IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO. 12/2018**

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS **APPLICANT**

And

SIPHO SHONGWE **RESPONDENT**

Neutral Citation: ***Director of Public Prosecutions vs Sipho Shongwe (12/2018)***

[2018] SZSC 23 (22ND AUGUST, 2018)

Coram : MJ Dlamini JA ; SB Maphalala JA ; JP Annandale JA

Heard : 16 July 2018

Delivered: 22 August, 2018

Summary: *Constitutional Law – Section 148(1) – Supervisory power of the Supreme Court – When exercisable - Conflicting orders in the High Court ;*

Criminal Procedure – Bail application – Appeal on a provisional ruling during bail hearing - Whether bail hearing stayed by the appeal - Nature of the ruling.

JUDGMENT

Introduction

[1] This application raises section 148(1) of the Constitution for the first time. The section vests this Court with *"supervisory jurisdiction over all courts of judicature and over any adjudicating authority"*. The application is urgent and not much research was done both sides. This should explain the inelegant manner in which the application was presented and the response thereto. This, of course, is not an excuse for any litigant to come to this Court not fully prepared. This Court has power to regulate its procedure and the exercise of it discretion in the interest of the due administration of justice. The expeditious conclusion of the bail application must be to the interest of both parties. Even though this application was opposed by the respondent, it seems to me that the opposition was directed to what respondent perceived to be unwarranted 'interference' in the bail proceedings, contrary to the provisions of section 141 of the Constitution. This being the first application on the section, we have taken the view that to dwell on the technical shortcomings in the papers filed would not contribute to the wider understanding of our Constitution. I should, nevertheless, applaud the applicant for taking the bold step of initiating these proceedings. I dare say, save for the electoral system, our Constitution has not seriously moved away from the mainstream Commonwealth constitutional arrangements. There is therefore a lot to learn from the Commonwealth in navigating our Constitution. Before embarking on the main issue, I find it necessary to say something in the following two sub-titles.

Advice to Counsel

[2] I noted some unprofessional exchanges in the written submissions of counsel on both sides. I need only remind counsel that they should never forget that they belong to 'an honourable profession which places them on a pedestal in society',

requiring them to always mind their language and comportment in court and, dare I say, outside. In the words of Honorable (Mrs) Akoto-Bamfo, JSC, Ghana: *"It is not for nothing that they address each other as learned friend. They are not only expected to display a deep and scholarly knowledge of the law, they must be seen to have arisen above emotional outbursts particularly in their work, for scholarship and intemperate or abusive language cannot be housed together. Expression must at all times be given to the phrase* 'learned friend*', since, in ordinary parlance, a friend connotes or conveys the idea of a person liked and respected. One would certainly not treat a friend with disdain".*

Challenge to Acting Registrar's letter of 15th May, 2018

[3] In para 47 and following, of his heads of argument, the respondent challenges a letter of the Acting Registrar of the High Court dated 15th May, 2018 (unmarked but annexed immediately before 'SDS 7' in respondent's opposing affidavit). The said letter is addressed to respondent's attorney and in part reads: "*4. . . the bail application cannot proceed pending the hearing of the appeal; 5. The Supreme Court is awaiting written reasons for the ruling before allocating a date of hearing of the appeal"*. 'SDS7' is a notice of set down by the respondent's attorney of the matter following the order of Nkosi J of 28th June 2018.

[4] The Registrar's letter is attacked on the basis that it was written by a person who was "*not a judicial officer and has no powers in law to issue an order*". In para 51, respondent states that the registrar is appointed in terms of s 160 of the Constitution, in particular section 160(3) "*which confers no judicial powers on the registrar at all"*, and that "*the letter is an interference and an attempt to undermine the powers and functions of Justice Nkosi . . .*" Section 160 is then cited, but the citation is not complete. Had the section been properly read or cited counsel

for respondent would have come across s 160(1) (c) which partly reads as follows: "*Subject to any other powers or general functions conferred on a service commission, . . . the judicial service commission shall, among other things, perform the following functions – (c) review and make recommendations . . . on the terms and conditions of service of Judges and* ***persons holding the judicial offices*** *enumerated in subsection (3)"*, (My emphasis). The registrars and their assistants, as are magistrates, are appointed by the Judicial Service Commission under the said sec 160 sub-sec (3). It follows that the registrars of court and their assistants are judicial officers competent, where necessary, to exercise judicial power. A simple example: if the presiding judge were to suddenly become incapacitated, it would be the undoubted duty of the registrar in attendance to adjourn the court. That is a judicial function. No other judge could barge in to replace the incapacitated judge until the court has been duly adjourned and reconstituted. This means that registrars must be properly qualified and trained officers.

Background

[5] On 6th April 2018, the applicant noted an appeal in the middle of a bail hearing. The main ground of appeal was that the learned Justice Nkosi who was seized with the bail application had made a ruling regarding the matter of whether or not the respondent had been lawfully released from a Correctional Facility in Barberton, Republic of South Africa. The applicant was of the view that the learned Justice Nkosi had no jurisdiction to pronounce on the lawfulness or otherwise of the release. That appeal is registered as Supreme Court Case No. 5 of 2018 and is presently still pending.

[6] On 22nd May 2018, the respondent moved an application before Justice Fakudze at the High Court. The respondent was praying the court to set aside the appeal No. 5 of 2018 and the accompanying application for leave to appeal. In the *alternative,* respondent, as applicant, prayed that "leave be granted to allow the *ex-tempore* judgment delivered on the 6th April, 2018 [under High Court Case No 42/2018] to be carried into operation and effect and be executed and the bail application be proceeded with and finalized pending the appeals (sic) by the respondent".

[7] The '*ex tempore* judgment' referred to in the foregoing prayer is that of Justice Nkosi which had in fact led to the appeal of 6th April, under Case No. 5/2018 and which is still pending. Rather curiously, in seeking to have both the appeal and the leave to appeal set aside, respondent writes "…the judgment appealed against was never issued" and according to respondent "no appeal lies against a non-existent judgment". It would of course be strange and very inconvenient if an appeal could not to be lodged just because a Judge has issued an *ex tempore* judgment which has not been transcribed or reduced to writing. Respondent is being disingenuous. Respondent in his grounds of application speaks of a "*judgment*…" that is "*non-existent"* but which he also wants to have set aside. How can that be? It sounds like a contradiction in terms.

[8] In his alternative prayer in Case No. 42/2018, the respondent says he wants "the *ex-tempore* judgment… to be carried into operation and effect…" Surely, there is an element of approbation and reprobation in respondent's application. I raise or remark on these issues because in his alleged statement (in an attached

transcript) the learned Judge Nkosi also says that *"I do not know what is it that is appealed against because there has been no final ruling on this matter, even on any point…*" and goes on to say "*….so I am not sure what this leave to appeal is about…the issue was whether or not he is an escaped convict and I found that there is no refutable proof so that I was trying to say* kutsi…kute *i judgment* mine lengiyi ishuwishile *(there is no judgment that I have issued) because it would be a fallacy of this justice system that you can just issue judgment for every little point that is raised on an aspect of bail application,…*".

