IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **Case No. 68/2015**

In the matter between:

BEAUTY BUILD CONSTRUCTION **Applicant**

And

MUZI P. SIMELANE t/a MP SIMELANE **1st Respondent**

NATIONAL COMMISSIONER OF POLICE **2nd Respondent**

ATTORNEY GENERAL **3rd Respondent**

Neutral Citation: Beauty Build Construction vs Muzi P. Simelane and 2 others (68/2015) [2018] SZSC 30 (24th September, 2018)

Coram : SP Dlamini JA, MJ Dlamini JA and SB Maphalala JA.

Heard : 31 May, 2018, 1st June, 2018 and 23rd August, 2018

Delivered : 24th September, 2018

JUDGEMENT

M.J. Dlamini JA

[1] The dispute between the applicant and the first respondent (the respondent) has a long and chequered history spanning some ten years or so. The dispute arises from an attorney and client relationship that irretrievably broke down soon after payment was made by the Government to respondent as attorney representing applicant for work done by the applicant. Respondent has failed and or is refusing to account to applicant as required by law. Respondent claims that applicant does not exist for not being a registered entity. A number of court orders have been issued all expressing the view that respondent must pay and or account to applicant. In these proceedings applicant has applied, inter alia, for an order that the "first respondent is in contempt of the Court Orders issued by the above Honourable Court on the 30th June 2016 and 15th May 2017" and that the "first respondent is ordered to be committed to gaol until he purges his contempt of court", and costs at attorney and own client scale.

[2] After hearing both counsel on 31st May 2018, there was a short adjournment for the parties to consult on possible terms of settlement. The matter was then set down for 12:30 pm, the following day, 1st June. On resumption, Mr. Jele, for applicant, was not available, while Mr. Howe for the respondent was present and apologized for Mr. Jele's absence and the fact that no draft settlement had been reached between the parties. In the absence of Mr. Jele, the matter was postponed to 5th June 2018 at 12:00 noon, on the understanding that a draft settlement would

be made available to the Court by 3:00 pm on the 4th June. No draft settlement was tendered as anticipated and the hearing on the 5th did not take place and the Court went on recess as the First Session had ended. The matter was then postponed to this session on a date to be arranged with the Registrar. The parties have filed all relevant documents.

[3] Following the abortive hearing in May – June as stated above, this application was then set down for hearing on 23rd August 2018 by notice from Robinson Bertram as *"1st Respondent's Attorneys"* in the matter of MP Simelane Attorneys as Applicant and Beauty Build Construction (Pty) Ltd [and 2 others] as "*First Respondent"*. Yet the matter that was ostensibly being set down for continuation was '*Beauty Build Construction (*Applicant*) and Muzi Simelane t/a MP Simelane Attorneys (*First Respondent*) and 2 others'*. The confusion has not been explained and none of the parties made issue of it. It was no doubt common cause that the matter that was on the roll and which had started on 31st May 2018, is the present application. On 23rd August, after hearing counsel for the parties, the Court was adjourned to the following day for judgment. On the 24th, the Court only gave an *ex tempore* order which was subsequently reduced to writing. The Court informed the parties that judgment would be delivered in due course. This is the judgment.

[4] In passing, one notes that in the intervening period since end of May 2018 a number of other applications for appeals and reviews – all bearing the same Case No. 68/2015 – have been filed in this Court. This leaves one with the definite feeling that there is no intention or desire to complete this matter any sooner. Even though these other pending applications are not relevant to this application I find it

necessary to observe that this Court (and the High Court) has been kicked hither and thither like a tennis ball by MP Simelane Attorneys. This Court must not allow such a thing to go on unchecked. There is need for a speedy end of this dispute.

[5] The undoubted and uncontroverted fact is that the applicant was contracted to execute work for the Government at the Matsapha International Airport. Government paid through the office of MP Simelane Attorneys, the *alter ego* of Attorney MP Simelane. MP Simelane Attorneys have not submitted an acceptable account of what happened to the money received from Government as required by law and practice. This matter must come to an end: either MP Simelane Attorneys through its senior and sole partner and the attorney who received the money from Government, Mr. MP Simelane, accounts and pays the amount indicated in the orders referred to in this application or the said MP Simelane is committed to gaol for contempt of court. The middle route of a settlement seems to have eluded the parties for whatever reason and this Court can do nothing about it.

