IN THE SUPREME COURT OF ESWATINI

HELD AT MBABANE **Criminal Appeal No.68/2015**

In the matter between:

Beauty Build Construction (Pty) Ltd **Applicant**

AND

Muzi P. Simelane

t/a MP Simelane Attorneys **First Respondent**

National Commissioner of Police **Second Respondent**

The Attorney General **Third Respondent**

Neutral Citation: **Beauty Build Construction (Pty) Ltd v. Muzi P. Simelane Attorneys and others (68/2015) [2019] SZSC 04 (1st March, 2019)**

Coram: **JP Annadale JA, SJK Matsebula AJA and MJ Manzini AJA**

Heard: **27th November, 2018**

Delivered: **1st March, 2019**

JUDGMENT

MANZININ AJA

[1] On the 23rd August, 2018 this Court (per MJ Dlamini JA) made an *ex tempore* Order against Muzi P. Simelane t/a MP Simelane Attorneys in the following terms:

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

3. That in the event the First Respondent fails or refuses to account and or pay over the said sum in paragraph 2 hereof, First 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 day's imprisonment.

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

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

[2] The *ex tempore* Order was made after the Court had heard an application launched by Beauty Build Construction (Pty) Ltd, the Applicant herein. The written reasons for the *ex tempore* Order were subsequently handed down on the 24th September, 2018. From the written reasons it emerges that the Applicant launched proceedings and applied for an Order declaring that the "First Respondent is in contempt of the 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.

[3] The judgment (written reasons) chronicles the events leading up to the contempt application proceedings in sufficient detail. I therefore find it not necessary to burden this judgment with an elaboration of these events. It suffices to say that the First Respondent herein is an admitted attorney practicing as such under the style "MP Simelane Attorneys". He was engaged by the Applicant, on whose instructions he successfully sued the Government of the Kingdom of Eswatini. He was paid a considerable amount of money on behalf of the Applicant, and it is alleged that he failed to pay a portion thereof to the Applicant. Hence, the protracted litigation at the instance of the Applicant to try and recover the remaining portion of what was paid to the First Respondent. The First Respondent, on the other hand, claims that the portion he has not remitted to the Applicant is in respect of his professional fees and other charges, and which he is entitled off-set against the money he collected.

[4] The litigation between the parties commenced at the High Court, which entered judgment in favour of the Applicant. The First Respondent appealed, and the matter ultimately landed in this Court. This Court dealt with the matter in various forms, including an application for review in terms of Section 148(2) of the Constitution, which was dismissed, and issued its own Orders that the First Respondent should pay the Applicant the sum of E547, 992.35. These are the Orders which formed the basis of the contempt proceedings.

[5] The judgment of Dlamini JA delivered on the 24th September, 2018 exhaustively dealt with the issues and legal arguments raised by the parties, and at paragraph [32] thereof concluded as follows:

> *"That respondent has dismally failed to comply with various orders of this Court and the High Court is a fact and reality that cannot be gainsaid…That therefore the failure to comply is deliberate and malicious is inevitable. In the result, I find that the respondent has wilfully and with mala fides disobeyed and or failed to comply with the orders of this court as set out in the notice of motion".*

[6] The judgment concludes with an Order declaring the First Respondent to be in contempt of its Orders, and confirming the *ex tempore* Order made on the 23rd August, 2018. In addition, it directed that –

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

[7] The present application for committal is premised on the First Respondent's alleged failure to pay the E547,992.35 within the time frame as ordered by this Court. The Applicant seeks an Order in the following terms.

1. The First Respondent is hereby sentenced to a period of 30 days for his refusal to comply with the Court Order dated 23rd August, 2018;

2. The First Respondent is ordered to pay costs of this application at attorney and own client scale.

[8] The Applicant alleges that the Court Order was served on the First Respondent at his offices on the 27th August, 2018. A Filing and Serving Notice is annexed to the Applicant's Founding Affidavit, and it indicates that indeed the Court Order was served at MP Simelane Attorneys on the 27th August, 2018. The First Respondent has neither denied nor disputed that the Court Order was served as alleged by the Applicant. And neither has he disputed that he was aware of the Court Order.

[9] The Applicant further alleges that the First Respondent has not filed anything to show why he should not be held to be in contempt and committed to gaol. Furthermore, that the First Respondent is guilty of contempt of Court and has to be sentenced by this Court to 30 days so that he can comply with the Court's Order.