[9] It is again quite difficult to follow what the learned Judge is saying: that no ruling has been made at all or that a ruling was made but no judgment on it has been written or that there is no intention to write one, it being a 'little point…on an aspect of bail application, …" But the learned Judge does say that he "found that there is no refutable proof" even though "*kute i judgment mine lengiyi ishuwishile*" he says. So, what was it that the respondent wanted to be executed or given effect in his application before Justice Fakudze? These issues provide pertinent pointers even if not central to the issue before Court. The notice of appeal filed on 6th April, the cause of all these other applications, has been pending for a long time causing an atmosphere that is not conducive to the due administration of justice. It is not proper to pass over these issues without appropriate observation and comment or order.

The Notice of appeal dated 6th April, 2018.

[10] The undisguised basis for the appeal would seem to be that Justice Nkosi had said or held that there was no refutable proof that the respondent had been

unlawfully released from Barberton Maximum Centre. In the subsequent transcript marked 'BM2' to the application in this matter, the following account is attributed to the learned Justice Nkosi: " … *I went all the way to hear all the aspect of the allegation of the escape, fraudulent release and I found no basis to conclude that there is irrefutable evidence that this man have (sic) escaped … I have to hear everything on the issue of flight risk then make a ruling on the flight risk;* ***the issue was whether or not he is an escaped convict, and I found that there is no refutable proof …"*** [My emphasis). It will be seen that the statement is retrospective having been made on the 28th June, on the occasion of the 'ruling' that the bail hearing would continue on the 9th July. But that is not all: Justice Nkosi is also reported as having said on the same occasion: *" … now to just deny a man on the basis of a species (suspicion ?) of one part, which is the escape, in the flight risk element, I do not think I want to be part, …".*

[11] It should suffice at this juncture to say that having "found that there is no refutable proof…", the learned Nkosi J should have followed up with the grounds or reasons for his finding. In the Lesotho case of **The President of the Court of Appeal**[1]**,** the Court in para [22], wrote: *"The fact that the adverse effect of the impugned decision will be confined to the appellant's reputation leads me to a further consideration. It is this. At the time of the appointment of the Tribunal most of the allegations of misconduct against the appellant were already in the public domain. I say that in the light of the following:"* Five reasons are then listed in support of that finding. And in **Ecclesia de Lange**[2]**,** the Constitutional Court of South Africa, per Justice Moseneke DCJ, held: "*[30] I am thus duty-bound to pose*

[1] **The President of the Court of Appeal v The Prime Minister and Four others,** Case No. C of A (Civ) No. 62/2013.
2**Ecclesia de Lange v Presiding Bishop of the Methodist Church of Southern Africa … and Anor,** Case CCT 223/14
[2]

the question: is it in the interest of justice to hear the appeal? I think not. This conclusion I reach for a number of cumulative reasons: …". The learned Deputy Chief Justice then lists some five reasons in support of the position he had reached. His judgment goes up to 68 paragraphs.

[12] It seems to me that another issue bearing on the appeal and this application but which does not seem to have been accorded sufficient attention before this Court is whether the appeal should have stayed the bail hearing. I say this because, on the face of it, the so-called 'ruling' on the release of respondent appears to be interlocutory and should not have had the effect of stalling the bail proceedings the way it has done. As Justice Nkosi himself says *"… I mean the flight risk, you mentioned passports, identities, movements across the border*, ***things that you still have to argue and put to me on that particular aspect…***" The impression given by the learned Judge is that the bail application was at the time of the ruling on the 6th April, still far from being concluded. So why a ruling on that **'little point'** should have stayed the bail hearing, in the first place or led the respondent to apply to set aside that appeal in the second place, and prompting the respondent to apply to execute that '*ex-tempore* judgment' – the ruling – which was presumably in his favour?

[13] In my opinion, the 'ruling' of Justice Nkosi that there was "no refutable proof" that respondent was not lawfully released from South Africa, giving rise to the appeal, was an interlocutory or provisional decision made in the course of the bail proceedings and as such it could change even before the end of the hearing. The Concise Oxford English Dictionary defines **'interlocutory**' as, 1 **law**, a

'decree or judgment given provisionally during the course of a legal action'. Something that is 'provisional' is for the present and may change later. Herbstein and van Winsen [3] say that *"An interlocutory order is an order by a court at an intermediate stage in the course of litigation, settling or giving directions in regard to some preliminary or procedural question which has arisen in dispute between the parties. Such an order may be either purely interlocutory or it may be an interlocutory order having final or definitive effect"*. It appears that in South Africa a purely interlocutory order by a superior court is subject to appeal only with leave of the court that made the order. In eSwatini on the other hand appeal on an interlocutory order of the High Court lies to this Court with leave of this Court.

[14] Following the decision in **Pretoria Garrison Institutes** [4] it is now settled that a decision or order is 'purely interlocutory' if it does not *"dispose of any issue or any portion of the issue in the main action or suit"* or does not "*irreparably anticipate or preclude some of the relief which would or might have been given at the hearing"*. In **South Cape Corporation**[5] Corbett JA states: *"Whatever the true position may have been in the Dutch Courts, and more particularly the Court of Holland (. . .), it is today the accepted common law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with leave of the Court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special application."*[6] As local authorities will show, the above common law rule reflects our position as well.

[3] **The Civil of The Superior Courts in South Africa,** 3rd ed, p 709
[4] **Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd** 1948 (1) SA 839 (A) 870
[5] **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd** 1977 (3) SA 534 (A) 549-550
[6] Ibid pp 544H – 545A

[15] Corbett JA, (*op cit.*), also says: *"In a wide and general sense the term 'interlocutory' refers to all orders pronounced by the court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes: (i) those which have a final and definitive effect on the main* action*; and (ii) those, known as 'simple (or purely) interlocutory orders' or 'interlocutory orders proper', which do not"* (p 549G). And that: *"(e) At common law a purely interlocutory order may be corrected, altered or set aside by the Judge who granted it at any time before final judgment; whereas an order which has final and definitive effect, even though it may be interlocutory in the wide sense, is res judicata (. . .)"* pp 550H – 551A

[16] *In casu*, was the 'ruling' final or purely interlocutory? If final, what exactly did the ruling dispose of? Presumably, it disposed of the point that respondent could be considered for release on bail because he was not a flight risk. Then, in the application to execute, what exactly did the respondent hope to execute and with what effect? Further, assuming the appeal on the ruling was unsuccessful, what really was the applicant going to lose other than a temporary setback on its defence armoury? For the ruling that there was '*no refutable proof*' did not by itself and without more secure bail for the respondent. It may have improved his chances of being released on bail; but that is not the same thing as being actually released on bail. The court hearing the application could still refuse bail on some other more persuasive argument. In the result, in my view, the ruling giving rise to the appeal was purely interlocutory as it did not dispose of anything but was a provisional ruling on a preliminary point arising in the hearing. Consequently,

could an appeal on such a kind of ruling have the effect of staying the entire bail proceeding? I very much doubt. We are told that the appeal is not that the ruling is wrong in law but that the court had no jurisdiction to pronounce on it. That the said ruling was purely interlocutory is also supported by the application for leave to appeal by the appellant.

