answering affidavit should be held inadmissible by reason that it was hearsay following that the directive was issued by the 1st respondent and not the Registrar of the Supreme Court who is the deponent.

[22] On the hearing date the Applicant did not pursue such point. I guess he was well advised in that regard. The reason is found in applicant's founding affidavit as he asserted that the 1st respondent pronounced the impugned directive to him while sitting in court. The applicant was appearing on behalf of his client. This court was the Supreme Court. The deponent, as the Registrar of the Supreme Court, is without doubt, the administrator of the Supreme Court. She is the custodian of court records. She is answerable for all events transpiring in court. It is for that reason that orders, rulings, directives or decrees by the court are signed and issued under her hand. For these reasons, the Registrar is the appropriate authority to depose to affidavits of this nature and certainly not the 1st respondent.

[23] The applicant also raised as an issue the appearance of 1st respondent's Counsel. He replied as follows:

> *"3.2. The employment of Robinson Bertram Attorneys to represent the first respondent is inconsistent with Section 77 of the Constitution Act 1/2005 and accordingly null and void. It is a misuse of public funds."*

[24] Like the rest of his points in *limine*, applicant did not pursue the above. I say nothing further except to point out that I guess, he was well advised again.

1st Respondent's submissions

[25] On the hearing date, the court was urged on behalf of the 1st respondent not to entertain applicant's application. The essence of the points in limine raised were that applicant had no right to access the courts of law as he had unclean hands. The grounds are summed as follows:

(i) Applicant had not purged his contempt and was in continuous contempt of the order of court to pay E8000 per month pending lodging of the account with the Master.

(ii) Applicant was a fugitive from justice.

Applicant's answer

[26] The applicant submitted that both the orders of the High Court and Supreme Court were granted without considering that he had no funds available in his trust account with regard to the deceased's estate. He had

filed the account. He had further tendered his resignation as an executor. He was therefore *functus officio*.

[27] He further argued that his appointment as an executor was not associated with his legal practice. He was appointed as executor in his capacity as an ordinary man and not an attorney. I must hasten to point out that by so averring, he loses sight of the evidence that the two cheques were deposited into his practice account (presumably the trust account of the firm).

[28] He then concluded that had both the High Court and the Supreme Court considered these circumstances, both courts would not have ordered him to pay maintenance and lodge an account. Further, had the 1st respondent given him the opportunity to advance his defence to the debarment directive, he would have submitted or made representation to that effect.

[29] He would have also reasoned with 1st respondent that barring him from making legal representation was akin to denying him the right to make a living. He had to pay rentals for his practice. He had to pay his secretary as well. He had no alternative means of earning a living. 1st respondent's action of imposing a bar on him without affording him the right to a hearing was a violation of Section 33 of the Constitution, Act No: 1 of 2005.

Adjudication

Issue

[30] The issue emanates from the points *in limine* raised. The question is therefore, "Is the applicant in the circumstances of the case serving before us entitled to access the courts of law?

Legal Principle

[31] The applicant laments the failure by the 1st respondent to afford him an opportunity to advance reasons on why the debarment directive ought not to be issued against him. Without losing focus on the procedure to be adopted in deciding the issues raised under the *points in limine* in this matter, it is apposite to refer to the well couched *ratio decidendi* by **MCB Maphalala JA** as he then was under Criminal Appeal **Case No: 26/2012, John Roland Rudd v Rex.**

[32] The facts of the case are that **John Roland Rudd** had been charged with two counts of attempted murder and three counts of contravening the Road Traffic Act No: 6 of 2007. He successfully applied for bail before this court for a bail bond of E15,000. He was ordered to deposit a cash amount of E5,000, with the balance as surety. A certain **Zwelithini Dlamini** stood as surety and secured his motor-vehicle for the same. This was on 27th June, 2012. Barely three days later, **Mr. Zwelithini Dlamini** approached this court and applied to withdraw his surety on the allegation that **John Roland Rudd** was about to skip his bail.

[33] On **Mr. Zwelithini's** testimony under oath, the Crown applied for cancellation of his bail and as correctly said by **MCB Maphalala JA** as he then was, *"A warrant for his immediate arrest"* was issued. The court granted all the orders prayed for without giving **Mr. Rudd** the opportunity to defend himself. **Mr. Rudd** raised the *audi alteram partem* principle. On appeal the learned Justice stated:

> *"The Court a quo was obliged to hear the appellant before cancelling his bail and discharging the surety in accordance with*

the principle of natural justice, the Audi Alteram Partem; literally it means "hear the other party."

[34] The learned **MCB Maphalala JA** hit the nail on the head as he expressed:

"*It is implicit in this principle that no person shall be condemned, punished or have any of his legal rights compromised by a court of law without being heard."*

[35] The learned Judge then referred to **Uma Nath Pandey v State of U.P Au 2009 SC 2375**[4] where Their Lordships wisely cited the *classicus* case of **Copper v Wandwerth Board Works (1863) 143 ER 414** as follows**:**

"*Even God did not pass a sentence upon Adam, before he was called upon to make his defence; "Adam" says God, "where art thou? Has thou eaten of the tree whereof I commanded thee that thou shouldest not eat?"*

[36] I must, from the onset, point out that beside that I am bound by the principle of *stare decissis***,** I agree entirely with the reasoning and final findings by **MCB Maphalala JA** in the circumstances of the **Rudd's** case for reasons that will become apparent later in this judgment. Now, what of the present application?