[6] Looking at the Book of Pleadings, it is observed that 'MP Simelane Attorneys' is the trade name and the *alter ego* of Mr. MP Simelane, the attorney, in whose trust account the money paid by Government was deposited. This Court has not been told by Mr. Simelane or anybody else that the money in question is in fact no longer present in Attorney MP Simelane's trust account. In the event, this Court is entitled to assume that indeed the money is available in the said trust account and respondent is willfully failing to account for it to the applicant.

[7] We are told that although at some time an order was obtained to execute against MP Simelane, that attempt was scuppered by Mr. Simelane who ensured that the goods which had already been earmarked and listed by the deputy Sheriff were not in fact removed from Mr. Simelane's premises. Although it is averred by Mr. Simelane that the marked goods were in fact removed, I have no reason to disbelieve the applicant in that the execution in fact failed as a result of Mr. Simelane's illegal intervention. It was as well that the execution failed because an argument has since been raised that execution against the trust account is not permissible. Both sides are agreed that that is the correct position, since the trust account is not the attorney's business account.

[8] To immediately note is that the orders respondent is said to be in contempt of are orders of this Court. Secondly, the first prayer is a declarator; that is, it is a prayer that this Court should find and declare respondent to be in contempt of those orders. It follows that the second prayer for committal cannot stand without respondent being called upon to show cause why he should not be so committed (after having been sown to be in contempt as alleged). The orders referred to by applicant as having been disrespected by respondent are as follows -

(a) On 30 June 2016, this Court ordered respondent, *inter alia*, to make payment to the applicant in the sum of E547,992.35 calculated as follows-

1.1 Capital sum of E487,992,35

1.2 Costs *a quo* in the sum of E60,000.00

(b) On 15th May 2017, this Court dismissed the application for review.

[9] Respondent says that this order is for the payment of money and is not susceptible to committal proceedings. We do not see it that way, because that money must come out of the trust account of respondent. As already pointed out the money in whatever form it is presented does not change to assume a new character, like being a debt. From the moment the money was paid by Government it belonged to the applicant not the respondent. Respondent is accordingly refusing to discharge his professional obligation of accounting to the applicant, his client. The money is not to be paid out of the business account of the respondent. Unless an accounting stuck in the trust account of the respondent. The question before Court is whether the respondent should be declared to be in contempt coupled with an order that respondent should show cause why he should not be committed to gaol if he should fail to purge his contempt.

[10] There seems to be no worthwhile argument about respondent being not in contempt of the Court orders. The serious argument before Court has been whether if indeed in contempt respondent should be committed to gaol. This turns out to depend on the character of the 'debt' owed by respondent to applicant. Mr. Howe for the respondent insisted that committal is not possible since the order said to be disrespected by respondent is an order for payment of money and that applicant's remedy is for execution only. It is true, as Herbstein and Van Winsen, say "Orders of court requiring compliance are generally speaking divided into two categories: orders *ad pecuniam solvendam* (ie, orders to pay a sum of money) and orders *ad factum praestandum* (ie orders to do or to abstain from doing a particular act). Not every order of court can be enforced by committal for contempt. The order must be

one *ad factum praestandum* before the court will enforce it in that manner". (See 5th edition pp 1106 – 7. Mr. Howe is therefore correct, speaking generally.

[11] Herbstein and Van Winsen [1] further write:

> *"Before steps are taken by a judgment creditor to sue out a writ of execution in satisfaction of a judgment in his favour, inquiry must be directed to the point whether the judgment is in a form that admits of enforcement by means of such a writ. If the judgment is one ad pecuniam solvendam, namely, one in which the court orders the debtor to pay a sum of money, it is appropriate to seek its enforcement by means of a writ of execution. An order to pay a sum of money by way of damages for breach of contract or delict, an order for the payment of maintenance for a wife or child, and an order for the payment of the purchase price of property bought are all examples of judgments ad pecuniam solvendam. So also, is an order to pay the costs of a suit or to contribute towards those costs."*

[12] *"When a judgment is one ad factum praestandum, namely an order to perform some act, for example pass transfer, remove an obstruction or vacate premises, the judgment creditor cannot seek its enforcement by the levying of a writ. His remedy is to apply for the committal of the judgment debtor for contempt of court . . .*