[17] There is also an air of hide and seek in these proceedings. We must now assume that the 'order' of June 28 by Justice Nkosi materially affected the pending appeal and or the (pending) bail hearing in some way we do not immediately understand. The only sensible explanation would be that if there was no evidence of unlawful release then respondent was not a flight risk, and accordingly, nothing serious further stood in the way of respondent being released on bail. In para [5] of his judgment Fakudze J states: *"The respondent [the applicant herein] submits that the above court made a specific finding that the respondent had failed to prove that the applicant [the respondent herein] was fraudulently released from Barberton Maximum Centre"*.

[18] Justice Nkosi also says "…*I shall make a ruling on the bail application on that day [the 9th July] if the prosecution persists in its attitude that it does not want to prosecute this bail application"*, and, further: *"There is no judgment that is forthcoming; there cannot be any, in terms of our law, any judgment that can ever (be) issued by me in terms of this court"* (sic). This Court is not called upon, strictly speaking, to order Justice Nkosi to deliver the judgment that the applicant presumably requires to set down and prosecute its appeal of 6th April. The question, however, is whether in exercise of its supervisory jurisdiction this Court

should do something about the vexed bail hearing. If this bail hearing is still pending before Justice Nkosi – which in fact it should be – this Court could allow the learned Judge to proceed to the conclusion of the matter or issue an order directing that the matter be removed to another Judge in the interests of justice, if it should appear that the proceedings have become so mired in controversy that justice cannot reasonably be foreseen materializing.

[19] It is clear that the appeal in Case No. 5 of 2018 (of 6th April) cannot proceed without a record indicating reasons for the ruling. This has nothing to do with the propriety or otherwise of the appeal itself. Even if the respondent believes in automatic deeming of abandonment of an appeal in terms of Rule 30 (4), in his own interest he may consider ways and means of precipitating the outcome of that deeming. It is not unusual, however, for a court making an interlocutory ruling on a point arising in proceedings to give reasons for the ruling, when required to do so. This is so because the ruling itself presupposes the existence of reasons in support thereof. It is true that for any view expressed in judicial proceedings there has to a basis for it. This is the more so on a matter so emotionally charged as the bail matter involving the respondent. Where a party challenges an interlocutory order, the trial Judge must give the reasons relevant to that ruling.

[20] It is worth noting, however, that in none of the papers before Court has applicant explained why the appeal noted on 6th April 2018 has to date not been set down and prosecuted. Applicant does not say that he has written to the court or Judge Nkosi asking for reasons for the ruling and with what response. In para 1.9.2 of his answering affidavit respondent states with reference to the appeal: “As the

matter stands no record of the proceedings under case number 05/2018 has been produced and or filed and to the best of my knowledge been requested by the applicant from the Registrar…" and yet 60 days has gone by since the noting of the appeal. In its replying affidavit the applicant has said nothing about such a charge. Any court of justice aware of a bail proceeding such as is pending before the High Court must surely want to know what it is that is stalling the appeal for so long. We cannot just turn a blind eye and pass over the issue without comment and pretend that all is well in the Palace of Justice. It is, however, not for this Court to pronounce whether the pending appeal is to be deemed as having been abandoned in terms of Rule 30(4) of this Court, just as it is not within our remit to pronounce whether the said appeal and leave to appeal have complied with the relevant rules of court. This application is a product directly or indirectly of the appeal: we cannot therefore avoid saying something about it.

The application

[21] On 28 June 2018, in Chambers and in open court, Justice Nkosi appears from a transcript that he made a statement in these terms "…. *What I want to do is make an order that this matter proceed on whatever arguments pertaining to appeals and so on and so forth that have been filed or not filed … I make this ruling in open court: Rex v Sipho Shongwe, bail application before me…this matter will proceed on the 9th July 2018 at 9:30 am in this court. It shall take priority"*. It was this 'order' or 'ruling' to proceed with the bail application that caused applicant to bring this urgent application since Justice Fakudze had dismissed respondent's application to set the appeal aside and had concluded: "*11. I therefore order that the High Court matter should wait for the determination of the*

appeal noted by the respondent and it is so ordered". Whether respondent was correct to bring the application before Justice Fakudze is for another court to determine.

[22] This application, launched on the 5th July 2018, was prompted by the order of Justice Nkosi of 28th June, 2018. In its notice of application, the applicant wants this Court to invoke *"its supervisory powers … to stay the bail proceedings in the court* a quo *scheduled for the 9th July 2018, pending the hearing of the appeal"*, noted on 6th April 2018. That would be an umpteenth order of stay! It is to this power of this Court we must now turn to. In paras 5 and 6 of its founding affidavit the applicant states as the *"purpose of this application"* that: *"5. This is an application in terms of Section 148 (1) of the Constitution of Eswatini for this Honourable Court to exercise supervisory jurisdiction over the High Court. 6. This Honourable Court has jurisdiction by virtue of s 148(1) of the Constitution to exercise supervisory authority over all courts of Judicature in Eswatini"*. I must confess finding it very hard to quite understand this alleged purpose – to exercise supervisory power and stay the pending proceedings. Why is it necessary to use supervisory jurisdiction to achieve that end?

[23] The reason for requiring the use of supervisory power is presumably to be found in the paragraphs that follow the 'Brief background'. And the 'background' is truly 'brief' as it covers a page and a half of four short paragraphs. In the circumstances of this bail application at the centre of all the vexed controversy the applicant could have been more forthcoming on the background to this application, if for no other reason, then to come clean on there being nothing to hide on its part

or deliberately frustrate the bail proceedings. In its 'background' to the application the applicant tells that: "*During the course of the bail proceedings, a legal question arose as to whether the court a quo had jurisdiction to pronounce on whether the respondent was lawfully released from custody in South Africa"*.

[24] This Court is not called upon to decide whether the trial court had jurisdiction or not in a matter which appears to raise issues of international law as to the proper forum for determining the issue indicated – the lawfulness or otherwise of the respondent's release from custody in a foreign country. It is, however, not entirely idle to ask how the release matter arose in the first place? If it was part of applicant's armoury to resist respondent's bail application, what was the trial court supposed to do: accept the applicant's allegation without comment and refuse the bail application? Surely, if the release issue was introduced as part of the argument why bail should not be granted it was a matter for adjudication by the learned judge. Otherwise it should not have been introduced at all at that stage in the bail proceedings when it was introduced and for the reason for which it was introduced. The applicant could have reserved that issue as a separate matter to be dealt with like in all other cases where an alleged fugitive is required by a foreign country. That is if the view taken by the applicant is correct that the release issue was not for the trial court to determine.

[25] Somewhere in his statement the learned Justice Nkosi does hint that "… *there are certain factors which showed me that if there is conclusive proof that this man escaped or fraudulently was released from jail, I would have no problem denying him a bail there and then…"*. Presumably, and, naturally, when the

learned Judge indicated that there was "no refutable proof" of respondent having been fraudulently released, the applicant saw red and rushed an appeal on that issue without waiting for a release order at the conclusion of the bail proceedings. This must be the consideration which propelled applicant to launch the appeal – a predictable outcome was within sight demanding pre-emptive response by applicant. This Court is entitled to draw this inference from the facts before it. This is not to pass judgment on the propriety or otherwise of the appeal.