Should the court apply the *audi alteram partem* principle *in casu*?

[37] Again, I ask this question without losing sight of the procedure to be followed as precipitated by the preliminary points raised and arguments advanced in support thereof on behalf of the 1st respondent in this matter, following that the rest of the respondents on the hearing date took the view

[4] Supreme Court of India

that they shall abide by the Court's decision. No doubt, the principle of our law that no man should be condemned unheard is the cornerstone of the administration of both civil and criminal justice systems. This principle is a mechanism put in place by natural laws themselves to safeguard against arbitrary and capricious decision making which affect the interests and liberties of individuals. Of course, having its origins from natural law, it has over the years been regurgitated, fine-tuned and modified, and in most civilised jurisdictions of the world, found access into constitutions and other legislative enactments.

[38] Adherence to the *audi alteram partem* principle is so vital such that **O Regan J** [5] espoused that it is not just a matter of procedural law only. It also calls for the court to take into account consideration of substantive issues in the determination of whether the functionary was informed by the party adversely affected before reaching its impugned decision. The learned Justice resonated in that regard:

> "*I have three differences which I wish to record: first, in my view, no sharp line can be drawn between the requirement of procedural fairness and reasonableness when it comes to assessing the failure by a decision-making body to consider representation made to it. In my view such a failure raises issues of both process and substance.*"

[39] The excerpt quoted from **O Regan J** above leads me to conclude that the elements of fairness and reasonableness are the substratum of the right to be heard principle. This is demonstrated from case law as I demonstrate herein. In other words, this principle of our law, like all others, is not rigid.

[5] Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (CCT 59/04A) [2005] ZACC 25 (30th September, 2005) at para 847

It stands to be applied with great consideration of the circumstances of each case serving before the court hearing the matter.

Case law demonstrating that the *audi alteram partem* principle is flexible

[40] **Wilson JA**[6] (in 1967) was faced with an appeal where the trial court had passed sentence without affording the appellant the right to be heard on mitigation. The Appellate Division noted that the appellant was represented when the trial judge passed sentence. **Wilson JA** made reference to **De Villiers JP**[7] who stated as follows**:**

> ***"****I fully agree with the authorities quoted to me to the effect that it is not necessarily a gross irregularity if the Court merely omits to hear argument (**exempli gratia, per incuriam**) for in such circumstances the attorney or advocate should draw the Court's attention to the omission immediately."*[8]

[41] **Wilson JA** pointed:

> "*The failure of a court to afford an accused or his representative the opportunity to address it on the merits as contemplated by sec. ….may amount to an irregularity upon which the conviction and sentence may be set aside on review;…. **In certain circumstances, however, the mere omission to hear such an address may not amount to such an irregularity as would entitle the accused to have the proceedings set aside.** It may be possible for the State, for*

[6] S v Bresler 1967 (2) SA 451
[7] Serfontein v Bosch 1930 OPD 75
[8] At page 455 of Bresler's case

instance, to show that in fact ***the accused suffered no prejudice as a result of such omission****. An example of such a position is to be found in the case of* ***Rex v Pillay****,* ***1947 (3) SA*** *254 (T), where the Court was satisfied that the failure, due to an oversight of the Court* ***a quo*** *to hear argument by the accused's attorney after he had closed his case without calling evidence had caused the accused no prejudice because there had been a comprehensive address on the merits by such attorney on an unsuccessful application for discharge of the accused at the end of the Crown case."*[9]

[42] The learned Justice proceeded:

"*What is clear, however, is that if a request is properly made by the defence to lead evidence or to address in mitigation a court should accede thereto. In order to avoid possible misunderstanding between the bench and the accused or his representative, the most desirable practice would be for a criminal court always to ask the defence after verdict whether it is desired to say anything in regard to sentence, even if there be no actual obligation on the court to make such an enquiry."*[10]

[43] He then reasoned as a *ratio decidendi*:

"***It is the function of the accused or his representative to indicate to the court that it is desired to say something about sentence or to give evidence in regard thereto***. ***Unless it appear that, per incuriam, due to a misunderstanding or some such factor, the***

[9] See pages 455-456 of Bresler's case
[10] See page 456 of Bresler's case *supra*

defence was indeed deprived of an opportunity to indicate and execute its desire and, further, that in fact some material information or consideration in regard to sentence was thus not presented to the court, no remedy is open to the accused based on the mere failure of the court to ask for the defence's attitude in regard to sentence."[11] (My emphasis)

[44] Similarly, **Trollip JA (**in 1973) faced with an appeal where it was alleged that the trial Judge had passed judgment before he could receive written submissions, found in favour of the respondent and refused to set aside the judgement of the *court a quo*. **Trollip JA** pointed out that *prima facie* such was an irregularity but did not vitiate the proceedings. The learned Justice referred to **Bresler's** case above by pointing out:

> "*It is clearly a fundamental principle that every litigant should be given a fair opportunity of addressing the court, either himself or through his representative. But Bresler's case and the authorities cited therein show that,* ***if failure on the part of a court to receive arguments on behalf of a party was due to omission might not constitute a fatal irregularity****."* (My emphasis)

[45] I understand the learned Judge to have said that it is desirable for the adjudicator to invite a party to make presentation on a matter before reaching an adverse decision affecting that party. There is however a caveat to this general rule and **Trollip JA** highlighted that where the decision maker fails to extend the invitation, the court would enquire whether there was opportunity for the aggrieved party to make his

[11] At page 451

representation and if by such omission the aggrieved party was prejudiced. If there was and it could not be reasonably said that the party suffered prejudice, then the court would decline to set aside the challenged decision where the *audi alteram partem* principle is raised. It is for this reason that this court totally concurs with the *ratio decidendi* in **Rudd's** case *supra*. The reason is that when the decision to cancel **Rudd's** bail and to have him incarcerated thereafter was taken, **Rudd** was not before court for him to seize the opportunity and make representation. Clearly, there was travesty of the maxim, 'let the other party be heard'.