[10] The application for committal, as expected, is vigorously opposed by the First Respondent, who filed an Answering Affidavit raising a number of points *in limine*, as well as dealt with the merits. The points *in limine* are as follows –

1. Lack of *locus standi* of First Respondent;
2. Application for committal premature; and
3. Court's power to approach matter with open mind may be hindered.

[11] The point with respect to the lack of *locus standi* of the First Respondent was not pursued in argument before us, and rightly so. It therefore falls away.

[12] The complaint with respect to the application for contempt being allegedly premature was also not pursued, as it was clearly academic at the time of hearing the matter.

[13] The third point, seemingly directed at the lack of impartiality of this bench, was also not pursued.

[14] In his main defence the First Respondent raised two substantive issues which call for determination by this Court. Firstly, he contends that the first part of the Order dated 23rd August, 2018 directed and ordered him to "account", which he claims he has since done, thus purging his contempt. In this context, he relies upon a document which will be dealt with in

detail later in this judgment. Secondly, he argues that committal to gaol, for any number of days, would violate the principle of double jeopardy, as he has already been penalised by the Chief Justice for the same offence. On this score, he relies upon a directive dated 9th April, 2018 and issued by the Chief Justice barring him from appearing before any Court in Eswatini, until he purged his contempt. He contends that the directive cites the very same Orders of this Court which the Applicant sought to enforce in launching the contempt proceedings which resulted in the Court Order dated 23rd August, 2018. The necessity to deal with the second defence will only arise if the first one fails.

Has the First Respondent complied with the Order dated 23rd August, 2018?

[15] The question whether or not the First Respondent has complied with the Order of this Court dated 23rd August, 2018 cannot be resolved without first establishing its terms. Put differently, the question is, what did this Court direct the First Respondent to do? Once this is established the next question will be – has the First Respondent complied with the Court's directive? If he has complied, or has a legal excuse, the application for committal cannot be granted. If he has not complied, the Court will have to determine, in light of the second defence raised by him, whether he should be committed to gaol, and for what period.

[16] Mr. Howe, who appeared for the First Respondent, contended that the latter complied with the aforesaid Order. He submitted that the Order directed the First Respondent, firstly, "to account". The First

Respondent's interpretation of the Order is that the first part directs him to prepare an account, and thereafter to pay the Applicant if there is any balance due. The First Respondent contended that he prepared "an account" as directed by this Court, and in terms thereof only an amount of E204.95 is due to the Applicant. A tender for the payment of this amount was made from the bar. The First Respondent further contends that a disagreement, if any, about his professional fees and charges does not amount to a failure to render an account as directed by the Court.

[17] The "account" on which the First Respondent relies as evidence of compliance with the Order is a document entitled "Statement of Account –Beauty Build Construction". The document contains a detailed breakdown of amounts received by the First Respondent, the dates of receipt, remittances to the Applicant and the dates on which these were effected. It also shows fees charged by the First Respondent, and the balance due to the Applicant (as according to the First Respondent).

[18] On the other hand, Mr.Jele, who appeared for the Applicant, disputed that the First Respondent had complied with the Order. The Applicant submitted that this Court did not direct the First Respondent to prepare another statement of account, as this had already been done in the proceedings before the High Court. It was further submitted that this Court ordered the First Respondent to account, as meaning pay, to the Applicant a specific amount of money, and that there was no disagreement with respect to the amount owed by the former. He contended that "account" simply meant "pay".

[19] Mr. Jele further submitted that the terms of the Order were that the First Respondent must "account and pay" the Applicant's money. He referred us to the Court Order prepared by the office of the Registrar of this Court which, for some unknown reason, is worded differently from that set out in the judgment itself. Paragraph 2 of the Registrar's Court Order provides that the "1st Respondent… is ordered to account and pay the Applicant the sum of E547,992.35 within 14 days of granting of this Order". Paragraph 3 provides that "in the event the First Respondent fails or refuses to account and pay over the said sum…". Mr. Jele argued that the discrepancy in the wording of the respective Orders was immaterial, and all what was required of the First Respondent was to pay the Applicant the sum of E547,992.35, failing which he should be committed to gaol for 30 days.