"The object of proceedings that are concerned with the willful refusal or failure to comply with an order of court is the imposition of a penalty in order to vindicate the court's honour consequent upon the disregard of

[1] **The Civil Practice of the High Courts of South Africa,** 5th ed. Vol 2 pp 1022-3

its order and to compel performance in accordance with the order. . . The penalty may take the form of committal to gaol, a suspended sentence or the imposition of a fine. In less serious cases the court may caution and discharge the respondent. (See Protea Holdings Ltd v Wriwt 1978 9(3) SA 865 (W) at 872E) [2] *".*

"Application should be brought in the court that made the order which the respondent is alleged to have disobeyed … When a High Court entertains civil proceedings for committal for contempt it does so in the exercise of its inherent jurisdiction to ensure that its orders are obeyed."[3]

[13] The orders cited by applicant for enforcement in this application are orders of this Court. Even if those orders came to this Court by way of appeal, and that this Court should not enforce orders of another court, viz the High Court, I would not relent. In **Bosman v Riddell** [1932 CPD 385] it was argued that the Provincial Division could not enforce a judgment of the magistrate's court unless it has tested its validity, meaning that a judgment of the magistrate's court had to be first converted to a superior court's judgment before the Provincial Division could enforce it. The case of **Van Zyl and Buissanne v Hayne** (28 SA Law Journal 526) was cited in support. Gardener JP responded as follows: " . . . *now that case can be distinguished from the present case because here the Court has had the fullest opportunity of testing the soundness of the magistrate's court judgment. That judgment has been before this Court on appeal and the appeal against it has been dismissed. There has therefore been a judgment of this Court affirming the judgment of the magistrate's court, and it seems to me that it would be a useless*

[2] Ibid pp 1100 - 1101
[3] Ibid pp 1104 - 1105

expense to have to proceed again to get a formal confirmation of this judgment by applying to have it made a judgment of the Superior Court."

[14] In the **Bosman v Riddell** case, it was further contended that the purported attachment of Riddell's right of occupation of land made the application to be an application for process-in-aid and as such the application could not be granted until the requisites in law have been complied with. There were certain orders the magistrate could not grant in connection with the application. Gardener JP concluded: *"It was necessary in my mind to come to this Court and I think this is a proper case for the Court to come to the assistance of the applicant"*. The concept or principle of process-in-aid is apparently employed to enforce the judgment of another court in certain circumstances. It is usually a superior court enforcing the judgment of an inferior court where the inferior court cannot effectively enforce the judgment or injustice might result. An example could be the situation where a magistrate's court remits a case to the High Court for sentencing where the Magistrate is not fully competent to do so. The High Court will first test the validity of the decision reached before imposing the appropriate sentence. It is not necessary that this should be done in terms of a statutory provision or Rule of Court: process-in-aid is an incident of a superior court's ordinary jurisdiction, as Mokgoro J says in para [20].

[15] In **Bannatyne v Bannatyne** [4] the Court held:

> *" . . . further, that 'process-in-aid' was the means whereby one court enforced the judgment of another court which could not effectively enforce the judgment through its own process. It was also a means whereby a court*

[4] 2003 (2) SA 363 (CC)

secured compliance with its own procedures. It was an incident of a superior court's ordinary jurisdiction. Contempt of court proceedings were a recognized method of putting pressure on a maintenance defaulter to comply with his/her obligation. An application to the High Court for process-in-aid by way of contempt proceedings to secure the enforcement of a maintenance debt was therefore appropriate constitutional relief for the enforcement of a claim for the maintenance of children";

And

" . . . that process-in-aid was a discretionary remedy. Process-in-aid would not ordinarily be granted for the enforcement of a judgment of another court if there were effective remedies in that court which could be used. ***There might well, however, be instances in which the facts of a particular case justified approaching a High Court for such relief****".* (My emphasis).