[46] Turning to the case *in casu*, the applicant deposed that on the 9th April, 2018 he appeared as Counsel on behalf of his client, **Sifiso Vusumuzi Sikhondze** who was appealing a decision in favour of the City Council of Mbabane. The 1st respondent addressed him as follows:

> *"[A]s the Chief Justice of Swaziland [sic] he had taken a stand to bar me from appearing in all the courts of Swaziland until I comply with an order of the Supreme Court granted on the 24th May, 2017.*
> *The respondent then advised me that he would issue a written statement to this effect and such a statement was to be issued without any delay*."[12]

[47] Now, applying the above *ratio decidendi* to the case *in casu*, it is clear that before the 1st respondent issued the written notice debarring applicant, he was *viva voce* warned of the adverse decision. This was when he presented himself in person before the 1st respondent (decision maker) on the 9th April, 2018. The question is, why did he not raise his side of the story

[12] See paras 8.2 and 9 of page 9 of book of pleadings

then? Why did he choose to accept the adverse decision against him without seizing the opportunity to persuade the decision-maker otherwise? The answers to these questions are privy only to the applicant. However, in the eyes of the law, these questions can only be answered by stating that the *audi alteram partem* principle was not violated in the circumstances of the case in light of the above highlighted cases by **Williamson JA, Trollip JA** *et al.* In other words, had the applicant received a written notice of his debarment on the 10th April, 2018, without the incident of the previous day, the 9th, then his application would be in all fours with the *audi alteram partem*. It is for this reason therefore that **Jafta AJ** in the Constitutional Court of South Africa and presiding on a case where the *audi alteram partem* principle was raised, clarified, "*The facts and circumstances of a particular case determine the content of procedural fairness."* [13] The learned Justice so stated after pointing out that the *audi alteram partem* principle was said to be addressing a procedural fairness question.

[48] I appreciate that it could be raised that it was pointless to raise any form of defences on the 9th April, 2018 as the 1st respondent advised the applicant that he had already formed the decision to debar him from all courts in the land. I must point out that administratively, there is nothing wrong for an administrator to take an adverse decision and then have the affected party make representation thereafter. Administratively, a decision maker is not *functus officio* once it takes a decision. It is still open for him to change his decision once persuaded otherwise. There is therefore a clear line of demarcation between decisions taken by a person discharging his judicial functions and one exercising his administrative powers. Expatiating on this position **Corbett CJ**[14] referred to **Lord Mustill**[15] as follows**:**

[13] See **Walele v City of Cape Town and Others 2008 (6) SA** 129 (CC) at para 28
[14] In Du Preez and Another v Truth and Reconciliation Commission 1997 (3) SA 204 at 231I-232D
[15] Doody v Secretary of State for the Home Department and other appeals [1993] 3 ALL ER 92

"*What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgement. They are far too well known. From them, I derive the following. (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2)The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principle of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) …….. (5)* ***Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representation on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both.*** *(6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."* (My emphasis)

[49 **Moseneke DCJ**[16] expressed similarly:

"*The maxim [audi alteram partem] expresses a principle of natural justice which is part of our law. The classic formulations of the*

[16] **Mosetlha v President of the Republic of South Africa and Another 2008 (1) SA 566 (CC)**

principle state that, when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken ***(or in some instances thereafter****…), unless the statute expressly or by implication indicates the contrary.*

[50] There is another aspect of case law reflecting that the maxim under discussion is prone to flexibility. In the **President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT 16/98) [1999] ZACC 11; 2000 (1) SA 1** (10th September, 1999) one of the issues raised was that the President ought to have afforded the respondents a right of hearing before taking the decision to institute a commission of enquiry against them. The President was called to give *viva voce* evidence by the *court a quo*.[17] The judgment by the court consisting of ten Justices[18] stated as follows after lamenting the *court a quo's* order to subpoena the President to give oral evidence:

"*The requirement of procedural fairness, which is an incident of natural justice,* ***though relevant to hearing before tribunals, is not necessarily relevant to every exercise of public power****.* ***Du Preez's*** *case is no authority for such a proposition,* ***nor is it authority for the proposition that whenever prejudice may be anticipated, a functionary exercising public power must give a hearing to the***

[17] I must highlight that the Constitutional Court frowned against such procedure and pointed out that owing to the very busy schedule of the President, courts must resort to other means of dissolving issues except in very rare and compelling circumstances.