[20] What is clear to me is that the words "account and or pay" lie at the heart of the different contentions of the parties. Most importantly, the meaning ascribed to these words will invariably determine whether or not the First Respondent has complied with the Order relied upon by the Applicant.

[21] The principles applicable to the interpretation of Court Orders are well settled. In the often cited case of ***Firestone South Africa (Pty) Ltd v. Genticuro A.G 1977 (4) SA 298 (A.D)*** Trollip JA laid the following guidelines –

> *"The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-*

known rules. See Garlick v. Smartt and Another, 1928 A.D. 82 at 87; West Rand Estates Ltd v. New Zealand Insurance Co. Ltd 1926 A.D 173 at p.188. Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgement or order can be asked to state what its subjective intention was in giving it (CF Postmasburg Motors (Edms) Bpk v. Peens en Andere, 1970 (2) SA 35 (N.C.) at p.39 F – H). Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise – see infra. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court a quo and its reasons therefor, can be used to elucidate it. If, despite that, the uncertainty persists, other relevant extrinsic facts or evidence are admissible to resolve it".

See too: ***Van Rensburg and Another NNO v. Naidoo and Others NNO; Naidoo and Others NNO v. Van Rensburg and Others 2011 (4) SA 149 SCA****;* and ***Swazi MTN Limited and Others v. Swaziland Post and Telecommunications***

Corporation and Another (58/2013) [2013]SZSC 46 (29 November, 2013).

[22] As alluded to above, the words "account and or pay" are germane to the determination of the question whether or not the First Respondent has complied with the Order dated 23rd August, 2018. In light of the principles of interpretation set out above, attention must be now focused on the Order itself, the judgment and the reasons therefor. It is significant to note that Dlamini JA dealt with the meaning of the word "account" in his judgment, and clearly articulated what was expected of the First Respondent. Paragraph [20] of his judgment set the tone, where he stated the following:

> *"Even though in its notice of motion applicant 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 tending a proper account, would be in Order"*.
>
> (own underlining)

[23] At paragraph [26] he further stated the following:

> *"What the respondent is required to do is to 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 the applicant. It is this accounting which the respondent is accused of failing to do as the law requires".

[24] Notably, having dealt with the "basic sense" of the word, Dlamini JA did not deal with any other sense.

[25] In my opinion, in the context of the facts of this case there is no other meaning which can be ascribed to the word "account". Several English dictionaries I have consulted define the word in more or less similar terms. For instance, according to the Compact Oxford Dictionary (3rd Edition 2008) the word "account" (verb) means "to give a satisfactory explanation of….". The Oxford Advanced Learners Dictionary (8th Edition 2010) describes the word to mean, inter alia, "a written or spoken description of something that has happened". The Concise Oxford Dictionary of Current English (9th Edition, 1995) defines the word to mean, inter alia, "a statement of the administration of money in trust (demand an account)".

[26] At paragraph [27] of the judgment his Lordship reiterated what was expected of the First Respondent (in light of the meaning he ascribed to the word "account") in the following terms:

"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 the respondent to do some act, namely, account for the money received on behalf of the applicant".

[27] In my view, the meaning ascribed by the Learned Judge to the word "account" is clear. The Learned Judge explicitly stated what was required of the First Respondent, that is, "give an explanation as to what he has done with the money received on behalf of the applicant". This is what the First Respondent says he understood the judgment to mean, hence the Statement of Account.

[28] On the other hand, the interpretation contended for by the Applicant raises the question, that if the Court's intention was to direct the First Respondent to simply pay the Applicant a specific sum of money, that is E547,992.35, why was it necessary to deal with the meaning of the word "account", and thereafter spell out what was expected of the First Respondent (in light of the meaning ascribed to the word)?

[29] For the reasons stated above I am unable to align myself with the Applicant's argument that the word "account" in the Order simply meant pay. To ascribe such a meaning, in my view, would amount to going against the text of the judgment. This is so particularly because Dlamini JA explicitly articulated what was required of the First Respondent as far as the requirement to account was concerned. Had he not done so I would, perhaps, be persuaded otherwise.

[30] I now turn to deal with the expression "and or". In some instances the use of the expression "and/or" has often been the subject of judicial disapproval, because the words in their ordinary meaning, must be read conjunctively, as well as disjunctively. In ***Berman v. Teiman 1975 (1) SA 756 (W)*** the court, in interpreting a clause in a contract which contained the expression "and/or" was compelled to read it disjunctively as well as conjunctively.