[26] And so this Court is called upon to exercise its supervisory power to stop Justice Nkosi from proceeding with the bail application pending the appeal of 6th April. As already observed, there is no indication whatsoever as to when the said appeal is likely to be heard, or what it is that is holding it from being set down for hearing. No indication of efforts undertaken by the applicant to expedite a hearing within the Rules of Court. In the circumstances, should this Court order a stay of the bail proceedings? Ordinarily this should pose no difficulty. What complicates the matter is the fact that Justice Fakudze has made an order that the bail hearing be stayed pending disposal of the appeal, and the subsequent 'resolution' of Justice Nkosi to proceed with the bail hearing notwithstanding. We are not aware of an appeal against Justice Fakudze's order nor of an application to have it set aside.

The supervisory power

[27] The issue of the conflicting orders on the bail hearing is contained in paragraphs 12 and 13 of applicant's founding affidavit, which according to

applicant, now calls for the employment of the Court's supervisory power. In other words, the applicant has found no rule of court that could be used to bring order to the situation pertaining this matter before the High Court. No Rule of Court was pointed out at the hearing as should have been used to correct the situation. The respondent in its opposing affidavit states that *"Applicant has failed to show…that substantial redress cannot be granted in due course, which is an absolute requirement . . . for the Order sought to be granted by the Court"*. Respondent's averment does not seem to address the matter before Court: it seems directed to the appeal by applicant. For the present contradictory orders there is no room for redress in due course. And applicant counters in its replying affidavit that if the bail hearing would continue on the 9th July 2018 (and any other time thereafter) the appeal would become academic. But no clear articulation why this should be the result is given.

[28] In his opposing affidavit respondent attacks the application as being fatally defective for lack of necessary averments. He states that section 148 (1) "does not grant [this Court] the power to interfere with a matter which is pending before another court as is before the Honourable Justice Nkosi" and that this Court is "specifically precluded from doing so in terms of section 141(2) of the Constitution", and that applicant has also failed to make out a case "as provided in section 148(1)…" The respondent further argues in para 45 of his heads of argument that *"Section 148(1) is not an appeal process and it was not designed to interfere with the judge who is performing his function as a judge. At the most it can only be for administrative purposes and it would be a violation of section 141(2) of the Constitution to stop Justice Nkosi from proceeding with the matter. A judge is not accountable to anyone when performing his functions and the court*

cannot interfere with him.". The short answer to this argument is that hard times call for hard options. When it is alleged that there is something fundamentally not going right in proceedings before any court of justice or adjudicating tribunal, it is the inherent obligation and duty of this Court as the highest Court of the land to protect the independence and effectiveness of the courts under the Constitution (s 141.3). When any court seems or is alleged to be losing direction it is the duty of this Court to intervene and bring order. This power is an aspect of the very independence of the judiciary as ordained by the Constitution. The supervisory power as stated in section 148(1) may appear to be administrative as respondent asserts but in practice it can only be effective by operating at a higher or deeper level of judicial administration.

[29] There is no doubt that section 141 guarantees the independence of the courts of law in the performance of their functions. Accordingly, therefore, so long as courts perform their duties in accordance with the law and the Constitution, they are masters of their destiny. There is no doubt also that if a court of law strays outside the parameters of its jurisdiction, there has got to be some power or authority competent to rein order in that court. That authority and competence vest in this Court as the highest court of instance. Judicial independence in terms of section 141 cannot mean unfettered freedom. That would be chaos. In a Privy Council decision emanating from Belize, Lord Walker for the Board stated[7]:

> *"[33] . . . their Lordships are satisfied that the Board itself has jurisdiction to grant interim relief, where appropriate, in order to ensure that any order which it makes on the eventual hearing of the appeal should not be rendered nugatory. The clearest and most obvious instance of this is staying execution of a death sentence: see Reckley v Minister of Public Safety and Immigration*

[7] **Belize Alliance of Conservation Non-Govt. Org. v Department of the Environment and Anor**, [2004] 1 LRC 630

[1995] 1 LRC 399. Their Lordships are not aware of any reported decision in which the jurisdiction has been discussed and exercised in a civil case, but they are satisfied that it exists, and has been exercised from time to time. The jurisdiction depends on the power of any superior court to supervise and protect its own procedures (see AG v Punch Ltd [2002] UKHL 50, [2003] 4 LRC 348, especially the observations of Lord Nicholls of Birkenhead at [43]. The power may be termed an inherent power, but that is not to say that its origins are devoid of statutory foundation. When Parliament established the Judicial Committee of the Privy Council and then extended its powers by the Judicial Committee Acts of 1833 and 1843 it must be taken to have intended to confer on the Board all the powers necessary for the proper exercise of its appellate jurisdiction".

And so it is with this Court under the various statutory provisions touching on its powers as an appellate court.

[30] Applicant's heads of argument, para. 13 reads: " … *When exercising its supervisory power this Honourable Court will not be interfering with the discretionary powers of the High Court as envisaged by section 141 of the Constitution as alleged by the respondent. The purpose of section 148(1) is to restore the administration of justice"*. Further, applicant submits: *" … The reason for interdicting Justice Nkosi are very clear in the applicant's application … Justice Nkosi was not supposed to order that the bail application will continue on 9th July 2018 while the judgment of Justice Fakudze had not been set aside"*. It seems that respondent underestimated the application or did not fully understand the nature and import of section 148 (1) in terms of which this Court is called upon to exercise its supervisory power. Even in their argument before this Court counsel for the respondent spent quite some time on tangential issues of urgency

and the appeal being automatically deemed to have been abandoned – issues not really relevant to this application.

[31] The applicant in its heads of argument states that *"the purpose of the application is to seek this Honourable Court's intervention as there are two conflicting court orders issued by two different judges of the High Court in respect of the same matter on the same facts"*, and that the *"applicant has brought the present application on the basis that there are two conflicting orders issued by the same court involving the same matter which is unprecedented"*. Applicant does not say just exactly what is wrong with two conflicting orders on the same matter and facts. Applicant furthermore does not say what this Court should do about these conflicting orders in the exercise of its supervisory power. The relief sought by applicant is as follows: *"The order made by Justice Fakudze is legally valid. It has not been set aside or altered by a superior court. It is just and equitable for this Court to intervene and restore the order by Justice Fakudze, attached herein…"* The applicant has also described the prevailing state of affairs at the High Court as a result of this matter as "*complete confusion which (is) embarrassing to the administration of the criminal justice in the Kingdom of Eswatini"*. Needless to point out that applicant should have framed specific reliefs for this Court's intervention in the matter. The supervisory power of this Court must be invoked for a specific purpose clearly articulated in terms of the anticipated outcome. As it is, this Court has been referred to a globular situation which needs to be streamlined in terms of the specific action to be undertaken to end the alleged state of confusion.