[18] Chakalson P, Langa DP, Ackerman J, Goldstone J, Kriegler J, Madala J, Mokgoro J, O' Regan J, Sachs J and Yacoob J.

person or persons likely to be affected by the decision. What procedural fairness requires depends on the circumstances of each particular case. "[19] **(**My emphasis**)**

[51] I understand their Lordships to be saying that 'the right to be heard' rule cannot trump public interest. Those exercising public power on the behest of public interest or policy should not be fettered by this rule. Another case lends credence to this proposition of the law. This is the case of **Masetlha** *supra*. Briefly, the President had terminated **Masetlha**'s contract of service as the head and Director-General of the National Intelligence Agency on the basis that there was irretrievable breakdown of trust between him and **Masetlha**. **Masetlh**a challenged the President's decision on the basis that he was not afforded a right to be heard prior to the President's decision. **Moseneke DCJ** neatly explained one of the issues:

"*The question then is whether the power to appoint and the correlative power to dismiss a head of the Agency as conferred by section 209(2) of the Constitution is subject to a requirement of procedural fairness. The unfairness that the applicant complains of lies in the President not affording him an opportunity to be heard before the impending dismissal. The applicant argues that the dismissal falls to be reviewed and set aside on the ground of procedural unfairness*."[20]

[52] The learned Judge espoused on the procedural unfairness:

[19] See para 219 of South Africa Rugby Football case *supra*
[20] Para 74 of Masetlha's case *supra*

"*It is so that the audi principle or the right to be heard, which is derived from tenets of natural justice, is part of the common law. It is inspired by the notion that people should be afforded a chance to participate in the decision that will affect them and more importantly an opportunity to influence the result of the decision. It was recognised in* ***Zenzile*** *that the power to dismiss must ordinarily be constrained by the requirements of procedural fairness, which incorporates the right to be heard ahead of an adverse decision."*[21]

[53] He then reasoned:

"*In my view however, the special legal relationship that obtains between the President as head of the national executive, on the one hand, and the Director-General of an intelligence agency, on the other, is clearly distinguishable from the considerations relied upon in* ***Zenzile****. One important distinguishing feature is that* ***the power to dismiss is an executive function that derives from the Constitution and national legislation.***

It is clear that the Constitution and the legislative scheme give the President a special power to appoint and that it will be only reviewable on narrow grounds and ***constitutes executive action and not administrative action****. The power to dismiss being a corollary of the power to appoint is similarly executive action that does not constitute administrative action, particularly in this special category of appointments.* ***It would not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action****. These powers to appoint and to dismiss are conferred specially upon the President*

[21] Para 75 op. cit.

for the effective business of government and, in this particular case, for the effective pursuit of national security." (My emphasis)

[54] The learned Justice then wisely referred to **Premier, Mpumalanga** as follows:

> "***In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively*** *(a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly."*

[55] From the above cases, it is undoubtedly clear that the *audi alteram partem* principle is not a hard and fast maxim. The cases lay out the proposition that the court must scrutinise the category of function discharged. If the decision maker was not discharging an administrative function, then the court should decline to find that he was subjected to this maxim.

[56] What then protects the rights of litigants challenging a decision which is not classified as administrative in order to ensure that the rights of the aggrieved party are not infringed? In other words, are those discharging executive or other powers immune to scrutiny especially with regards to the human rights concept of *audi*? The answer is an emphatic, "No". All parties affected by a decision are protected irrespective of whether the decision was taken administratively or otherwise.

[57] Where a decision was not taken administratively and therefore not subject to the *audi alteram* rule, the court is called upon to examine if the decision maker exercised his powers within the confines of the law. Was the decision taken in conformity with the principle of legality? The courts will resort to the enabling legislation for instance to determine if the decision maker did not act *ultra vires* for instance. It will then resort to asking if there was a basis for the decision. Did the adjudicator reached an informed decision, for instance.

[58] In the **South African Rugby Football** case *supra* the court found that the respondents had been engaged prior by the line Minister before the President took the decision to institute the commission of enquiry into respondent's activities. The President had been informed by a report of a task team set prior by the Minister. Similarly, in **Masetlha**, the court noted that Masetlha had two meetings with the Minister where he was invited to provide an explanation about the surveillance and his role. He did submit a written report explaining his position on the impugned surveillance activities against a business man called **Macozoma**. At one point in time, he had an audience with the President where he expressed his views with regard to the **Macozoma** surveillance issue and protested the dismissal of his subordinates. In as much as he did not express his view about his own dismissal which was not discussed, for the reason that he occupied a position of trust, the President acted within the confines of the law when he summarily dismissed him. In brief, a decision reached not within the exercise of administrative powers is subjected to the question of whether it was taken rationally without any *mala fide* and arbitrariness.

[59] Analogously, the decision *in casu* was taken as pointed out by the applicant in his founding papers, following the decision of the Supreme Court

granted on 24th May, 2017. The matter as clearly outlined on behalf of the 1st respondent commenced in this court where the applicant was given the opportunity to explain his failure to finalise the liquidation and distribution account. He did advance the reasons that he had filed one in December, 2012. He had resigned as an executor and therefore *functus officio*. He did not have any funds in the account under the name of the estate. In brief, all these reasons he seeks to advance in order to resist the debarment of the 9th April 2019 were well canvassed by three courts, viz., the High Court, the Supreme Court firstly sitting as an appeal court and later as a review court. They were all found to be fallacious and rejected by all three courts. There is nothing new that the applicant intends to advance in order to have his debar set aside. Like in **Masetlha** and the **South African Rugby** cases where the court found that the presentation made to their line Ministers was sufficient, there was no need to make any before the President, applicant *in casu* is not entitled to have debar set aside on the ground that the *audi alteram partem* rule was not observed by the 1st respondent. The 1st respondent took a rational decision informed by the last judgement in this matter of 24th May, 2017. He was exercising his powers as the Chief Justice and the head of the Judiciary in terms of section 139(5) of the Constitution (Act No. 1 of 2005). This was well communicated to the applicant both on the 9th and 10th April, 2019.