[31] Similarly, in the case of ***Thomas v. BMW South Africa (Pty) Ltd 1996 (2) SA106 (C)***, the court in adjudicating a special plea to particulars of claim containing allegations of negligence joined by the use of and/or, adopted the same approach. There, the court said (of the grounds of the claim) –

> *"Accordingly they are capable of being read either conjunctively or disjunctively"*.

The court proceeded to read the grounds of the claim disjunctively, as well as conjunctively.

See too: ***Brink v. Premier Free State, and Another 2009 (4) SA 420 (SCA) at 424 – 425***.

[32] In applying the above stated principle to the facts at hand, the Order issued by this Court "to account and or pay the Applicant the sum of E547, 992.35" must be read disjunctively as well as conjunctively. If read disjunctively, the First Respondent was directed to (a) account or (b) pay the Applicant the sum of E547, 992.35. If read conjunctively, the First

Respondent was directed to account and pay the specific sum of E547,992.35. This would be a combination of (a) and (b).

[33] If the Order is interpreted to mean that the First Respondent was directed "to account" in the sense that the word was used in the judgment, what was required of him is an account which would indicate what was received, what was remitted, and if there is a balance payable to the Applicant, payment thereof – "tendering a proper account" as Dlamini JA referred to the process, and as acknowledged by Mr. Jele.

[34] If the Order is interpreted to mean that the First Respondent was directed to simply "pay" the Applicant E547,992.35 without any accounting in the sense that the word was used, this would result in a clear inconsistency with the rest of the judgment. Inconsistency in the sense that Dlamini JA explicitly stated what was required of the First Respondent, an exercise which would be meaningless if the amount due and payable is already known.

[35] Lastly, if the Order is interpreted to mean that the First Respondent was directed to "account and pay" the Applicant the sum of E547,992.35, this would require the latter to prepare an account showing the amount due as that specified in the Order. This would result in an absurdity, because if the amount due is already known there is no need to explain "as to what he has done with the money received on behalf to the Applicant". In other words, there is no need to account in the basic sense of the word. Furthermore, why would the First Respondent "account" for the

E60,000.00 (in respect of costs) which forms a component of the E547,992.35?

[36] Having stated the above, the critical question is, if the First Respondent placed reliance on one of the plausible interpretations of the Order dated 23rd August, 2018, and thereafter prepared a detailed statement of account, has he failed to comply with the Order so as to warrant his committal gaol?

[37] The learned authors, ***Herbstein and Van Winsen "The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa (5th edition 2009)*** in dealing with "Requirements for granting an order for committal" at page 1110 have this to say:

> *"If a person's failure to comply is thus due to inability to do so or flows from a mistake as to what was required, or if he bona fide believed that it was not required to comply with the court's order, a committal for contempt will not be granted."*

[38] The authors, at page 1111, go on to state that:

> *"A misunderstanding of the true meaning of a judgment has been held to be evidence of absence of wilfulness on the part of a respondent who failed to comply with the judgment"*.

[39] ***"Erasmus Superior Court Practice" (2nd Edition, 2016)*** at page A2-171 express a more or less similar legal exposition where the learned author states the following:

> *"Even though the defaulting party may be wilful, and admittedly so, he may yet escape liability if he can show that he was bona fide in his disobedience, that is, that he genuinely, though mistakenly, believed that he was entitled to commit the act, or the omission, alleged to be a contempt of court.*
>
> *Thus, the court will not order committal for contempt for not complying with the judgment of the court if it appears that the non-compliance is not due to wilful disobedience but rather to a misunderstanding of the true meaning of the judgment. The fact that the misinterpretation was unreasonable may be an indication of the absence of bona fides, but unreasonableness per se does not mean absence of bona fides: there are degrees of unreasonableness and in a particular case the defaulting party's conduct may be so blatantly unreasonable that the court would be prepared to reject as false on those grounds his statement that his conduct was bona fide, and the unreasonableness of his conduct would only be method of arriving at the result."*

[40] In my view, the meaning ascribed to the word "account", coupled with what the Court explicitly stated to be required of the First Respondent, incline towards the interpretation contended for by him. Thus, from an objective stand point, the Order is capable of more than one interpretation, including the one contended for by the First Respondent. In the circumstances such as the present, and in the absence of any

evidence that the interpretation placed on the Order by the First Respondent is unreasonable, my considered view is that the Court should be loathe to issue an Order for the committal of the First Respondent.