[16] Although Mokgoro J in the **Bannatyne** case opens the judgment by declaring that "this case concerns the responsibility of the Judiciary to ensure that maintenance

orders are observed", in my opinion that responsibility extends to all litigants who come to court in pursuit of their legitimate claims. Persons liable to maintenance may be a significant class but they are by no means an exclusive class on their own. This responsibility of the Judiciary is an entitlement of all litigants in a democratic society under the rule of law and a Bill of Rights. The Judiciary must discharge this responsibility by dispensing effective orders and remedies to all but in particular in the case of recalcitrant court order defaulters. Civil contempt is therefore a form of process-in-aid to coerce and compel the defaulter to comply

with the order of court. The imprisonment or fine does not exonerate the defaulter from the responsibility to obey the order. The defaulter may be imprisoned or fined and the term of imprisonment or the fine may be increased until the defaulter purges himself by obeying the order. See **Nel v Le Roux NO and Others** 1996 (3) SA 562 (CC).

[17] We refer to the process-in-aid principle to answer the argument by the respondent that this Court has no jurisdiction in this matter; that instead the matter should be referred to the High Court. Even if respondent is generally correct in this submission, it is my opinion that the referral would be undesirable in the present case. This matter has dragged for unduly long – almost ten years – without anything new to indicate progress made. A referral to the High Court can only further possibly extend the delay should the respondent seek an appeal and or review of the appeal decision. This Court is familiar with every aspect of the case based on previous dealings with the matter. To that extent, this Court has the requisite jurisdiction and the orders sought to be enforced are its own orders. Process-in-aid is also a discretionary remedy and a means for a court to secure compliance with its own procedures. There is no reason why this principle should be confined to maintenance cases. The principle also has the advantage of expediting the administration of justice in cases where a litigant already has an order in its favour but the execution thereof is frustrated by a recalcitrant respondent or judgment debtor. There can therefore be no hard and fast rule that if another court, for instance the High Court, can enforce the order this Court is constitutionally barred and devoid of jurisdiction to enforce the order even though it is equally *au fait* with the matter. There is good and sufficient reason for this Court to exercise jurisdiction in this matter in its own right or in aid of the High

Court. In my opinion to refer this matter of committal to the High Court can only be dilatory. And if this Court's jurisdiction in this matter should ever be in doubt on account that this matter is not an appeal, then may the doubter take comfort in knowing that through process-in-aid the doubtful jurisdiction is effectively overcome.

[18] Following the decision of Fleming J in **Johannesburg Taxi Association,**[5] it had for some time been thought that if an agreement between parties had been made an order of court it could not be enforced by contempt proceedings. But this thinking was quashed as mistaken by Southwood J in **York Timbers Ltd** [6]in these terms: *"I have no doubt that the* ratio *in* Johannesburg Taxi Association *case is wrong. In my view, there is no difference between the legal effect of an undertaking to do something or refrain from doing something which is made an order of court and the legal effect of an order to the same effect made by the court after considering the merits and giving judgment"*. The learned Judge then referred to Halsbury's Laws of England, 4th ed, Vol 9, para 75 where it reads: *"An undertaking given to the court by a person or corporation in pending proceedings, on the faith of which the court sanctions a particular course or action, has the same force as an injunction made by the court and a breach of the undertaking is misconduct amounting to contempt"*. In the result, *in casu*, the respondent cannot argue that since the order of 30th June 2016 was a product of agreement between the parties it cannot be enforced by the present type of proceedings. And, further, having consented to the order made an order of court and represented by counsel, respondent cannot be heard to say that he does not know the order and needed to

[5] **Johannesburg Taxi Association v Bara – City Taxi Association** 1989 (4) SA 808 (W)
[6] **York Timbers Ltd v Minister of Water Affairs and Forestry** 2003 (4) SA 477 (T) at 500

be served personally with it – even though respondent later reneged from the agreement.

[19] At this juncture one need refer to the judgment of Mlangeni J in Civil Appeal Case No. 387/2013 on this very issue. The opening statement of Justice Mlangeni is worth pondering: "*[1] The application before me is a sequel to a raging dispute between an attorney and his own client in respect of payment of collection commission. It is common cause that the attorney, who had collected a substantial amount of money on behalf of his client, took his time to account to his client. This resulted in the client engaging another firm of attorneys to compel him to account. The application for debatement came before Mabuza J on the 31st January 2014,* …". This is just an indication of how respondent has tried to duck and dive, and do his utmost to evade accounting to the applicant, his own client.