Doctrine of unclean hands

[60] The doctrine of unclean hands was well articulated by **Mr. Z Jele**. This doctrine was echoed by **Wilmot CJ**[22] in this manner:

> *"All writers upon our law agree in this-* ***no polluted hand shall touch the pure fountains of justice."***

[22] In **Collins v Blanterns (2 Wilson 347) 1767** reported in **Jajbhay v Cassim 1939 AD 537** at 551

[61] **Watermeyer JA**[23] expatiated on the doctrine:

> " '***Procul, O, procul este profane.'*** *This statement rests the refusal of the Court to assist the plaintiff upon the doctrine that the Court will not assist a plaintiff unless he comes into Court with clean hands."*

[62] One of the rationale for the doctrine of unclean hand is to compel parties to comply with court orders. Where court orders are flouted with impunity, this leads to anarchy and the law of the jungle reigns supreme. Survival of the fittest, a concept correlative to the law of the jungle has no place in our world. Public order or policy dictates therefore that where a litigant has flagrantly refused to follow orders of the court or tribunals, this doctrine stands to be invoked. It is a component of the rule of law. Its perception is that you cannot hope to get assistance from the very machinery you disregard. On its application, it shuts the doors of justice completely until the concerned party complies with the orders or to put it directly, purges his contemptuous act. Unfortunately, once this doctrine is established by the party raising it, the court cannot even try to dust the comb web to see beyond it with a view of ascertaining whether the party who has to answer to the doctrine has prospect of success in the merits of the case. It is a preliminary point that must be dealt with. Once upheld, the whole proceedings collapse against the party which the doctrine is raised.

[63] The Supreme Court[24] cited with approval the case of **Mullingan v Mullingan 1925 WLD 104** in the following:

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[23] **Jajbhay v Cassim** *supra page 551*

[24] **Thomas Investments Corporation v Greans Investment (Pty) Ltd (31/12) [2012] SZSC 58 (30th November, 2012)**

> *"**Before a person seeks to establish his rights in a Court of law he must approach the Court with clean hands; where he himself, through his own conduct makes it impossible for the processes of the Court (whether criminal or civil) to be given effect to, he cannot ask the Court to set its machinery in motion to protect his civil rights and interests.** Were it not so, such a person would be in a much more advantageous position than an ordinary applicant or even a peregrinus, who is obliged to give security. He would have all the advantages and be liable to none of the disadvantages of an ordinary litigant, because, if unsuccessful in his suit, his successful opponent would be unable to attach either his property, supposing he had any, or his person, in satisfaction of his claim for costs. Moreover, it is totally inconsistent with the whole spirit of our judicial system to take cognizance of matters conducted in secrecy…. "*

[64] Like all other principles, fluidity attached to this doctrine is that the adjudicator may use his discretion and allow a party who has disregarded a court order. As correctly referred to by learned Counsel for applicant, **Mr. T. Maseko,** it is not every misconduct by a litigant or his Counsel which warrant sanction in accordance with the doctrine of unclean hands. The court may use its discretion even though evidence shows that there was disrepute. This was expressed in **Swaziland Federation of Trade Unions v President of the Industrial Court and Another; Appeal Case No. 11/199 (Swaziland Federation).**

Case at hand

[65] Two grounds have been raised on behalf of the 1st respondent as the basis for invoking the doctrine that the pure fountains of justice should not be touched by the applicant. The first is that the applicant is in contempt of court. The second is that applicant is a fugitive of the law.

Contempt of court

[66] I have already highlighted that applicant's appeals and review applications were dismissed by the relevant courts. The beneficiary to the estate then moved a contempt of court proceedings before the Supreme Court. Applicant was found to be in contempt by order dated 24th May, 2017. It is not disputed that applicant has not complied even to date. In fact the whole reading of applicant's founding affidavit served in this application reflects that applicant shall not comply with any of the court orders, let alone the orders of 24th May, 2017. He advances the reasons that he did file a distribution and liquidation account long before the matters returned to court; that he has no funds available in his trust account and that he resigned from the office of executorship in regard to the deceased's estate and therefore *functus officio*. He does not want to acknowledge that such points were considered by this court and the Supreme Court and they were found to be wanting and therefore rejected. From his founding affidavit alone, it is clear that the applicant does neither intends to comply with the orders of the highest court in this land nor does he show that he might in the future. At any rate, he was so found on the 24th May 2017 to be in contempt of court. In his replying affidavit, he insist on the findings of the Supreme Court on contempt of court:

> "***Even if I am in contempt of court, <u>which is denied</u>****, I have a right to approach the court to protect myself against the illegality which is being perpetrated against me. The first respondent cannot exercise unspecified powers whose effect is to abrogate the Constitution and an Act of Parliament."* (My emphasis)

[67] So clearly, even though applicant was found to be guilty of contempt of court by the highest court of the land, he still disputes the same. Why in the absence of any review? He is a lawyer who has deposed in the founding affidavit that he has been practising law for the past thirty years.

