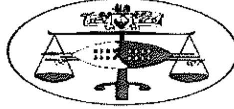


IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO. 2472/2023**

In the matter between: -

PHUMLANI MABUZA	1st Applicant
PHUMELELA MABUZA	2nd Applicant
AYABONGWA MABUZA	3rd Applicant

And

THE COMMISSIONER GENERAL FOR HIS MAJESTY'S CORRECTIONAL SERVICES	1st Respondent
THE ATTORNEY GENERAL	2nd Respondent

Neutral citation: *Phumlani Mabuza & 2 Others vs The National Commissioner for His Majesty's Correctional Services & Another (2472/2023) SZHC 47 (20 March 2024)*

CORAM: **N.M. MASEKO J.**

FOR APPLICANTS: **ATTORNEY M. MASUKU**
FOR RESPONDENTS: **CROWN COUNSEL M. MASHININI**

HEARD: **20/02/2024**
DELIVERED: **20/03/2024**

PREAMBLE:

Civil Law – Civil Procedure – Points *in limine* – Writ of Mandamus – Jurisdiction – Exhaustion of local remedies – Non-joinder of a necessary

party – Presence of alternative remedy/relief to applicants per Section 25 of the Correctional Services Act 13/2017 – legal authorities discussed.

JUDGMENT

MASEKO J

[1] On the 20th October 2023, the Applicants launched motion proceedings for an order in the following terms:-

1. That the 1st Respondent be directed and ordered to grant the Applicants reasonable access to their incarcerated father Mduduzi Bacede Mabuza.

2. Costs of suit in the event of opposition.

3. Further and/or alternative relief.

[2] The 1st and 2nd Applicants are adults and the 3rd Applicant is a minor. They are all children of Mduduzi Bacede Mabuza who is currently incarcerated for criminal charges.

[3] The Applicants state that since their father was incarcerated they have had very little access to him owing to restrictions which are imposed by the 1st Respondent. They state further that they have opted to visit him as a collective, and that their father always make a request to the 1st Respondent's authorities to permit their visit.

[4] The Applicants state further that their last attempt to visit their father was on Friday the 6th October 2023, and they were denied access to see him. The Applicants state that they have a right to see their father and that these rights are being trampled upon by the 1st Respondent's refusal to allow them to see their father. It is on these basis that the Applicants have launched these proceedings.

[5] The Applicants state further that they have a clear right to have access to their father, and that there is apprehension of harm because of the lack of fatherly figure in their lives. They state that the refusal by the 1st Respondent to allow them access to their father has resulted to actual injury to them. The Applicants state that they have no alternative remedy other than to approach this Court for the grant of an order to compel the 1st Respondent through these mandamus proceedings to have access to their father. The Applicants' father and mother have filed confirmatory affidavits in this regard.

[6] On the other hand the 1st Respondent has raised two points *in limine* for **"non-joinder"** of their father Mduduzi Bacede Mabuza and **"failure to exhaust local remedies which renders this Court not to have jurisdiction to hear and determine this matter at this stage."**.

[7] On the merits the 1st Respondent acknowledges that access and/or visitation rights are basic rights enjoyed by all offenders. However, these rights are subject to conditions which are necessary for the general control and management of the Correctional Centre.

[8] The 1st Respondent states that the law or regulations which govern visitation rights is derived from the National Constitution, the Correctional Services Act of 2017, the Correctional Services Regulations of 2022 and the Nelson Mandela Rules.

[9] The matter was argued wholistically on the points *in limine* as well as on the merits.

POINTS *IN LIMINE*

[10] Mr Mashinini argued that the Applicant should have joined as of necessity their father Mduduzi Bacede Mabuza because he has a direct and substantial interest in whatever order which this Court would issue. Mr Mashinini argued that the Applicants have not exhausted internal remedies i.e., they approached the Court pre-maturely instead of approaching the 1st Respondent's administration to seek redress in accordance with Correctional Services Act. Mr Mashinini referred to legal authorities in support of his submissions.

[11] On the other hand Mr Masuku in response to the points *in limine* submitted that the Applicants are independently seeking for an order to have access to their father, and that the point *in limine* on non-joinder has no merit because the Applicants have filed the Confirmatory Affidavit of their incarcerated father. Counsel argued further that the test proceeds beyond the direct and substantial interest whether the Respondent would be prejudiced by the order the Court might make and that the interest in the subject matter of the litigation is for the Applicants to be granted the relief they seek independently of their

father, as they are protected by the Children Protection and Welfare Act of 2012.