[32] Applicant alleges that the framers of the Constitution, 2005, *"seemingly borrowed the concept of supervisory powers of the Supreme Court as it appears in section 148 (1) of the Constitution from the case of McNabb et al vs United States"*[8]. In support of its application as to the supervisory power of this Court, the applicant referred the Court to the case of **McNabb v United States** and to an article by Murray M Schwartz[9] on *"The Exercise of Supervisory Power by the Third Circuit Court of Appeals"* of the United States. In the case of McNabb, the applicant referred the Court to the first four headnotes to that case: *"1. The power of this Court upon review of convictions in the federal courts in not limited to the determination of the Constitutional validity of such convictions. 2. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. 3. The principles governing the admissibility of evidence in criminal cases in the federal courts are not restricted to those derived solely from the Constitution. 4. In the exercise of its authority over the administration of criminal justice in the federal courts, this court, from the beginning, has formulated applicable rules of evidence; and has been guided therein by considerations of justice not limited to strict canons of evidentiary relevance"*.

[33] McNabb is a criminal appeal in which the appellants (petitioners) were convicted after a long investigation and questioning in the absence of a lawyer or any relative or friend until incriminating admissions were obtained from them. The appellants argued that the evidence used to convict them for murder should not have been admitted: *"It is true, as the petitioners assert, that a conviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand…. And this Court*

[8] 318 US 332 (1943)
[9] **1982 Villanova Law Review,** Vol 27 (Issue 3 Article 3) 506

has, on constitutional grounds, set aside convictions, both in the federal and state courts, which were based upon convictions 'secured by protracted and repeated questioning of ignorant and untutored persons, in whose minds the power of officers was generally magnified'; ***Lisenba v California****, 314 US 219, 239-40, or 'who have been unlawfully held incommunicado without advice of friends or counsel';* ***Ward v Texas*** *316 US 547, 555…*" (pp 339-340) observed Mr. Justice Frankfurter.

[34] *"Instead of being brought before a United States commissioner or a judicial officer, as the law requires, in order to determine the sufficiency of the justification for their detention, they were put in a barren cell and kept there for fourteen hours. For two days they were subjected to unremitting questioning of numerous officers. Benjamin's confession was secured by detaining him unlawfully and questioning him continuously for five or six hours. The McNabbs had to submit to all this without the aid of friends or the benefit of counsel. The record leaves no room for doubt that the questioning of the petitioners took place while they were in custody of the arresting officers and before any order of commitment was made. Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of the law"*, pp 344-5, Justice Frankfurter observed.

[35] In **McNabb,** Mr. Justice Frankfurter further stated: "…*Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized criminal standards of procedure and*

evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards by securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force…. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, … this Court has, from the very beginning of its history, formulated rules of evidence to be applied in criminal prosecutions… And in formulating such rules of evidence for federal criminal trials the court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance", (pp 340-341).

[36] The learned Justice Frankfurter continued: "*Quite apart from the Constitution, therefore, we are constrained to hold that the evidence elicited from the petitioners in the circumstances disclosed here must be excluded. For in their treatment of the petitioners the arresting officers assumed functions which Congress has explicitly denied them. They subjected the accused to the pressures of a procedure which is wholly incompatible with the vital but very restricted duties of the investigating and arresting officers of the Government and which tends to undermine the integrity of the criminal proceeding. … The purpose of this impressively pervasive requirement of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process"*, (pp 341- 342, 343).

[37] Even though there was a dissent, the conviction was quashed and the sentence of forty-five years for the murder was set aside. The Supreme Court exercised its authority for *"judicial supervision of the administration of criminal*

justice in the federal courts" as appears in the second and fourth headnotes to the judgment. As we have seen above, the Supreme Court was emphatic that its authority of superintendence over lower courts was apart from, and over and above, the black letter of the Constitution; that power was in virtue of it being the apex court and the issues raised in the review were fundamental to the due administration of justice in a democratic society under the rule of law (due process of law). The issues raised in this application compel this Court to rise to the same occasion and emulate the laudable jurisprudence of the US Supreme Court. If it is not the function of this Court as the highest superior court of record to quell any looming disorder in the High Court or adjudicating tribunal which other institution must then intervene or should the problem attend to itself and simply disappear?

[38] The applicant also referred the Court to a Villanova Law Review article by Schwartz on the exercise of supervisory power by the Third Circuit Court of Appeals. The supervisory power of the Third Circuit is not very different from that of the Supreme Court of the United States. The Circuit Court is said to have acquired and developed its supervisory power by way of the '*trickle-down*' theory in terms of which "*if the Supreme Court has supervisory power over all lower federal courts, then the courts of appeals have supervisory power over district courts"*. Schwartz writes:

> *"During the last decade, the United States Court of Appeals for the Third Circuit (Third Circuit) has dramatically expanded its use of supervisory power as a basis for decision. Courts in general have employed supervisory power in a broad range of cases. For example, the Supreme Court has used its supervisory power over low federal courts to further the 'fair administration of justice' by excluding various types of tainted evidence, establishing rules for the composition of federal juries, and overseeing*

activity of the executive branch. In the Third Circuit, supervisory power has been asserted, if not always exercised, in a wide variety of contexts in both civil and criminal areas. The nature of supervisory power is amorphous and its doctrinal limitations are ill- defined", (pp 506-507).

[39] Schwartz continues:

"Defining supervisory power presents an initial problem. The Supreme Court generally refers to its 'power of supervision over the administration of justice in the federal courts'. This power has included such elements as 'the formulation and application of proper standards for the enforcement of the federal criminal law', including the 'duty of establishing and maintaining standards of procedure and evidence'; the power to police and make certain that the Federal Rules of Criminal Procedure are honoured by federal law enforcement agencies;… the power to ensure that 'the waters of justice are not polluted'; and, finally, the power to further the 'two-fold' purpose of 'deterring illegality and protecting judicial integrity'. These phrases indicate the broad nature of the doctrine at the Supreme Court level", (p 507).

[40] Indicating the broad and expansive nature of this power, a Third Circuit judge once described supervisory power as "…*enabling appellate courts to impose policy judgements on the lower courts, stating that 'appellate courts, it appears, exercise supervisory power over lower courts to impose procedural requirements that seem wise, but that are not compelled by the constitution or statute. In fact, the court itself has cited with approval a statement by the Supreme Court asserting that 'over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts'. These statements*

indicate an expansive reading of supervisory power by members of the Third Circuit. It appears that supervisory power embraces any decision not based on the constitution, statues, procedural rules, or precedent, including decisions based on policy grounds. The lack of clear perimeters often makes it difficult to determine whether the Third Circuit has actually exercised its supervisory power, or instead has based its decision on an alternative ground" (pp 508-9). Unlike the US and other jurisdictions, in sec. 148(1) we have a clear, legitimate basis for the exercise of supervisory power. Under sec. 152 of the Constitution the High Court has similar power over courts subordinate to it.