Fugitive from justice

[68] It is not in issue (as deposed by applicant himself in reply) that the applicant having been arrested and surrendered by the deputy-sheriff, **Nkosingiphile Dlamini** to **His Majesty's Correctional Services** (the **Correctional Services)** in order to serve his custodial sentence after failing to purge his contempt within the grace period of thirty days, the applicant did not remain in custody. Further undisputed evidence serving before court is that the applicant demanded a special diet from the **Correctional Services** personnel if he be lodged in. The **Correctional Services** personnel *mero motu* released applicant on the basis that they were to prepare for his special diet. It is not clear as to why **Correctional Services** was concerned with applicant's diet as he was to serve a civil imprisonment and not a criminal sentence. The obligation to provide applicant with food or anything was not part of their mandate. Their duty was to receive applicant into goal and charge lodging fees, period! The **Correctional Services** had no obligation to bear applicant's living expenses while in goal in terms of the law. The rationale for this position of the law is simply that the applicant's lodging in goal was not at the instance of the Crown but a private citizen. There was therefore no justification for the tax payers' money to be expended upon the applicant. **Correctional Services** ought to have sought legal advice on this matter.

[69] It is obvious though, that the **Correctional Services** fell into the deceitful trap of the applicant. According to **Mr. Z Jele**, applicant seemed to have used his very legal profession to intimidate the prison's officials. It is upon the release by the **Correctional Services** without serving even a single moment of his civil imprisonment that the applicant took the opportunity to avoid his civil penalty and evade this court's jurisdiction. The court was told by his own Counsel that he was then residing in Piet Retief, the Republic of South Africa. Testimony to this were his affidavits which were deposed in Piet Retief.

[70] The wise observations by their Lordships in **Mullingan**'s case are that: "***Were the Court to entertain a suit at the instance of such a litigant it would be stultifying its own processes and it would, moreover, be conniving at and condoning the conduct of a person, who through his flight from justice, sets law and order in defiance."***

Answer

[71] Called upon to respond to **Mr. Z Jele's** submission that the applicant should be denied access to the courts by virtue of the contemptuous findings by the Supreme Court against him and the evidence that he is a fugitive of the law, the applicant's attorney referred the court to **Swaziland Federation's** case and urged this court to use its discretion and allow the application to be heard in the merits.

Use of discretion on the doctrine of unclean hands by the court

[72] In his quest for the exercise by the court of its discretion, the applicant's attorney referred the court to the **Swaziland Federation of Trade Unions**

v President of the Industrial Court and Another, Appeal NO. 11/1997 where their Lordships held:

> *'While the doctrine of "clean hands" may apply to situations in which relief is sought which is discretionary in nature as far as the judicial officer is concerned it cannot be applied when the discretion of the Court is excluded such as the position in casu where the appellant was entitled to an order, based as it was on a failure to afford it the right to be heard. In our law as stated above the entitlement to a hearing is invariable and inviolable. A request to review a failure of it does not depend on the discretion of the Court and the doctrine of clean hands, therefore, is inappropriate and inapplicable."*[25]

[73] Further, this court is much alive to the principle laid down in **Performing Arts Council v Paper Printing Wood & Allied Workers 1994(2) SA 204** at 218 where **Goldstone JA** stated that courts should be constrained to deny access to court by a litigant who is said to have unclean hands. The learned Judge however, clearly expressed that this concerned industrial matters. He stated:

> "*It is now accepted that the industrial court may come to the assistance of employees who embark on illegal industrial action provided they can show good cause, such as necessity, self-defence, provocation or, as in this case, precipitate action by the employer."*

[74] He reasoned:

[25] See page 24

"***Nicholus AJA***[26] *has reminded us that labour law operates at the interface between law and industrial relations. Accordingly, 'its problems are delicate and complex and not to be solved solely by statutory fiat or legal analysis. Labour law has social, economic and psychological dimensions which cannot be constrained in legal formulas.'"*

[75] In support of his bread and butter issues, the applicant deposed:

"*My constitutional right to practise a profession of my choice has been infringed as the effect of the directive is that no court in Swaziland is to grant me audience yet my livelihood is fully dependant on legal practise, a profession I have been involved in for over three (3) decades.*

Not only is the directive detrimental to me but my dependents as well who must bear lack of parental support."[27]

[76] Now the question facing this court is, should the court use its discretion in favour of the applicant? The court appreciates as demonstrated in the preceding paragraph that the directive to debar the applicant pertains to his means of earning his livelihood and therefore has a dire consequences on his life on this one hand. On the other however, there is so much public outcry on lawyers expropriating deceased estate funds such that in 2012 Parliament passed a motion setting up a special committee to investigate lawyers. The Law Society ran to court seeking a restraint order against the Legislative arm of Government. Worse still, there is the Supreme Court judgment where applicant was found to be in total disregard of its orders to account for the sum close to a million Emalangeni which was received in

[26] **SA Chemical Workers Union and Others v Cape Lime Ltd (1988) 9 ILJ 441 (IC)** at 455C-D

[27] See page 13 paras 13.2 and 14 of book of pleadings

2001 and which remains unaccounted even to date. The matter of the applicant could be correctly classified as a matter of public interest. Now it is a question of balancing between the personal interest of the applicant and that of the public.

[77] It is very critical that when a court of law exercises its discretion, it does so judicially. **Botha JA**[28] summed similarly:

> "[*A] discretion which must be exercised judicially upon a consideration of all the relevant facts and in accordance with recognised principles. As between the parties it is in essence a matter of fairness to both sides*.