[12] Mr Masuku further submitted that the point in limine on the Applicants' failure to exhaust local remedies by approaching the 1st Respondent's administration also do not have merit because the incarcerated father of the Applicants has himself failed when he engaged the 1st Respondent's officers at the correctional institution. Mr Masuku referred to legal authorities in support of his arguments.

ANALYSIS OF THE POINTS IN LIMINE AND THE LAW APPLICABLE

[13] I haver carefully considered the submissions by Counsel on both sides and I am of the considered view that both points in limine are dispositive of this matter.

[14] The point *in limine* on non-joinder of Mduduzi Bacede Mabuza in these proceedings has merit because he has a direct and substantial interest because any order which this Court may make has a direct effect on him. Further whatever order that this Court may issue cannot be sustained or carried into effect without involving him. In the confirmatory affidavit filed by Mr. Mabuza, I can see that he has not waived his right to be joined in these proceedings.

[15] In the case of **Thembekile Cecelia Tshabalala and Two Others v The Municipal Council of Manzini and Seven Others (1978/12) [2014] SZHC 137 (4 July 2014)** Mabuza J (as she then was) states as follows at paragraph 37.

> "[37] In **Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637** the headnote states that if a party has a direct and

> substantial interest in any order the Court might make in proceedings or if such order could not be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings, unless the Court is satisfied that he has waived his rights to be joined. The Court may *mero motu* raise the issue of non-joinder on appeal."

[16] These proceedings *in casu* were launched because the Applicants claim that they do not have access to their incarcerated father Mduduzi Bacede Mabuza. Whatever order which this Court grants surely will have a direct and substantial effect on Mr Mabuza, further whatever judgment is passed cannot be carried into effect without involving him i.e. if such order would be the dismissal of the application it would be prejudicial to him. The fact that Mr Mabuza has filed a Confirmatory Affidavit in support of the Applicants clearly indicates his direct and substantial interest and that he is a necessary and indispensable party who should be joined in these proceedings. This is not a joinder of convenience but rather a necessary joinder for a just and fair determination of the application. Mr Mabuza cannot be said to have waived his joinder when he has filed a Confirmatory Affidavit in these proceedings in support of his children.

[17] As regards the point *in limine* on non-exhaustion of the local remedies by the Applicants, Section 25 (1-8) of the Correctional Services Act No. 13/2017 (The Act) provides as follows:-

> *25 (1) A person who has a complaint against a Correctional Services officer or the Correctional Services shall first lodge such complaint with the Commissioner General.*
>
> *(2) The Commissioner General shall, within twenty-one (21) days of attending to the complaint under subsection (1) notify the complainant of the decision, opinion and facts of the matter or action to be taken.*

(3) *Where the complainant under subsection (1) is not satisfied with the response or there is no response from the Commissioner General after twenty-one (21) days of lodging the complainant, the complainant may submit the complaint to the Commission for its consideration and determination.*

(4) *When so requested by the Commission, the Commissioner General shall submit a comprehensive report relating to the complaint under subsection (1) to the Commission within the time specified in the request.*

(5) *A complaint may either be oral or written, relating to the conduct of a Correctional Services officer of the Correctional Services whether by an act or omission, submitted by a member of the public or the representative of that member of the public.*

(6) *Where a complaint is made orally, it shall immediately be reduced into writing by the Commissioner General or the Commission, and read back to the complainant who shall confirm the facts in the complaint by appending the complainant's signature on the complaint.*

(7) *A person lodging a complaint shall, when so required by the Commissioner General or the Commission, attest under oath to the truthfulness of the fact forming the complaint.*

(8) *A complaint may also be lodged by a Correctional Services officer against the conduct of an institution, authority, member of the public, or against another member of the Correctional Services.*

[18] Section 25 is self-explanatory in that it provides for extensive and mandatory local remedies which must be set in motion by any person when he/she has a complaint against the Correctional Services. Mr Mashinini submitted that the Applicants *in casu* did not exhaust local remedies and thus this Court has **no jurisdiction** to hear this matter at this stage.

[19] The Applicants have not invoked the provisions of Section 25, whereas they are mandated by law to approach the 1st Respondent and exhaust the laid down local remedies. It is for this reason that this Court does not have jurisdiction to deal with this matter unless and until the Applicants have exhausted the local remedies as laid down in Section 25 of the Act.