[20] Mr. Jele, for the applicant, properly submitted that there was no need to resuscitate and pursue the aborted issue of execution referred to above. This is not a debt *simpliciter* involving the payment of a sum of money. This is a case involving trust funds kept by an attorney who now refuses to account to his client, because so says the attorney, the client does not exist in law. This, Mr. Jele decries, is a disgrace to the legal profession, bearing in mind that respondent successfully represented the now 'non-existent' client and received trust funds to that end. Mr. Jele then referred the Court to para [33] of this Court's judgment delivered on 15th May 2017 between the same parties; on the same matter of respondent's failure to account. Even though in its notice of motion applicant had prayed for an order for immediate committal of respondent to gaol for contempt

Mr. Jele, however, relented acknowledging that an order calling upon respondent to show cause why respondent should not be committed for contempt until he purges the contempt by tendering a proper account, would be in order. For the respondent, Mr. Howe strenuously opposed a committal order; arguing that if such an order should be contemplated, a similar order to that made by this Court in Swazi MTN v SPTC[7] case should be made, that is, remitting the matter to the High court, for it to call upon respondent to show cause. As already explained, that would not be necessary, in my view, as it would only amount to a formality which 'places form above substance'.

[21] This Court is constrained by the terms of the notice of motion in this matter. This matter is not before Court in terms of this Court's appellate jurisdiction. Applicant brought this application to enforce certain judgments of this Court against the respondent as shown earlier on above. It will be noted that in the Swazi MTN case the matter was not merely sent back to the High Court. The matter being before this Court on appeal, this Court, *inter alia,* set aside the order of the High Court and replaced it with a new order, part of which was to call upon the respondent in that case to show cause why respondent should not be declared to be in contempt. In that case the order in question was strictly an order of the High Court. That is is not the case here. Mr. Jele referred this Court to section 148 (1) as authorizing this Court to enforce its own orders. But I think he wanted to refer to section 140(2) read with section 139 (3) of the Constitution which respectively allow a superior court "in relation to any matter within [its] jurisdiction" to issue such orders and directions as may be necessary to ensure the enforcement of its judgment, decree or order, including the power to commit for contempt to itself.

[7] **Swazi MTN Ltd and 3 Others v Swaziland Posts and Telecommunications Corpn,** Civ., App Case No. 58/2013

Mr. Howe contended that s 139 (3) is for specific performance, but without elaborating or giving example.

[22] Mr. Howe points out in the heads of judgment that for the contempt order there has to be personal service of the notice, that such service has not been shown to have occurred. Reference was made to Rule 4(2) (j) of the High Court Rules. It will be realized, however, that the Rule cited by the respondent regulates service of process in cases affecting, inter alia, "the liberty of the respondent". I understand prayer 1 on the notice of motion to be only a request for a declaratory order. The liberty of the respondent is accordingly not affected until we reach prayer 2. In its replying affidavit the applicant had answered respondent's concern about the service in these terms *"5.2. The deponent has become aware of the matter. That is the purpose of personal service. The deponent has filed an answering affidavit. The issue has therefore been overtaken by events"*. With reference to this issue of personal service, the Swazi MTN case is again useful. Paras [35] and [42] thereof refer. In the latter paragraph, the learned Ramodibedi CJ stated: *"[42] To sum up, as alluded to in paragraph [35] above, the court order in question was brought to the knowledge of the respondents. It is common cause that they have consistently failed to comply with it… I should stress that the court has a duty to vindicate its authority by ensuring that its orders are complied with at all times"*. That was a case, like here, where the respondents were sought to be held in contempt. It was enough that the respondents were previously aware of the orders they were alleged to be in contempt of. As we have seen, the order of 30 June 2016 was a consent order. In para [12] of the 15 May 2017 judgment, Dr. Odoki JA states: *"The consent order which was read out in Court was then endorsed by the Court in those terms and made an order of the Court, dated 30 June 2016"*.