[78] The learned Judge continued to point out that incorrect exercise of discretion would be evident by irregularity, misdirection or "*disquietingly inappropriate*" outcome. Now my duty is to put on the scales of justice the evidence adduced on behalf of the applicant and that of the 1st respondent in order to assess whose interest weigh heavier. Is it that of the applicant or the public or justice as it were? Questions of prejudice remain to be considered.

[79] It is pertinent that I discuss the **Swaziland Federation's** case. The Appeal court in the **Swaziland Federation** had found that the *court a quo* had relied on what it termed a judicial knowledge (notorious facts) to find that the **Swaziland Federation** was in contempt. The court held that it was a misdirection by the *court a quo* to rely on judicial knowledge without affording the **Swaziland Federation** the right to be heard on the very question as to whether indeed what it termed judicial knowledge was in fact true. In other words, in the **Swaziland Federation** case, the *court a quo* ought to have conducted an enquiry on whether the **Swaziland Federation**

[28] Kathrada v Arbitration Tribunal an Another 1975 (2) SA 673 at 680

was in fact in contempt of court. It ought to have done so by giving the **Swaziland Federation** the right to be heard before concluding or taking judicial knowledge of the circumstance upon which it relied to find the **Swaziland Federation** in contempt and therefore having dirty hands. *In casu* however, the court is not called upon to make such a finding, i.e. whether applicant is in contempt. That finding was made by the Supreme Court by order dated 24th May, 2017. For this reason, the **Swaziland Federation** case is distinguishable from the present.

[80] Turning to the case at hand, the applicant has pointed out clearly that he is not in a position to comply with the orders of the Supreme Court to pay the sum of E8000 as maintenance per month pending filling the liquidation and distribution account. He states that he lodged the liquidation and distribution account on 7th December, 2012 long before the matter was adjudicated in the courts. He says that he is therefore *functus officio* by reason of having filed and his subsequent resignation as the executor. At the same time he pleads with this court that the 1st respondent cannot take away his means of earning a living. Clearly from these averments, the applicant is not in a position to comply with the orders of the ultimate court of the land i.e., not now, in the near future or ever.

[81] On the other hand, it is contended on behalf of the 1st respondent that the doctrine of unclean hands must be given effect. The fountains of justice stand to be polluted if the court would exercise its discretion in favour of the applicant. Not only has applicant failed to comply with the order of the superior court but has also evaded justice right from the hands of the lawful agency as he manage to escape from prison using subtle means.

[82] Putting the above on the scales of justice, it is my considered view that the justice of the matter favours that the applicant's application be declined. To grant him the right of audience in light of the doctrine of unclean hands, would be indirectly setting aside the Supreme Court judgment which has reached its finality in that it has been adjudicated upon even on review. This is without considering the directive by the 1st respondent. At any rate, the directive to debar applicant by the 1st respondent was nothing else than a confirmatory of the doctrine of unclean hands. Whether the directive to debar applicant is there or not is immaterial as applicant will always be confronted by this doctrine in every court he appears, until he purges his contempt.

[83] In this application, applicant has made it clear that he will not comply with the order leading to his civil imprisonment. This is what he asserts he intended to tell the 1st respondent if he were afforded the opportunity before issuing the impugned directive. This court cannot override the order of the Supreme Court by then granting him the right to be heard thereby infringing on the doctrine of unclean hands. He is an architect of his own misfortunes. This court cannot come to his rescue. The dictates of the administration of justice tilt the scales of justice in favour of public interest. Justice must not just be done but must manifestly be seen to be done. The widow as a member of the public stands to suffer irreparable prejudice should the doctrine of unclean hands be ignored in the circumstances of the case at hand. In fact, applicant's persistent refusal to comply with the orders of the Supreme Court is not only derogatory of the justice system but an affront to the legal profession as a whole as well for a member who boasts of three decades in the legal practice and a former Master of the High Court himself to depose that he shall not abide by the orders of court, let alone the Supreme Court. This is fortified by reason that I know of no

other profession in the world where its members are referred to as 'learned' except the legal profession. It is therefore the duty of the courts to uphold this noble description accorded to our profession by ferociously guarding and maintaining the purity of the fountains of justice. All those who drink from its wells must either be clean or purged. Unfortunately, applicant is neither. What confounds his application is that he has stated under oath that he shall not purge his disdainful conduct. He has further manifestly demonstrated this by evading the jurisdiction of this court after he was ordered to be imprisoned by the highest court of the land. Worse still, he managed to evade the stings of justice from the very hands of **Correctional Services**. He must bear the blunt therefore.

[84] When called upon to answer to the deputy sheriffs' averment that he is nowhere to be seen or found, he launches a serious attacks against them. He asserts that they have no authority to re-surrender him to the **Correctional Services** as they are *functus officio* and that any attempt to enforce the order of imprisonment against him would be illegal. He intimidates them by deposing that he is ready to challenge them. As correctly argued by **Mr. Z Jele**, he uses his very legal profession to appease his insatiable ego instead of serving the needs of his client by complying with the court orders. For a period spanning about two decades, he adamantly refuses to account for the sum of about one million Emalangeni received by him and interest accumulated over the years. He then nose-thumb the court by litigating across the fence. As already demonstrated, his prayer to set aside the debarment directive by 1st respondent is nothing but an abstract as the doctrine of unclean hands will always haunt him unless he purges his contempt, an order he categorically states under oath that he shall not abide with. His mendacious act deserves censure by invoking the doctrine of unclean hands.