[41] I hasten to add that the conclusion I have reached, however, does not relieve the First Respondent from complying with this Court's Order dated the 30th June, 2016 directing him to pay the Applicant the sum of E547,992.35, as reaffirmed by the Order dated 23rd August, 2018. For so long as these Orders have not been set aside the First Respondent is liable to pay the Applicant the sum of E547,992.35.

[42] To avoid any uncertainty this Court will place new timelines within which this amount should be paid by the First Respondent, failing which the Applicant may set the matter down for an Order committing the First Respondent to gaol for the period specified in the Order of the 23rd August, 2018.

[43] **Costs**

Ordinarily costs follow the event. However, the conduct of the First Respondent renders him non-suited for a favourable costs order. In the event there will be no order as to costs.

[44] In the result the following Order is issued:

1. The First Respondent is hereby ordered and directed to pay to the Applicant the sum of E547,992.35 within 14 (fourteen) days from date of the granting of this Order.

2. In the event that the First Respondent fails, refuses or neglects to pay the aforesaid sum, the Applicant may set the matter down and apply for an Order for the committal of the First Respondent to gaol for the period specified in the Order of this Court dated 23rd August, 2018.

3. No Order as to costs.

MJ MANZINI ACTING
JUSTICE OF APPEAL

I agree

JP ANNANDALE
JUSTICE OF APPEAL

(Dissenting judgement by **SJK MATSEBULA AJA**)

For the Applicant: Mr. N.D. Jele

For the First Respondent: Mr. L. Howe

MATSEBULA AJA

Summary: An application for committal to prison for contempt of court – Respondent (an attorney practising under the style MP Simelane Attorneys) refuses to account and pay over monies he collected from Applicant's debtors (Eswatini Government) on the basis of a technicality which is that Applicant is not properly registered as a legal person (company) in terms of the Companies Act and therefore a non-legal person, not capable of receiving such monies - this Court on application by Applicant issued an order that Respondent must account and pay the sum of E 547, 992.35 to the Applicant at the pain of imprisonment for 30 days – Respondent defied this order and relied on further technicalities that the word account means he must prepare a statement which he had done and in which the statement indicated that the sums he had collected almost equalled his fees – the judgement of this Court had a specific sum of E547,992.35 which he had to account to Applicant.

Held –the modern trend, which has been endorsed by our Courts, is that technicalities should not be a bar to justice or denial of justice though in certain cases sloppiness should not be encouraged.

Held further – Respondent, but for the majority judgment, is in contempt of this Court and should have been committed to prison as per notice of motion.

JUDGMENT
(DISSENTING)

[1] I have read the judgment prepared and agreed to by my brothers Manzini A.J.A and Annandale J.A. I appreciate the superb legal research of the law and the comprehension of the events surrounding the case. The case has been going on before our courts for more than eight long frustrating and agonising years. The first question which crosses my mind is, was this necessary. It is a simple matter where an attorney is instructed to collect money from the Government and there after hand over the collected money minus the attorney's legal fees. Hundreds of cases involving disputes or disagreement between Attorneys and their clients have gone through our courts and have been quickly resolved in less time than the eight years herein. Resolution of cases speedily is part of the elements or constituent parts of the rule of law. The simplicity of the matter lies in this: the relationship, in the strict sense, between the client and Government is that of creditor and debtor but that between the client and attorney is trusteeship (the funds are temporarily managed by the attorney in the conduit pipe scenario and that relationship should not degenerate to that of creditor and debtor. The attorney collects the money, deducts his fees and hands over the balance to the client. If there is a dispute on fees, it is referred to the taxing master. That should end the matter. A healthy judicial system quickly resolves matters before it. The few cases that have dragged on for long have one thing in common, the Attorney is holding or withholding the clients' money or property. It is not vice versa. Where it is the attorney against the client, the attorney within a short space of time gets his orders against the client. This is so, notwithstanding Section 20 of the Constitution which says we are all equal before the law.

[2] In my view, what has prolonged this case is not the law or want of it but technicalities in or of the law. Technicalities or knock-outs do not go to the merits of a matter and also have the tendency of shortening or prolonging the process. My honourable brothers herein, I would say, approached the case well but allowed technicalities of the law to assume a dominant role in reaching the decision they reached. I humbly submit that my approach differs hence I disagree with the decision.