[41] Schwartz further observes:

> *"The fact that no panel of the Third Circuit has articulated a persuasive theoretical framework to determine where the power comes from and when it should be exercised raises grave questions about the legitimacy of any exercise of supervisory power. Without a sound doctrinal basis, exercise of supervisory power can become little more than a device to enable a court of appeals to impose its policy judgments upon the district courts"* (pp512-3).
>
> But:
>
> *"The Supreme Court has frequently relied upon its obligation to protect the integrity of judicial processes to justify what otherwise would be impermissible intrusions upon the executive branch. In McNabb v United States, the case which first articulated the modern version of the supervisory power doctrine, the Court reversed a conviction which rested on a 'flagrant disregard' of federal law by federal officers…"* (p528).

[42] Whilst the United States Supreme Court is said to exercise supervisory power without the express aid of the Constitution or statute, but by virtue of its standing as the apex court in the US hierarchy of courts, in this Kingdom we have the express aid of the Constitution itself. This fact does not mean that the nature and purport of such power is materially different. The Constitution is thus only an aid to a power which otherwise inheres in a superior court of appeal as we shall see below. The only trouble which we may share with the United States in the exercise of this power is that while the US has no explicit constitutional provision which would also possibly define the parameters, we have the constitutional provision and still do not have any appropriate centre or boundary of that power. The absence of this statutory instrument should not, however, deter this Court from exercising its supervisory power when called upon to do so: it is after all a power inherent in this Court as a superior court of record; it is a part of the self-sufficiency of the Judiciary, to be able to deal with its own problems wherever and howsoever they arise.

[43] In **The Republic v High Court, Judge Kumasi, ex parte: Hansen Kwadwo Koduah**[10]**,** the Supreme Court of Ghana wrote, per Akoto – Bamfo JSC:

"In ***Tsatsu Tsikata*** [11] this Court re-iterated the principles in these terms:

> *'Our supervisory jurisdiction under article 132 of the 1992 Constitution should be exercised only in those manifestly plain and obvious cases, where there are patent errors of law on the face of the record, which errors either*

[10]Supreme Court, Civil Motion, No. J5/10/2015 (4th June, 2015)
[11] (2005 – 2006) SC GLR 612

go to jurisdiction or are so plain as to make the impugned decision a complete nullity. It stands to reason that error(s) of the law as alleged must be fundamental, substantial, material, grave or so serious as to go to the root of the matter. A minor trifling, inconsequential or unimportant error which does not go to the core root of the decision complained of or, stated differently, on which the decision does not turn would not attract the court's supervisory jurisdiction'. Therefore, where the court has no power to deal with the kind of matter at issue nor with a particular person concerned or issues a judgment or order of a kind that it has no power to issue, it could be said to have acted in excess of its jurisdiction".[12]

[44] It is true that there should be set out clear grounds for the application, spelling out the nature and gravity of the offence complained of and the specific remedy required. *In casu*, the application is directed to the ruling or order of Justice Nkosi to continue the bail hearing notwithstanding Justice Fakudze's order. The application tends to be shallow in its foundations, which may well be a defect in some cases where the court cannot see what order it is expected to make. The factual depositions and prayers must be sufficient for the purpose. The only saving grace in the present matter is the transcript reflecting the statement allegedly made by Justice Nkosi on the occasion of his ruling. Even then, the applicant should have referred to specific aspects of the transcript to assist the Court better appreciate the real concerns of the Crown. But that is not all: Justice Fakudze's order in para [11] of his judgment (see para [21] supra) may well be questioned whether it was not in excess of his authority and as such liable to be quashed.

[12] Section 148(1) and (2) benefited from Articles 132 and 133 of the *Constitution of Ghana, 1992*, which the Drafting Committee had occasion to view during the drafting of the *Swaziland Constitution, 2005*.

[45] From the above case, it is evident that the issue complained of must be "fundamental, substantial, material, grave or so serious as to go to the roots of the matter", or, in other words, the error must be extant on the face of the record, that is, it must be *prima facie,* to import the supervisory jurisdiction of this Court. Ordinarily, the record of the proceedings with the full judgment would have to be presented before this Court, even if only interlocutory. *In casu,* there is of course no such identifiable record in support of the impugned ruling or order, unless of course, we use the statement in the transcript as sufficiently informing us why the learned Judge made the ruling, as he himself tentatively does. In ***ex parte* Minister for the Interior**[13], also dealing with the exercise of supervisory power under the Ghana Constitution, Benin JSC, after recounting the grounds to quash a decision of the High Court in that it had exceeded its jurisdiction and committed an error patent on the face of the record, began the judgment as follows: *"The applicants herein seek to invoke this Court's supervisory jurisdiction for an order of certiorari to quash the decision and/or order of the High Court, General Jurisdiction 5 dated 18th September 2017"*. The learned Supreme Court Judge then proceeded to state that *"an application founded on the court's supervisory jurisdiction must be confined or restricted to the decision and /or order complained of"*.

[46] In **Vinay Chandra Mishra** [14], an objection was taken by the contemnor and the State Bar Council of U.P. that the Indian Supreme Court could not take cognizance of the contempt of the High Courts. The contention was based on two

[13] **The Republic v High Court, General Jurisdiction'5' Accra** (No. J5/10/2018)
[14] [1995] INSC 180; AIR 1995 SC 2348

grounds. The first was that Article 129 of the Indian Constitution vests the Supreme Court with the power to punish only for the contempt of itself and not for the high courts. Secondly, the High Court is also another court of record vested with identical and independent power of punishing for contempt of itself. The Supreme Court responded as follows:

> *"24. The contention ignores that the Supreme Court is not only the highest Court of record, but under various provisions of the Constitution, is also charged with the duties and responsibilities of correcting the lower courts and tribunals and of protecting them from those whose misconduct tends to prevent the due performance of their duties. The latter functions and powers of this Court are independent of Article 129 of the Constitution. When, therefore, Article 129 vests this Court with the powers of the court of record including the power to punish for contempt of itself, it vests such powers in this Court in its capacity as the highest court of record and also as a court charged with the appellate and superintending powers over lower courts and tribunals as detailed in the Constitution. To discharge its obligations as the custodian of the administration of justice in the country and as the highest court imbued with supervisory and appellate jurisdiction over all the lower courts and tribunals, it is inherently deemed to have been entrusted with the power to see that the stream of justice in the country remains pure, that its course is not hindered or obstructed in any manner, that, justice is delivered without fear or favour and for that purpose all the courts and tribunals are protected while discharging their legitimate duties. To discharge this obligation, this Court has to take cognizance of the deviation from the path of justice in the tribunals of the land, and also of attempts to cause such deviations and obstruct the course of justice. To hold otherwise would mean that although this Court is charged with the duties and responsibilities enumerated in the Constitution, it is not equipped with the power to discharge them"*

[47] In **All lndia Judicial Service Commission**[15]**,** the Supreme Court observed:

> *"18. There is therefore no room for any doubt that this Court has wide power to interfere and correct the judgment and orders passed by any court or tribunal in the country. In addition to the appellate power, the Court has special residuary power to entertain appeal against any order of any court in the country. The plenary jurisdiction of this Court to grant leave and hear appeals against any order of a court or tribunal, confers power of judicial superintendence over all the courts and tribunals in the territory of lndia including subordinate courts of Magistrate and District Judge. This Court has, therefore, supervisory jurisdiction over all courts in lndia."*