Costs

[85] The applicant prayed in relation to costs of suit:

> "*Granting costs to applicant including certified costs of counsel in terms of Rule 68(2)"*

[86] Applicant was not represented by senior Counsel in this matter. It is not clear why such high scale on costs were sought. It is not surprising that the 1st respondent similarly prayed for costs at punitive scale. I must once more ring a bell that litigants must trade very cautious when drafting request for costs' prayers. This is because our position in this jurisdiction is that a party should not ask what itself cannot give. For if it does, upon losing the case, it shall be ordered to pay costs at the same scale it had prayed against its opponent.

[87] That as it may, costs being at the discretion of the presiding officer, I am not inclined to grant costs at punitive scale. The applicant, by its application, futile as it was, was exercising his constitutional right to demand under the *audi alteram partem* maxim. However, considering the attitude of the applicant towards courts' orders, I am not inclined to depart from the general rule as stated by **Traverso J**[29] that "*Generally, the party who achieves substantial success will be entitled to costs. Only where there are special circumstances will a departure from the general rule be justified. There is no fixed definition of what 'special circumstances' will justify a departure from the general rule, but it is well recognised that the fact that a plaintiff succeeds in a lesser amount than his claim does not in itself justify a departure from the general rule."* *In casu* there are no

[29] In **Joubert t/a Wilcon v Beacham and Another 1996 (1) SA 500** at 502

special circumstances advanced on behalf of the applicant on why the court should deviate from the general rule. It follows therefore that costs should be awarded to the 1st respondent.

By C. Maphanga J

[88] I have read the judgment of my sister and agree with it. I would however like to add as *orbiter* that there is but one aspect of this unfortunate matter that merits consideration, albeit in *obiter*. It is this. The irony of ironies that this case gives rise to lies in the fact that the applicant petitions this court to come to his aid complaining as he does, of an edict that he claims prevents him from conducting his practice and thus infringes on his professional right to carry on work as an attorney of this court – all this in circumstances where, regardless of his primary and fiduciary duties as an officer of this very court, he is in flagrant defiance, neglect or contempt of its orders.

[89] Given the circumstances of this matter and the untold difficulties that will undoubtedly been visited on the widow in the matter of the winding up of her husband estate and its protracted course, the applicant should consider himself in good fortune that so far he has deftly escaped the invocation of section 27 as read with section 27 *ter* of the Legal Practitioners Act, of 1964. We consider it a serious blight on the profession that despite the serious *prima facie* instance of professional misconduct that the proceedings have surfaced, no steps whatsoever have been taken by the Law Society at the very least to investigate, consider and or invoke the disciplinary provisions of the Act. *Aliter,* in contrast the essential object of these proceedings is to champion the interests of the ostensibly errant practitioner as opposed to those of his hapless victim. Indeed this question was posed during the hearing of this application by the Court directed at the

Applicant's attorney, **Mr. T. Maseko** as to whether the Applicant's interests and lamentations as a legal practitioner should trump those of the widow in the underlying causes that have led to this application. In credit to **Mr. T. Maseko** he conceded that he could not support such a proposition nor was that the intended effect of the application. It is however an inevitable impression that the applicant's application to this court suggests.

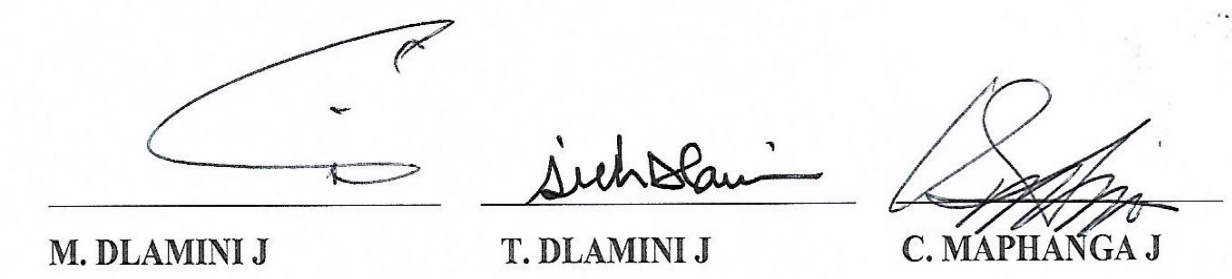
[90] The time does come where the Chief Justice and indeed any judge of this court in his absence, being apprised of a flagrant instance of professional misconduct in the course of proceedings before him, may exercise the inherent power of the Court; which prerogative bears a tint of professional supervision over all its officers, and in its discretion suspend a practitioner where the circumstances call for prompt action. It may do so in conjunction with appropriate ancillary directives such as the referral of the matter for further action by the Law Society as the professional institution charged with the statutory oversight and disciplinary jurisdiction; in which proceedings the practitioner would be afforded ample opportunity to make his case.

[91] It is not lost to us that the Law Society was initially cited and joined as a respondent in the application before us. Curiously it has elected to hold its peace and make no submissions in the matter whatsoever. As indicated we make these remarks in *obiter*. It is nonetheless desirable that the long-drawn saga in the underlying cause be brought to a timely close and that final redress to the affected parties be achieved. For these reasons, the Law Society must act appropriately, lest it and the justice system suffer further reputational damage.

[92] In the final analysis, the following orders are entered:

[92.1] The applicant's application is dismissed;

[92.2] The applicant is ordered to pay 1st respondent costs of suit.



M. DLAMINI J T. DLAMINI J C. MAPHANGA J