[3] I hold the view that the law should take into consideration, amongst other variants: the political and social variant, the economic variant, the law and justice variant and the environment or situational circumstances under which the case takes place (the presence or absence of the rule of law). The aim of the law is to serve the people. The Superior Courts should be able to provide redress quickly as final courts of the land instead of allowing endless litigation in the name of legal technicalities (a point of law or a small set of rules that forces one to make a decision that seems unfair)

The prevailing situation in the legal front:

[4] This case takes place when there are public concerns about the judiciary coming from clients, the courts, members of the Law Society of Swaziland and others. For instance, on page 2 of the Swazi Observer dated January, 17 of 2019, the Observer wrote -

> "*The Vice President of the Law Society of Swaziland Lucky Howe has said there is no rule of law in the country. Speaking during the Human*

Rights Day Commemoration, hosted by the Law Society under the Theme of "The Role of the Legal Profession in Promoting and defending the Rule of Law and Human Rights, Howe blamed the Judiciary System of the country, accusing a very senior officer of manipulating and depriving the rights of access to justice".

[5] He is further quoted as stating -

> *"The rule of Law is a measure of a country to the international world. Investors also, may analyse the rule of law if they want to invest in a country"*.

The participants of the meeting seemed to have concurred.

[6] The above quotation is testimony and recognition that not all is well in the judicial or judiciary. It must be noted that amongst others, the judges, magistrates and members of the Law Society of Swaziland are all officers of the courts and hence they are part of the judiciary. They are all duty bound to assist in the restoration of the rule of law, if it is wanting. The Law Society of Swaziland can contribute a lot if it can, for all to see, discipline some of its members who are accused of abusing trust funds and other monies belonging to their clients. There have been many complaints from clients about the squandering of their monies by attorneys but there has been no corresponding disciplinary trials or convictions or punishments. This perception or reality of the matter contributes to the lack of the rule of law in the country and may impact on the investor's choice where to invest. Lawyers are greatly respected and influential members of society and the judiciary, where aggrieved citizens, both poor and rich, run to them for legal solutions such as

recovering monies owed by other non-paying parties. Once an attorney recovers the money he should hand it over to his client immediately and not hide behind any technicalities of the law. Attorneys should not keep their clients' monies longer that it is necessary to deduct their fees. Lawyers are human beings too and can be tempted and misappropriate their clients' funds as long as they do not immediately hand over it over. Where this happens the law should apply and if the law is not applied and no punishment is visited to the erring attorney, then there is no rule of law and investors will shun the country and if the client is local, is likely to suffer irreparable damage. The environment of misappropriation of clients' funds is not new as there was once an outcry concerning the Motor Vehicle Accident Fund until remedial steps were taken. The rule of law and public confidence was restored. In the present time remedial action must once again be taken by those vested with this responsibility.

[7] Section 20 (1) of the Constitution states-

> *"All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every respect and shall enjoy equal protection of the law."*

[8] The Law Society of Swaziland must be able to discipline its erring members and if the Law Society of Swaziland fails to do so as provided in the Legal Practitioners Act then the Courts must fill the void and apply section 20 (1) of the Constitution or other provisions of the law. When this happens, the Law Society of Swaziland, hopefully would not interpret such as usurpation of its powers by the Courts. The Courts whose powers are established by a superior law, the Constitution should

be able to protect and provide remedies to all litigants, noting that all other laws are inferior to the Constitution.

Briefly the case at hand:

[9] The Applicant, Beauty Build Construction, was owed some monies by the Eswatini Government. The Applicant then hired the 1st Respondent, M.P. Simelane Attorneys to recover these monies from Government. A relationship was established. At first, the Respondent would recover the monies and deduct his fees and collection commission. Later on when the sums to be recovered became larger or more frequently, the Respondent recovered the monies but refused to hand them over to the Applicant as the Respondent alleged that the Applicant was not a duly registered and incorporated company (a legal person) in terms of the laws of Swaziland. This meant in law, the Applicant (as non-existent) is not capable of suing, be sued or hold property (including money). The Respondent said the Applicant does not exist and therefore he cannot pay any monies to a non –existing person. At the same time the Respondent did not return the monies to Government as it would appear he had been instructed by a non- existing person. He kept the money in his accounts. The Applicant approached the courts to assist in recovering his monies from the Respondent.