[20] Section 15 (1) (2) (3) of the Act provides for the administration of Correctional Services as follows:-

> *15 (1) The superintendence of the Correctional Services is vested in the Commissioner General.*
>
> *(2) The Commissioner General shall generally supervise Correctional Centres and do all such acts as may be necessary for the maintenance, rehabilitation, reformation of offenders, and welfare of correctional services officers.*
>
> *(3) Without prejudice to Section 63, the Commissioner General shall ensure that the lives and health of both officers and offenders are preserved through declaring all Correctional Centres to be non-smoking facilities.*

[21] In the year 2005, the legislature enacted the Constitution of the Kingdom of Eswatini Act No. 001/2005 (the Constitution). Section 190 of the aforesaid Constitution provides as follows:-

> *(1) The Correctional Services for Swaziland shall be responsible for the protection and holding on terms convicted persons and the rehabilitation of those persons and the keeping of order within the Correctional or Prison Institutions of the kingdom.*
>
> *(2) The Superintendence of the Correctional Services is vested in the Commissioner of the Correctional Services.*
>
> *(3) Subject to any lawful superior orders, the Commissioner of Correctional Services shall be responsible for the administration of and the discipline within Correctional Services.*

[22] The Constitution is the supreme law bestowing the superintendence and administration of the Correctional Services on the Commissioner of Correctional Services, who is now the Commissioner General of His Majesty's Correctional Services. There is no conflict between the Constitution and Act No. 13 of 2017 together with the Correctional Services Regulations of 2022 (the Regulations). The Act and the Regulations all complement the Constitution. The superintendence and administration of the Correctional Services by the Commissioner General and her officers can only be challenged before this Court on review **only** where the Applicants *in casu*, and other interested parties have complied to the letter with the mandatory provisions of Section 25 and the Regulations of the Act, and until that is done, this Court has no jurisdiction to interfere with the superintendence and administrative powers and functions bestowed upon the Commissioner General in terms of the Constitution, the Act and the Regulations.

[23] I am therefore in full agreement with Mr Mashinini that the Applicants have not exhausted the local remedies as laid down in Section 25 of the Act, and consequently that this Court does not at this state have the jurisdiction to determine this matter.

[24] Mr Mashinini in his able arguments submitted that the consideration of local remedies *in casu* entails a two-pronged approach or test, firstly that the Regulations are able to provide an effective redress in respect of the Applicants' complaint about visitation, and secondly that the case of **Cele and Others v University of Swaziland [2002] SZHC 99 (31 December 2002)** decided by His Lordship TS Masuku J set out precedent that domestic remedies should be exhausted first where they are capable of providing an effective redress in respect of the complaint.

[25] In the Cele case *(supra)* His Lordship TS Masuku J stated as follows at page 21 of the judgment:-

> "It is my considered view that this is a proper case for the deferment until the local remedies, which have clearly not been exhausted are fully exhausted. In my finding, this point is well taken and I therefore find it unnecessary and inopportune to consider the matter on the merits and on which I have stated before, I was fully addressed."

[26] Mr Mashinini also referred to the case of **Elias v Allied Health Professions Council of Namibia Case No. (HC-MD-CIV-MOT-REV-2019/00233** where Angula DJP in dealing with Administrative Law and the exhaustion of internal remedies stated as follows at paragraphs 31-32:-

> "[31] It is my considered view that this interpretation of the Act, not only accords with the legislative intent, but also affords the

applicant an opportunity to have her grievance heard by a specialised body and only if she still was not satisfied with the decision of the appeal committee, then she may thereafter approach this Court. A contrary interpretation would to my mind create absurd results and fly in the face of the legislative intent.

[32] It is correct that in some very exceptional cases a litigant may be allowed to bypass some internal remedies, but that will only happen where the legislature clearly intended that to be the case. I think it is fair to say that the present case fits hand in glove with the legislative intent namely where a person is aggrieved by the decision of the Council, he or she has been provided with internal remedies and must first exhaust those internal remedies before approaching this Court. After all, in the end he or she will reach this Court, through the path provided by the legislature, should he or she not be happy with the appeal committee's decision." (underlining my emphasis)

[27] Mr Masuku in his able arguments submitted that the applicants as children of the incarcerated Mduduzi Bacede Mabuza should be afforded the protection as envisaged in Section 29 of the Constitution which caters for the rights of the child. Section 29 is the foundation or pillar upon which the Children's Protection and Welfare Act No. 6/2012 was enacted. In its preamble the aforesaid Act clearly states as follows:-

> "An Act to extend the provisions of Section 29 of the Constitution and other international instruments, protocols, standards and rules on the protection and welfare of children, the care, protection and maintenance of children, and to provide for matters incidental thereto."

