IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Criminal Appeal Cases No.19A&B/2021

HELD AT MBABANE
In the matters between:

MDUDUZI BACEDE MABUZA **1st Appellant/Applicant**

MTHANDENI DUBE **2nd Appellant/Applicant**

And

THE DIRECTOR OF PUBLIC PROSECUTION **Respondent**

Neutral Citation: *Mduduzi Bacede Mabuza and another vs The Director of Public Prosecution (19A&B 2021) [2022] SZSC10 (12 05 2022)*

Coram: **J.P ANNANDALE JA**
S.J.K MATSEBULA JA
J.M CURRIE AJA

Heard: **25th March 2022**

Delivered: **12th May 2022**

SUMMARY : *Three different matters were presented for hearing of appeal(s) and a renewed application for bail, certified by their attorney as urgent – No effort of consolidation made by either party –Pleadings by Applicants/ Appellants unacceptably presented under guise of procedural ignorance – No demonstrated effort to overcome patently obvious misguided papers filed of record – Purported certificate of urgency to seek justification for enrolling and dealing with it under a "certified" basis of urgency in support of a late application for condonation of the admittedly late filing of their Notice of Appeal – It seeks to import a fresh application for the release of the applicants on bail, which was held out to be considered as a Court of First Instance. This incompetently presented prayer was not pursued by the Applicants and it falls to be regarded as "Pro non scripto".*

<u>Second issue</u> of Notice of Appeal against Order of the High Court dated the 6th August 2021: Appellants/ Applicants belatedly sought to appeal the refusal of their bail application – Not seeking extra time to pursue their "other options" at the High Court and obviously aware of the obstacle, also filed an application for the condonation of the late filing of their appeal – It is hopelessly inadequate – The founding affidavit is not confirmed nor even supported by the second Applicant/

Appellant. The blatant disregard of numerous judgments by this Court, especially pertaining to the requirements of stating the prospects of success in their intended appeal, does not salvage the dilemma. Instead, the concept of "interests of justice" was proffered and sought to trump any other legal precedents.
Statements of opinion and beliefs by the erstwhile attorney of record do not elevate the "interests of justice" to any other level from the well-established principle of stare decisis *–No argument that plethora of case law was wrongly decided, thus potential justification for radical departure from precedent. Application for condonation for late filing of Appeal dismissed.*

Notice of Appeal dated 14th September 2021 containing 6 *(six) stated grounds of appeal, as well as a second version thereof, circulating as "Amended Notice of Appeal" and now containing* (8) *(eight) grounds of purported appeal, with no relevant leave having been applied for nor granted; Such Notice ordered as being struck off the roll, not to be reinstated without leave of this Court having been sought and granted.*
Third matter for consideration contains an appeal against the judgment of the same Court below, dated the 14th September 2021. Appeal not without merit vis-à-vis the Order as made per incuriam *by the Court* a quo. Ratio decidendi *justifies a finding of being* functus officio, *however not an order of "Application Dismissed". It was*

entered per incuriam, the *Court being incompetent to dismiss the application itself without having heard and definitively decided the merits of the matter. Erroneous order set aside on appeal and substituted with an Order that: "The matter be removed from the Roll due to the Court being* functus officio".

No costs orders made.

JUDGMENT

Jacobus Annandale JA

[1] This wonderfully blessed Kingdom of Eswatini has peacefully co-existed within itself and with our neighbours for many generations. Recent events have however caused havoc and destruction all over the land, in our cities, in our lives, our structures and a dark cloud descended in the midst of a Covid pandemic.

[2] It was in these turbulent times that the two Appellants/ Applicants before us were arrested and indicted. They jointly face charges under the Terrorism Act and incitement, amongst others. Their trial is ongoing in the High Court with some 46 witnesses already called by the prosecution.

[3] Rapidly after their arrest, both Appellants filed an application for their release on bail. The High Court, per Dlamini J, heard the fully ventilated application, applied her mind to the matter and the law at hand and concluded that their application be dismissed. This was done on the 6th August 2021.

[4] The Judiciary of Eswatini owes its existence to the Constitution. As independent Courts we rely on the Rule of Law, Statutes, Common Law and Rules of Court to regulate our sphere of work. Procedure and precedence create certainty and regularity. *Stare decisis* and the hierarchy of our Courts all function predictably in law. For instance, Rule 8 of the Court of Appeal Rules, made under Section 112 of the Constitution and in conjunction with the Court of Appeal Act of 1954, sets out the manner in which dissatisfaction with the outcome of a judgment by the High Court may be prosecuted as an appeal to this Court.