[48] It is clear to me that it cannot be doubted that even besides section 148 (1), this Court, as a superior court of record, with all the powers of such a court, has the power to superintend over and even interfere in the proceedings of lower courts in the interests of due administration of justice and in order to maintain pure and keep flowing the stream of justice in the Kingdom. This power of intervention may take the form of removing a matter from one Judge to be heard by another in appropriate cases, for instance, where it is strongly felt that the stream of justice has been sufficiently polluted to the extent of compromising judicial impartiality and possibly undermining the integrity of the administration of justice. What appears to be the concern *in casu* is that the bail hearing before Justice Nkosi be stayed pending the appeal. One of the problems that this Court has is being unsure of the effect of the appeal on the bail hearing. We have not been told in what specific way the outcome of the appeal will affect the bail hearing. That is: assuming appellant is successful, what then? Will the bail

[15] [1991] 4 SCC 406

hearing abruptly end or will it still continue to its proper conclusion? Since the appeal arises from a point in the proceedings and is as such only interlocutory, one would have thought that whatever the outcome of the appeal the bail proceedings before Justice Nkosi will continue to logical conclusion. At any rate, one way or another, Justice Nkosi is still enjoined to deliver a judgment on the bail hearing. If the applicant has issue with the judgment there will still be room for an appeal. It can only be trusted that the appeal is not just a red-herring, 'calculated to delay the process of the bail application'.

[49] The worst-case scenario for the applicant in the bail hearing would be the granting of bail to the applicant, the present respondent. But that would not be the end of the world for the applicant. If the applicant is for any reason unhappy with the granting of bail, it would not be without options as to a further course of action. Justice Nkosi did not grant bail by the ruling complained of by the applicant. So, the respondent is still very much within the jurisdiction of the court and short of some extraordinary misadventure, respondent will not leave the correctional facility's custody until there is a judgment and order to that effect. As I see the situation, the Crown is free to reconsider and abandon its appeal and stake its chances on the judgment of Justice Nkosi, whatever it may be.

[50] A further exploration of the supervisory jurisdiction reveals that such jurisdiction may be exercised to vacate orders made by lower court judges for a variety of serious errors committed. As Schwartz states:

"Although Hoots[16] *is by far the most dramatic example of a Third Circuit exercise of supervisory power in excess of its function, it is not a lone aberration. On three other occasions the court asserted its authority to remove district judges from further participation in particular cases. In* Johnson v Trueblood [17] *the court vacated the district court's retroactive revocation of an attorneys pro hac vice status and exercised its supervisory power to impose a pre-revocation notice and comment requirement in such cases. The court concluded on the facts presented that if the revocation were pursued further, the case should be assigned to a different judge. . . . From the opinion it appears the court simply decided that it would rather not have him hear the case. Indeed, the earlier case of* Poteet v Fauver[18] *makes it clear that* Trueblood *was an exercise of supervisory power, rather than a holding based upon an abuse of discretion by the district court. In* Poteet, *a state prisoner petitioned for a writ of habeas corpus, challenging the state trial judge's action in increasing his sentence because he persisted in asserting his innocence after a guilty verdict was entered. In the course of ordering that the writ issue unless state authorities resentenced the petitioner, the court stated: 'We will reverse the judgement of the district court and remand the proceedings with specific direction… Were the trial court in the federal system we would exercise our supervisory power and direct that another judge be assigned for resentencing'".*

[51] *"Finally, in* Lewis v Curtis, [19] *the court reversed the district court's final order dismissing the plaintiff's complaint and denying his motion for leave to amend, and ordered that the case be assigned to a different judge on remand. The Third Circuit justified its action by stating:*

> ***'Impartiality and the appearance of impartiality in a judicial officer are the* sine qua non *of the American legal system… Without***

[16] **Hootes v Pennsylavia** 639 F 2nd 972 (3d Cer 1981)
[17] 629 F. 2d 302 (3d Cir. 1980)
[18] 517 F.2d 393 (3d Cir. 1975)
[19] No. 81-2055 (3d Cir. Mar. 3, 1982)

> ***pausing to consider whether there is a basis for legal disqualification, we conclude that the undisputed facts dictate that the appearance of justice will be served only if the assignment to another judge is made, and we will,*** **pursuant to our supervisory power,** ***so direct.'"*** (pp 520-521)

Again, Schwartz says: *"In* Government of Virgin Islands v Bill [20] *the court invoked its supervisory power as an alternative basis for decision when the trial judge erroneously commented on the failure of a criminal defendant to take the witness stand. The court relied on its supervisory power, although it was doing no more than correcting a trial court's error of law,* (p527).

[52] If the supervisory power of the US Supreme Court is not based on the Constitution, statutes, procedural rules or precedent, we may as well exercise our own supervisory power with a clearer conscience knowing that it is endowed by the Constitution. The Constitution does not prescribe that there will be rules guiding the exercise of this power. The framers of the Constitution must have known that this Court will know how to discharge this function with or without further legislation. This does not mean that some guiding rules may not be helpful. With or without rules the power has to be exercised. All that we need to do is put in place the first brick and the rest will be history, as it is said. Diverse are the ways the US Supreme Court and the Third Circuit have employed their supervisory power. The Supreme Court of Ghana seems to be somewhat more cautious in its approach to the jurisdiction. It is the Indian justification of the existence and exercise of the supervisory power that I find most attractive.

[20] 392 F.2d 207 (3d. Cir. 1968)

[53] Section 139 of the Constitution provides, *inter alia*; *"(3) The superior courts are superior courts of record and have the power to commit for contempt to themselves and all such powers as were vested in a superior court of record immediately before the commencement of this Constitution";* and, Section 146 reads: *"(1) The Supreme Court is the final court of appeal. Accordingly, the Supreme Court has appellate jurisdiction … ; (3) … the Supreme Court has … the power, authority and jurisdiction vested in the court from which the appeal is brought"*. Under Section 147 (2) the Supreme Court may grant or refuse special leave to appeal to it in any cause or matter, civil or criminal; and section 148(1) reads: *"The Supreme Court has supervisory jurisdiction over all courts of judicature and over any adjudicating authority and may, in the discharge of that jurisdiction issue orders and directions for the purposes of enforcing or securing the enforcement of its supervisory power"*. It may fairly be said that this section is not creative but is confirmatory. The section expresses power that this Court already has in terms of the various provisions in the Constitution and the Court of Appeal Act, 1954.