[10] This case has been in and out of the court system and has gone through all the hierarchy of the judiciary, forth and back. The Respondent when ordered by the Courts to account to the Applicant, he presented a statement that showed that he had charged the Applicant almost all the monies he had received as fees and collection commission and further that he, the Respondent, had advanced some monies to the Applicant. The

Court held that the Respondent is not entitled to charge fees as well as collection commission and ordered that the Respondent should account and pay over to the Applicant a sum of E547, 992.35. This is a determined amount the Respondent was ordered to pay to the Applicant, it is not as if the word "account" meant he had first to do some arithmetic but meant to be accountable, accountability and responsibility to the Applicant.

[11] The Respondent refused to pay the Applicant and instead resorted to what may be called legal technicalities by challenging some aspects of the court judgements.

The Applicant then decided to commence contempt proceedings against the Respondent and the Respondent was to be found in contempt of the court but was given time to purge or set things right with his client, the Applicant. The orders were handed down by this Court on the 16th June, 2016 and 15th May, 2017.

[12] And on the 24th August, 2018 this Court issued an order dated 23rd August. 2018 in the following terms:

1. *That the Judgement of the Supreme Court set out in paragraph 1 of the 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 lawfully suspended or stayed by a competent Court of law or as a consequence of the operation of the law.*

2. *That the 1st Respondent in compliance with paragraph 1 above is ordered to account and pay the Applicant the sum of E547, 992.35 within 14th days of granting of this order. (my underling)*

3. *That in the event the 1st Respondent fails or refuses to account and pay over the **said sum** is hereby within 21 days from date hereof called upon to show cause why he should not be committed for contempt of court and sentenced to 30 days imprisonment .(my underlining and bolding)*

[13] The Respondent as usual resorted to attacking the application for imprisonment and such court order on legal technicalities. He also attacked an administrative order issued by the Chief Justice barring him from appearing before the courts of Eswatini on the ground that the Chief Justice had no locus standi to issue that administrative order.

On the Judicial or court order the Respondent argued that the Order for his imprisonment was premature in that before the lapse of the 21 days the Court had found that he was in contempt. He further submitted other legal technicalities.

I wish to point out that the Administrative order and the Judicial order are two different things and of different footing and status and issued by two different bodies. One was issued by the Head of the Judiciary as an administrative instrument. The Judicial order was issued by this Court, after the Applicant sought it from this Court and he now wants to enforce it.

The Judgement;

[14] It is a well-established principle in our law that legal technicalities could be used and relied upon where justly appropriate but not with the intent to defeat justice. Justice should prevail. There is a trend world over that technicalities must not be to the detriment of justice. The Longman Dictionary of Contemporary English defines "technicalities "as a point of law or a small set of rules that forces you to make a decision that seems unfair"

It is like a technical knock-out in boxing as it does not go to the merits of the issue. As pointed out, Justice should be the winner, justice should not be prejudiced or harmed by the art of knock-outs.

[15] This trend is demonstrated in the following cases for different technicalities.

In Savannan M. Maziya Sandanezwe v GDI Concepts and Project Management (Proparties) Limited, High Court case No. 905/2005, Ota J. at page 7 said –

> "*The question that arises at this juncture is should the court throw this application into the waste bin, like a piece of unwanted meal by reason of this fact as is urged by the Respondent? I do not think so. I say this because the universal trend is towards substantial justice. Courts across jurisdictions have long departed from the era when justice was readily sacrificed on the altar of technicalities. The rationale behind this trend is that justice can only be done if the substance of the matter is considered. Reliance on technicalities tends to render justice grotesque and has the dangerous potentials of occasioning a miscarriage of justice.*" *(my underlining)*

In the matter between **Phumzile Myeza and Others v The Director of Public Prosecutions and Another Case No. 728/2009**, Ota J again emphasised as follows –

> "*I must say that I am confounded by the very proposition, that this factor is a pre - condition to the enforcement of the fundamental right to fair hearing enshrined in the Constitution. I am of the firm conviction, that this factor resides more in the realm of forms and formalities, rather than substance, and therefore should not count greatly in the determination of this matter. I say this irrespective of the reasons advanced by case law in honour of it …. I hold the view, that to rely on forms and formalities to harm strung the very constitutional right which Section 21 (1) strives to protect is in itself unconstitutional. The universal trend is that courts are interested in substance rather than mere form. This is because the spirit of justice does not reside in forms and formalities,* ***nor in technicalities*** *nor is the triumph of the administration of justice to be found in successfully picking ones between the pitfalls of technicalities. Justice can only be done if the substance of the matter is considered.*" (my bolding and underlining)