[5] Section 4 of the Act establishes the right to appeal by a person aggrieved by a judgment of the High Court. Rule 8 requires that a Notice of Appeal be filed within four weeks of the judgment appealed against. This peremptory requirement finds repercussions with the Registrar when it is out of time. Rule 8 (2) holds that:

> "The Registrar shall not file any Notice of Appeal which is presented after the expiry of the period referred to in paragraph (1) [four weeks] unless leave to appeal out of time has previously been obtained".

[6] The importance of compliance with the Rules and strictly so in matters like this is patently obvious. Literally, it means that if a Notice of Appeal has not been filed within a period of four weeks from the date of judgment, no appeal shall be enrolled or heard unless leave to appeal out of time has previously been obtained. The seemingly harshness of the time bound exercising of a right to appeal is ameliorated in several ways.

[7] Legal practitioners in this jurisdiction are taken to be *au fait* with the Rules of Court. When a situation arises where a potential appellant, for whatever reason, foresees or must be presumed to have foreseen that the time for filing of a Notice of Appeal might well expire before he is ready to take the step, Rule 16 comes to the rescue of the reasonably prudent lawyer. These rules permit the extension of time limits on almost mere application. In this regard, as to the expected standard of service delivery in the field of legal advice and of taking instructions, we have repeatedly recited the *dictum* by Steyn CJ in Saloojee and Another, NNO V. Minister of Commerce Development, 1956 (2) SA 135 (A) at 141 C-E. There, he said: -

> "There is a limit beyond which a litigant cannot escape the results of his Attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad*

misericordiam should not be allowed to become an invitation to laxity.... The Attorney, after all, is the representative whom a litigant has chosen for himself, and there is little reason why, in regard to condonation of the failure to comply with the Rule of Court, a litigant should be absolved from the normal consequences of such relationship, no matter what the circumstances of the failure are."

If the application is for leave to appeal, it must contain grounds of appeal which *prima facie* show good cause for leave to be granted.

In The Swazi Observer Newspaper (Pty)Ltd t/a Observer on Saturday and 2 Others vs Dr Johannes Futhi Dlamini (13/2018) [2018] SZSC 39 (19/10/2018), paragraph [9] to [17]:

"In Dr Sifiso Barrow v Dr Priscilla Dlamini and the University of Swaziland (09/2014) [2015] SZSC 09 (09/12/2015) the Court at 16 stated "It has repeatedly been held by this Court, almost ad nauseam, that as soon as a litigant or his Counsel becomes aware that compliance with the Rules will not be possible, it requires to be dealt with forthwith, without any delay".

In Unitrans Swaziland Limited v Inyatsi Construction Limited, Civil Appeal Case 9 of 1996, the Court held at paragraph 19 that: -

"The Courts have often held that whenever a prospective Appellant realizes that he has not complied with a Rule of Court, he should, apart from remedying his fault, immediately, also apply for condonation without delay. The same Court also referred, with approval to Commissioner for Inland Revenue v Burger 1956 (A) in which Centlivres CJ said at 449-G that "... whenever an Appellant realizes that he has not complied with the Rule of Court he should, without delay, apply for condonation"

In Maria Ntombi Simelane and Nompumelelo Prudence Dlamini and Three Others Supreme Court Civil Appeal 42/2015, the Court referred to the dictum in the Supreme Court case of Johannes Hlatshwako vs Swaziland Development and Savings Bank Case No. 21/06 at paragraph 7 to the following effect: "It required to be stressed that the whole purpose behind Rule 17 of the Rules of this Court on Condonation is to enable the Court to gauge such factors as (1) the degree of delay involved in the matter, (2) the adequacy of the reasons given for the delay, (3) the prospects of success on Appeal and (4) the Respondent's interest in the finality of the matter".

In the same matter, the Court referred to Simon Musa Matsebula v Swaziland Building Society, Civil Appeal No. 11 of 1998 in which

Steyn JA stated the following: "It is with regret that I record that practitioners in the Kingdom only too frequently flagrantly disregard the Rules. Their failure to comply with the Rules conscientiously has become almost the Rule rather than the exception. They appear to fail to appreciate that the Rules have been deliberately formulated to facilitate the delivery of speedy and efficient justice. The disregard of the rules of Court and of good practice have so often and so clearly been disapproved of by this Court that non- compliance of a serious kind will henceforth result in procedural orders being made-such as striking matters of the roll – or in appropriate orders for costs including orders for costs de *bonis propriis*"

[8] It is common cause that the Notice of Appeal was presented for filing well in excess of the permitted period of four weeks. Under the provision of Rule 8 (2), the Registrar was in fact precluded from filing the purported Notice of Appeal as it was too late. It is also common cause that no application for leave to file a Notice of Appeal out of time was either sought or granted. It is also common cause that the Appellants/Applicants were well aware of the four-week period within which they were required to institute their appeal against the refusal of their bail application. This is borne out by their application for condonation dated the 14th September 2021, the same date as endorsed on their so-called Notice of Appeal.