[28] In his submissions Mr Masuku sought to conscientize this Court that the Kingdom's legislative framework makes provision for the welfare of children and by necessary implication the Applicants ought to be treated within the provisions of the Children's Protection and Welfare Act in so far as their visitation rights are concerned. There are some challenges in this approach, firstly Section 2 of the Children's Protection Act defines **a child** as a person below the age of eighteen (18), so *in casu*, only the 3rd Applicant is a minor and therefore falls within that category so described

as a child. The 1st and 2nd Applicants are now adults and therefore the Children's Act does not apply to them. Secondly, in so far as reference to the 3rd Applicant, the Children's Act does not override the peremptory provisions of the Correctional Services Act in particular Section 25 and the Regulations of 2022 in so far as the superintendence and administration of the Correctional Services is concerned. The 3rd Applicant is equally liable to comply with the provisions of Section 25 of the Correctional Services Act if she is aggrieved with the conduct of Correctional Services officers, of course duly supported by her brothers the 1st and 2nd Applicants respectively who are now adults, or to be supported by their mother in lodging her complaint in terms of Section 25 of Act 13 of 2017

[29] There was also submissions by both Counsel as regards Section 16 and 35 of the Constitution, which are contained in the Bill of Rights – Chapter IV –

> "16 (6)where a person is arrested or detained:-
>
> (a) -----
> (b) The next of kin, legal representative and personal doctor of that person shall be allowed reasonable access and confidentiality to that person";

On the other hand Section 35 provides as follows:-

> "35 (1)Where a person alleges that any of the foregoing provisions of this Chapter has been, is being, or is likely to be, contravened in relation to that person or a group of which that person is a member (or, in the case of a person who is detained, where any other person alleges such a contravention in relation to the detained person) <u>then, without prejudice to any other action with respect to the same matter which is lawfully available</u>, that person or that other person may apply to the High Court for redress." (underlining my emphasis)

[30] As stated above herein, both Section 16 and 35 are within Chapter IV of the Constitution being the Bill of Rights and complement each other. Section 16 (6) (b) specifically refers to a **"person who is arrested or detained"**. It is common cause that the person who is arrested or detained is Mduduzi Bacede Mabuza has not been joined in these proceedings, and Section 35 is the enforcement clause of Section 16 and other protective provisions within the Bill of Rights which basically means that any person affected by any contravention of the provisions in the Bill of Rights has a right to invoke this Section i.e. Section 35 by approaching this Court for redress. However, this is not absolute because there is a limitation or qualification where the Section states that:-

> "----then without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress."

[31] In my view the other action with respect to the same matter which is lawfully available simply means that Section 35 can only be invoked if it doesn't prejudice any other action in respect of the same matter which is lawfully available, and this means Section 35 can only be invoked where local remedies have been exhausted. *In casu* this section can only be invoked where the local remedies as per Section 25 of the Correctional Services Act have been complied with. If the Applicants have invoked Section 35 read together with Section 16 (6) (b), which they have not done *in casu*, that would be prejudicial to Section 25 of the Correctional Services Act as well as the Regulations because these provide what remedial action is to be taken by a person who has a complaint against a Correctional Services officer or officers. I am just making observations as regards Sections 16 (6) (b) and 35 of the Constitution because Counsel on both sides referred to them, otherwise the Applicants *in casu* never invoked the aforesaid Sections but rather are seeking for an order or writ

of mandamus to compel the 1st Respondent to grant them access to their father Mduduzi Bacede Mabuza.

REMEDY OF MANDAMUS

[32] Mr Mashinini argued that the Applicants have not met the requirements for the grant of a mandamus which is interdictory relief in nature enforced against a government official.

[33] A mandamus can be described as an order from a Court to any government official ordering the government official to properly correct an abuse of discretion. The purpose of a mandamus is to remedy defects of justice. It lies in the cases where there is specific right but not specific legal remedy for enforcing that right. Since the nature of a mandamus is interdictory relief, the normal requirements for an interdict be it interim or final apply. The Applicant for a mandamus must establish a clear right/*prima facie* right, apprehension of harm and/or harm or injury actually committed, absence alternative remedy or relief, and that the balance of convenience must favour such applicant. In casu the prime requirement which features prominently is the absence of alternative remedy or relief. The Applicants have not discharged this onus of proving that there is no alternative remedy or relief in their application for mandamus.