[23] The United Nations *Basic Principles on the Role of Lawyers* states as the "duties and responsibilities" of lawyers, *inter alia:*

> *"12 Lawyers shall at all times maintain the honor and dignity of their profession as essential agents of the administration of justice.*
>
> *"14 Lawyers, in protecting the rights of their clients and in promoting the cause of justice ... shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.*
>
> *"15 Lawyers shall always loyally respect the interests of their clients.*
>
> *"18 Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions".*

In articles 26 to 29 the Basic Principles speak to the issue of disciplinary proceedings in the case of lawyers and call for codes of conduct to be established by the legal professions through their appropriate organs or by legislation. Article 28 states: "*Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession …"*

[24] Even though at the beginning of the hearing it was pointed out that the executive of the Law Society was not before Court, it would be remiss of me not to remark that the persistent failure of the Law Society to take appropriate disciplinary action in matters involving their members and process such actions "expeditiously and fairly under appropriate procedures" as the Basic Principles enjoin imposes unnecessary strain upon the Judiciary which must then perform the function of the

Law Society if it is not to be seen as complicit in the unethical conduct of some of the Society's members. This is very unfair as the Judiciary is drawn into the conflict zone/space left unoccupied by the Law Society. The Law Society and the legal profession have a role to play in the overall administration of justice. In this regard, I need not over emphasise that every executive member of the Law Society should scrupulously and ethically be above reproach. These basic principles are not at variance with the values enshrined in the Legal Practitioners Act, 1964. The two are complementary. Whatever may be the problems of the Law Society to discipline its members, this Court cannot sit back and allow the rot to continue unchecked to the dire prejudice of the public in general and the individual clients of [crooked] lawyers in particular. The respondent has abused the legal system to stall accounting to his client. This Court must adopt and if necessary contrive strict measures to remedy the situation.

[25] Needless also to highlight that systematic failures to enforce court orders can only have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The judiciary must endeavor to secure for judgment creditors their legal entitlements. If court orders are habitually evaded and defied with relative impunity, the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those most dependent on the law.

[26] The nature of the payment in this matter holds the key to its enforceability by contempt proceedings. This is besides the consent orders which have also failed to realize compliance. What the respondent is required to do is account to applicant

for what respondent as attorney obtained from the Government following work done by applicant at the request and instance of the Government. The word 'account' should not be a problem to a practicing attorney, and no doubt respondent understands it very well. In its basic sense the word 'account' (verb) means "to give an explanation or reason for". In this sense, respondent must give an explanation as to what he has done with the money received on behalf of the applicant. The transfer or payment of any money to the client is part of that accounting. What we are faced with in this matter is an account which would indicate what is payable to applicant. It is this accounting which the respondent is accused of failing to do as the law requires.

[27] In my opinion, the nature of the payment we have here is not a money payment *simpliciter* which would give rise to execution and not committal. The complaint involved here is failure to account for moneys received on behalf of applicant. Thus characterized, the payment due to applicant is of a judgment *ad factum praestandum*, and as such amenable to an order of committal. The payment is from the trust account of respondent and the parties were agreed that execution from trust account is not permissible. The order which is the basis for this judgment is not a simple payment of a 'debt' for lack of a better word; it is an order for respondent to do some act, namely, account for the money received on behalf of applicant.

[28] It is trite that respondent as a practicing attorney is required in terms of section 24 (1) of the Legal Practitioners' Act, 1964 to *"open and keep a separate trust account, at a bank lawfully established within Swaziland, in which he shall*

deposit all moneys held or received by him in connexion with his practice within Swaziland, on account of any person; and he shall further keep proper books of account containing particulars and information as to moneys received, held or paid by him for or on account of any person". Section 24(3) makes it clear that the *"amount standing to the credit of such a trust account in the bank shall [not] form part of the assets of the attorney….and no such amount is liable to attachment at the instance of any creditor of the attorney…"*. Clearly, therefore, any amount in the trust account of an attorney is not an executable asset of the attorney. The money does not belong to the attorney: he is not the beneficial owner; the attorney only holds it in trust for a particular person or client. Such trust amount does not therefore constitute a 'debt' strictly so called. In a case like the present, the attorney, respondent, is only required to hand it over, to deliver or transfer it to the person for whom the trust was established (the *cestui que trust*). That is why respondent is liable to committal proceedings. Counsel for respondent is not correct in my view in arguing for execution, which in any case was at some point frustrated by the respondent.

[29] The applicant in its replying affidavit states: "8.4 *The orders sought herein are not per se ad pecuniam solvendam as alleged or at all. The Court ordered the deponent to account to the applicant the monies which he unlawfully withholds. The orders of this Court are therefore enforceable by contempt proceedings. This is so, because in full defiance of this Court, the deponent has not accounted to the applicant"*. Applicant continues in paragraph 11.3: *"The essence of the judgment is to the effect that the deponent should account monies he unlawfully withholds. This matter is not one where the deponent was sued for a debt. This was not action proceedings. It was an application for him to account monies he withholds*

unlawfully. The court granted the application……. The deponent in defence of the orders of this Court had up to date not accounted". And this Court, as a superior court, is not without the power to ensure the enforcement of any of its judgments.