[54] What comes out clearly from Schwartz' article is that the supervisory power is a jurisdiction exercisable by courts which have appellate jurisdiction, be it the supreme court or an intermediate court of appeal between the high court and the supreme court, including the High Court itself. That explains the US system where the Third Circuit also exercises supervisory power similar to that of the Supreme Court. The doctrinal principle is the same. Hence the lessons we learn from the Supreme Court and Third Circuit are not, for our purposes, distinguishable. There

might only be a difference in scope or range of the power exercised. In my opinion, we stand to learn a lot from the foreign jurisdictions exercising supervisory power. This is particularly so since the power is said not be prescribed by the Constitution, except in broad general terms, as in the United States or India. In the Indian Supreme Court, the supervisory power is inferred from the specific powers defining the jurisdiction of the Court as the highest court of record in the land. In *re Vinay Chandra Mishra*, the Indian Supreme Court has eloquently explained the supervisory power as a power that inheres in superior courts of record with appellate jurisdiction. The Supreme Court went on to anchor its defence of its supervisory power on article 129 of the Indian Constitution. Article 129 provides that the Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself. Article 129 does not seem to be materially different from our section 139.

[55] Section 148 (1) has equipped the Supreme Court with the means of discharging its supervisory power in these terms: *"…and [the court] may, in the discharge of that jurisdiction, issue orders and directions for the purposes of enforcing or securing the enforcement of its supervisory power"*. Incidentally, the High Court of England and Wales also exercises supervisory jurisdiction. In **R v Crown Court at Leeds**[21] Lord Widgery CJ at p 137 d – h stated as follows:

> *"That is sufficient to dispose of the merits of the point of law involved in the case, but reference has been made to the jurisdiction of this court to control the Crown Court in matters of certiorari with particular reference to the earlier decision in* ***R v Crown Court at Exeter, ex parte Beattie***.[22] *The*

[21] **R v Crown Court at Leeds, ex parte City of Bradford Chief Constable** [1975] 1 All ER 133 QBD
[22] [1974] 1 All ER 1183

point can be put quite briefly. Section 10 of the Courts Act 1971 prescribes the extent to which, and the methods by which, the High Court can supervise and control the activities of the Crown Court. In the earlier subsections of s 10 are set out the circumstances in which appeal by case stated is possible, … When one gets to sub-s (5) of s 10 one comes to the provisions dealing with the jurisdiction over the Crown Court in certiorari, and the phrase used is:

> *'In relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment, the High Court shall have all such jurisdiction to make orders of mandamus, prohibition or certiorari as the High Court possesses in relation to the jurisdiction of an inferior court.'*

It was argued in Exeter case that on its true construction that language allowed this court to exercise its supervisory jurisdiction over the Crown Court by use of the prerogative orders only where the complaint against the Crown Court was that it had exceeded its jurisdiction strictly so called. I expressed the provisional view in the Exeter case, the matter not being fully argued, that the construction of s 10(5) was wider than that and it gave these supervisory powers over the Crown Court not only in matters strictly relating to jurisdiction but also in regard to other matters normally appropriate for use of the prerogative orders. The opportunity for argument has been given today and I understand that my brethren in this court today are of the view that the provisional statement of the situation given by me in the Exeter case was the right one."

[56] The advantage of the English position is that there are clear rules regulating the exercise of the supervisory jurisdiction. There is something different to learn in all the above jurisdictions relative to the exposition of the supervisory power and what such power may look like on the ground. That this Court has supervisory power as section 148 (1) prescribes is without doubt. What has been doubtful and uncertain is the scope and content of that power. It must now be clear that this Court has power to intervene in any proceedings where there is a complaint or allegation that the proceedings are for any reason seriously in danger of perpetrating injustice or undermining the integrity of judicial administration. Also, this Court may intervene of its own motion where it becomes aware of a potential miscarriage of justice in the conduct of any proceedings. By its superintendence over the lower courts and tribunals this Court plays an oversight role to cure deviations from the due performance of their duties. In dealing with any perceived deviations this Court may, *inter alia*, stay proceedings, reverse any order made, or remove a hearing from one judge to another for sufficient cause shown. It would be sufficient cause to show that the stream of justice has been sufficiently polluted to cause reasonable doubt that justice will be done or be seen to be done.

Conclusion

[57] It is my considered opinion that in light of the prevailing circumstances in and around the bail proceeding before the High Court, this Court is obliged to intervene and exercise its supervisory power. What has taxed my mind is whether the bail application which has attracted undue media attention should be reassigned to another Judge, with the possibility of further delay in concluding the

hearing. The prevailing climate is undesirable and if allowed to continue unchecked is likely to fester and become very unhealthy. In my view, the applicant has nothing to lose if the bail hearing is delayed. It is the respondent who has everything to lose. To delay the bail proceedings any further by some radical changes in the proceedings would not be the in the interest of the due administration of justice. The cause for the delay in the appeal has not been adequately explained to this Court. If the setting down of the appeal is awaiting the reasons for the ruling by Nkosi J, that too has not been indicated when it is likely to happen.

[58] As the Indian Supreme Court has succinctly stated that under the banner of the supervisory and appellate jurisdiction, the Supreme Court is *"entrusted with the power to see that the stream of justice … remains pure, that its course is not hindered or obstructed in any way, that justice is delivered without fear or favour and, for that purpose, all the courts and tribunals are protected while discharging their legitimate duties"*. This jurisdiction must, however, be exercised responsibly and with due sensitivity, to avoid it having a chilling effect on the lower courts and tribunals and the appearance of undue interference. Be that as it may, in my opinion, and with due respect, the order of Justice Fakudze contributed to the troubled situation in the High Court. That order should not have been made, leading to its unceremonious, subtly and veiled rejection by Justice Nkosi through the ruling of 28th June, as we have seen. That ruling culminated in this Court, on the 6th July, issuing a third stay order of the bail proceedings pending the finalization of this application. The last order had the added advantage of obviating the uncertainty of whether the appeal of 6th April, had legally stayed the bail proceedings. So, Justice Fakudze's order was not necessary. Ordinarily,

therefore, there should not have been conflicting orders had all concerned kept within their spheres of competence. Justice Nkosi's reaction to the appeal and ruling should have been avoided as it only exacerbated the situation. These glitches cumulatively prejudiced the proper administration of justice. To reassign the bail application would mean starting it afresh. I have to decide where the interest of justice resides between reassigning the bail application and expediting its conclusion, in the hope of calming the turbulent waters in the High Court. In a case like the present, there can be no true victor.

The Court Order

[59] In the circumstances, the application succeeds and in the exercise of the supervisory jurisdiction of this Court, it is ordered and directed that -

1. The order of Fakudze J, in Case No. 42 of 2018, purporting to stay the bail hearing before Nkosi J, be and is hereby set aside;

2. The order or ruling of Nkosi J of 28th June, 2018 for the bail hearing to further procede on 9th July 2018 be and is hereby set aside;

3. Any pre-existing stay of the bail hearing be and is hereby lifted;

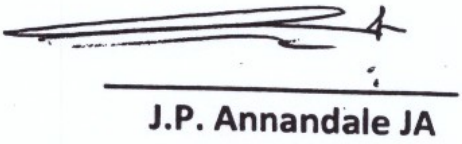
4. The bail hearing before Mr. Justice Nkosi be continued with due expedition.

M.J. Dlamini JA

I AGREE

S.B. Maphalala JA

I agree



J.P. Annandale JA

A. Makhanya and M. Nxumalo for Applicant

BJ Simelane; L. Howe and S. Mnisi for Respondent