> In the celebrated case of **Shell Oil Swaziland (PTY) LTD v Motor World (PTY) (PTY) LTD T/A Sir Motors, Court of Appeal case No 23/2006**, at page 17, Tebbutt JA stating the trend said –

> *The learned Judge a quo with respect, also appears to have overlooked the current trend in matters of this sort, which is now well-recognised and firmly established, viz not to allow technical objections to less than perfect procedural aspects to interfere in the*

expeditious and, if possible, inexpensive decisions of cases on their real merits (see e.g. the dicta to that effect by Schreiner JA in TRANS-AFRICAN INSURANCE CO LTD vs MALULEKA 1956(2) SA 273(A) at 278G; FEDERATED TIMBERS LTD v BOTHA 1978(3) SA 645(A) at 645C - F; NELSON MANDELA METROPOLITAN MUNICIPALITY AND OTHERS v GREYVENOUW CC AND OTHERS 2004(2) SA 81(SE)). In the latter case the Court held that (at 95F -96A, par 40):

"The Court should eschew technical defects and turn its back on inflexible formalism in order to secure the expeditious decisions of matters on their real merits, so avoiding the incurrence of unnecessary delays and costs."

[40] The above considerations should also be applied in our courts in this Kingdom. This Court has observed a tendency among some judges to uphold technical points in limine in order it seems, I would dare to add, to avoid having to grapple with the real merits of a matter. It is an approach which this Court feels should be strongly discouraged. (my underlining)

[16] The above trends are now law in our land and should be vigorously followed to such an extent as to improve our jurisprudence but not at the expense of sloppiness and lowering of professional standards. The guiding torch being to do justice to all persons and to promote and enforce the rights given by the Constitution.

[17] Section 21 (1) of the Constitution states that-

> "*In determination of Civil Rights and obligations or a criminal charge a person shall be given a fair and speedy public hearing within a* ***reasonable time*** *by a an independent and impartial court or adjudicating authority established by law* (my underlining)

In my view eight years is not "speedy and reasonable" for any person to hold one's money in the pretext that that person does not exist. Speedy hearing in my view also includes speedy conclusion of the case. The Respondent has been raising one technicality after another ever since the Applicant demanded his money from the Respondent some of which are that the Respondent is not a legal person in terms of company laws of the country to producing a statement of account which is almost equal to the hundreds of thousands of Emalangeni that he was required to collect on behalf of the Applicant. Upholding these technicalities would, in my opinion, be sacrificing justice to crucifixion or a failure to do substantive justice to both litigants. The Respondent must be relieved the burden of carrying the sizable sack of Applicant's money and be made to hand it over to the Applicant and the Applicant, simultaneously, be allowed to enjoy the fruits of his toil.

Again in the cited Shell Oil Swaziland case above at page 29, Tebbutt JA stated –

> *[62] Swaziland is a constitutional democracy and this Court, as the highest Court within the constitutional structure will, of course, protect the rights and interests of all the people in Swaziland in accordance with the Constitution and the appropriate duly enacted legislation, conscious of the norms and mores of the Swazi people. It will do so to ensure, as it*

must, that justice is done to all and with impartiality and fairness to litigants before it. (my underlining).

[18] Lastly, I hold the view that it is immoral, unethical and unlawful to see a person when he gives out instructions to collect his money from the debtor and soon as you have collected the money you no longer see him when it's time to account and pay that person on allegation or technicality that that person is not a legal person as per requirements of the company laws of Eswatini.

[20] Finally, it is common cause that the Respondent has not paid the sum of E547, 992.35 to date to the Applicant as ordered by this Court.

In the circumstances, I, but for the majority judgement, would have -

a) Found Respondent guilty of contempt of this Court;
b) Sentenced the Respondent to a period of 30 days in goal for his refusal to comply with the Court Order dated 23rd August, 2018; and

c) Ordered the Respondent to pay costs of this application at attorney and own client scale.

SJK MATSEBULA

Acting Justice of Appeal