[34] A writ (order) of mandamus shall not be issued by the Court where there is an alternative remedy for redress. *In casu* the alternative remedy is

mandated by Section 25 of the Act which provides for statutory procedures and redress mechanisms to be adhered to by any person who has a complaint against a Correctional Services officer. There is therefore no way by which this Court can circumvent the provisions of Section 25 and the Regulations of 2022 and issue an order or writ of mandamus against the 1st Respondent where the Applicants have not firstly dealt with their complaint in accordance with the laid down statutory procedures clearly stipulated in the Act. If the Court were to do so it would constitute judicial overreach on the functions, superintendence, powers and administrative jurisdiction of the 1st Respondent as enshrined in the Constitution and the Correctional Services Act of 2017

[35] As stated above, the procedure is clearly laid down in Section 25 of the Act on how any aggrieved person against a Correctional Services officer shall lodge his or her complaint. The word **"shall"** in Section 25 is peremptory and complements Section 16 (6) (b) and 35 of the Constitution itself which as demonstrated herein above endorses the exhaustion of local remedies, before these sections can be invoked in a Court of law. This is in essence the existence of the alternative remedy to seek redress where there is a complaint against the officers of the 1st Respondent. It is trite law that where an alternative remedy exists to address any grievance or complaint, then the Court will decline to grant an interdict be it interim or permanent, unless and until the alternative remedy has been invoked to seek redress of the issue(s) at hand.

[36] At pages 1467-1468 **Herbstein and Van Winsen** in their book titled *THE CIVIL PRACTICE OF THE HIGH COURTS OF SOUTH AFRICA 5th Ed, Juta,*

2012 state as follows when dealing with the issue of "adequate remedy" in the principles of interdicts:-

> "The applicant for an interdict must establish that there is no other alternative remedy available. The alternative remedy postulated in this context must –
>
> (a) be adequate in the circumstances;
> (b) be ordinary and reasonable;
> (c) be a legal remedy;
> (d) grant similar protection"

[37] At pages 1469-1470, the learned authors state as follows:-

> "An alternative remedy does not necessarily take the form of a claim for damages. In **Reserve Bank v Rhodesia Railways 1966 (3) SA 655 (R)** the Court refused an interdict where, three days after it had granted a *rule nisi* in the matter, an order issued by the Minister of Transport provided an effective remedy. The invocation of police protection, criminal prosecution or a binding-over order may be regarded as adequate. The alternative remedy must be a legal remedy that provides adequate similar protection.
>
> It is not sufficient for the applicant merely to allege no adequate remedy. The applicant must set out facts that show this to be the case. For instance, the applicant should, where applicable, set out facts on the basis of which:-
>
> (i) it is believed that the wrongful act will continue;
> (ii) or the reasons why damages will be difficult to assess;
> (iii) or facts making it clear that he has exhausted other remedies that might be regarded as adequate."

[38] *In casu* the alternative remedy and/or the exhaustion of local remedies is adequate in the circumstances, and also ordinary and reasonable. Further it is a legal remedy sanctioned by Section 25 of the Act, and it grants similar protection to the complaint filed by the Applicants before this Court *in casu*.

[39] In the case of Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd 1992 (2) SA 459 (C) at 454 (G) Cooper J stated:-

> "the grant of an interdict or refusal to grant an interdict is a matter within the discretion of the Court which is hearing the application and this depends on the facts peculiar to each individual case and the right the applicant is seeking to enforce or protect ..."

CONCLUSION

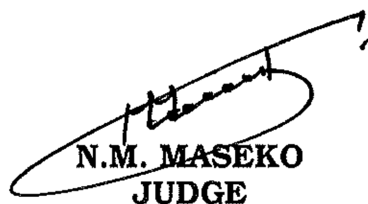
[40] The Applicants *in casu* were under a legal duty to join their father Mduduzi Bacede Mabuza as a co-applicant because he has a substantial and direct interest in these proceedings, and he is a necessary party because the judgment or order cannot be carried out without affecting him.

[41] Further the Applicants were under a legal duty to exhaust all the local remedies as mandated by Section 25 of the Act together with the Regulations of 2022. This matter cannot be dealt with by this Court unless and until the mandatory requirements of Section 25 of the Act are fully complied with. Section 25 provides for an alternative remedy which the Applicants ought to have exhausted first before approaching this Court on review or for the interdictory relief of mandamus. The failure by the Applicants to exhaust the local remedies which are an alternative remedy, renders this Court not to have jurisdiction to determine the application for a mandamus against the 1st Respondent.

[42] In the circumstances, I hereby hand down the following judgment:-

1. The point *in limine* on non-joinder is upheld.

2. The point *in limine* on the non-exhaustion of local remedies which deprive this Court of jurisdiction to hear and determine this matter at this stage is hereby upheld; and consequently;
3. The application dated the 20th October 2023 is hereby dismissed with costs.



N.M. MASEKO
JUDGE