[30] The conclusion of this dispute between the parties should not be further delayed. There is no need for this matter to be referred to the High Court. If I should be wrong in this regard, then on the principle of process-in-aid this Court is entitled to enforce the order which would otherwise be referred to the High Court for enforcement. At any rate, section 16(1) (b) of the Constitution allows this Court to punish any person for contempt of itself or of any other court or tribunal. Section 16(1) (c) also permits the deprivation of a person's liberty in the execution of any court order *"made to secure the fulfilment of any obligation imposed on that person by law"*. The Legal Practitioners Act, 1964, imposes a legal obligation on the respondent vis-a-vis his client: that obligation respondent wilfully refuses to carry out in defiance of numerous court orders. If respondent unlawfully misappropriated the trust funds in respect of the applicant then respondent must accept the consequences of the lapse in his ethical, professional, conduct. Para [35] of Swazi MTN reads: *"Insofar as the law of contempt of court is concerned, it is trite that where the order of court has been brought to the knowledge of the respondent, as here, and the respondent fails to comply with it, again as here, willfulness and mala fides will be inferred on the part of the respondent and the onus burdens such respondent to rebut this inference on a balance of probabilities…"*

[31] Before dismissing the respondent's application for review of the 30 June 2016 judgment, Dr Odoki JA, in para [33] of the 15 May 2017 judgment made this telling statement: "… *the conduct of the [respondent] in presenting a dishonest defence that its client was fictitious and in delaying to pay to the [applicant] money collected on its behalf from the Government of Swaziland for several years is dishonourable and disgraceful conduct which is an abuse of the court process* …" Speaking for myself, I hope this is the very last time this Court has to deal with this matter except, may be, only in meting out an appropriate punishment. It is perverse that this Court should become a yoyo at the hands of a person who is otherwise an officer of this Court. Respondent should do the right thing and save us all from the embarrassment of having to see this matter to its logical but avoidable conclusion – committal.

[32] That respondent has dismally failed to comply with the various court orders of this Court and the High court is a fact and reality that cannot be gainsaid. Even the respondent implicitly concedes to this failure by his insistence that applicant does not exist. Unfortunately, that argument is so fatuous, porous and vacuous it cannot even begin to exonerate the respondent from the responsibility to comply with the court orders or from the palpable dereliction of his duty to his client. That therefore the failure to comply is deliberate and malicious is inevitable. In the result, I find that the respondent has willfully and with *mala fides* disobeyed and or failed to comply with the orders of this Court as set out in the notice of motion. I make the following order-

1. The application succeeds;

2. 1st Respondent is declared and held to be in contempt of applicant's first prayer.

3. The *ex tempore* Order handed down on 24th August, 2018 is hereby confirmed and set out as follows:

"1. That the Judgments of the Supreme Court set out in paragraph 1 of Applicant's Notice of Motion dated 18th May 2018 in this matter are of full legal force and effect and the 1st Respondent is enjoined at law to obey them unless otherwise suspended or stayed by a competent court of law or as a consequence of the operation of law.

2. That the 1st Respondent, in compliance with paragraph 1 above, is ordered to account and or pay the Applicant the sum of E547,992.35 within 14 days of granting this Order.

3. That in the event the 1st Respondent fails or refuses to account and or pay over the said sum in paragraph 2 hereof, 1st Respondent is hereby within 21 days from the date hereof called upon to show cause why he should not be committed for contempt of court to 30 days' imprisonment.

4. That the Applicant is entitled to set down the matter in the event that the 1st Respondent refuses or fails to comply with this Order.

5. That the 1st Respondent is ordered to pay costs at an attorney and own client scale".

4 The sentence of 30 days referred to in 3.3 above may be renewed and extended by this Court until 1st Respondent complies and purges his contempt or is otherwise absolved from compliance by this Court.

M.J. Dlamini JA

I Agree

S.P. Dlamini JA

I Agree

S.B. Maphalala JA

For the Applicant Mr. Z Jele & Mr. N Jele

For the 1st Respondent Mr. L Howe