[9] Again the Rules of Court provide an avenue to be followed when a problem such as the present arises, that of condonation. The term and concept of condonation *per se* already denotes an openness for persuasion to overlook something.

As was said in Kombayi v Berkhout 1988 (1) ZLR 53 (S) at 56 by Korsah JA.

"Although this Court is reluctant to visit the errors of a legal practitioner on his client, to whom no blame attaches, so as to deprive him of a rehearing error on the part of a legal practitioner is not by itself sufficient reason for condonation of a delay in all cases. As Steyn CJ observed in Saloojee & Another NNO v Minister of Commerce Development (*supra*) at 141 C:

"A duty is cast upon a legal practitioner, who is instructed to prosecute an Appeal, to acquaint himself with the procedure prescribed by the Rules of the Court to which a matter is being taken on Appeal".

In Darries v Sheriff, Magistrate's Court Wynberg and Another, 1998 (3) SA 34 (SCA) Plewman JA (with whom Hefer HA, Eksteen JA, Olivier JA and Melunsky AJA concurred) stated as follows:

"Condonation of the non-observance of the Rules of this Court is not a mere formality".

"In Commissioner for Inland Revenue v Burger (*supra*)

It was also stated that:

'Nor should it be simply be assumed that, where non-compliance was due entirely to the neglect of the Appellant's attorney, condonation will be granted.''

[10] Merriam Webster mentions absolution, forgiveness, pardon, and remission as being akin concepts. Clearings, exculpations, acquittals, atonements, compurgation and whitewashes are further nouns of nearer and further relevance. Bearing in mind that the Appellants/Applicants did not avail themselves to ask for an extension of time, or ask for leave to file an appeal out of time, all of their eggs are now in a single basket, so to speak. Their entire expectation of successfully appealing the judgment of 6th August 2021, which dismissed their application for bail, is now dependent upon their application for condonation. Rule 17 empowers this Court to consider an application for the condonation of the late filing of the Notice thereof to excuse the party from compliance with the Rules, thus admitting the appeal itself to be heard. But is this to be so?

[11] In order for an appeal to be heard, various procedural steps are implemented for the transitional arrangements to have a matter considered as ripe for argument on appeal to proceed. The cornerstone or "birth certificate" of an appeal is the filing of a Notice of Appeal with the Registrar. Thereafter, all and sundry processes follow. However, for a Notice of Appeal to have the legal consequences ascribed to it in order to fulfil its intended function, it must comply with the rules pertaining to its existential attributes. It is in order to obtain such indulgence by the Court to condone or overlook or pardon the fact that the Notice was almost two weeks out of time, that the present application is before us. It can be done and it has been done by this Court in numerous precedents.

[12] It is precisely these numerous precedents from this Court and the persuasive value of equally unanimous judgments on the concept of "Condonation" in our neighbouring jurisdictions, which exhaustively and repetitively have set out the required standards and contents of pleadings and averments which need to be contained within the confines of such condonation application.

[13] Before I revert to this, there is some uncertainty as to exactly which Notice reference is to be made. We have two different "Notices of Appeal" before us. The first is dated the 14th September 2021 and filed by the erstwhile attorney of record, Mr. T. R. Maseko.

Notably, it contains six numbered grounds of appeal. Now, suddenly and without any stated cause we are simply expected to accept it as an "Amended Notice of Appeal", this time around containing eight and not six numbered grounds of appeal. The last two prayers are now in bold typescript. There is no indication anywhere that there might have been a successful application to amend the grounds of appeal, of major importance when an appeal is argued, with the applicant limited to argue only the stated grounds of his or her appeal.

[14] Yet another anomalous aspect which surfaced before us is a so-called ancilliary bail application. The Notice of Application in which the prospective Appellants pray for the condonation of the late filing of their appeal comes under cover of a "Certificate of Urgency", as written by their then attorney of record, Mr. T.R. Maseko. In it, the contents are directed in the main to the plight of the Applicants, with reference to their Constitutional rights to liberty and the right to a presumption of innocence. Reference is made to their personal obligations, innocence and to "... perform their Constitutional oversight role over the other organs of State". The attorney takes shots at "trumped-up charges" to frustrate "...the exercise of the democratic and constitutional rights of calling for an elected Prime Minister as opposed to being appointed by His Majesty the King, thus making a mockery of democratic principles". These bald statements

of personal political beliefs are out of context and entirely uncalled for. They have nothing to do with the attached application for condonation. they could as well have been struck-out. The certificate then goes on to pray for an order to release the Applicants on bail. Third in the certificate of Urgency correspond to the 2nd prayer to the Application for Condonation.

[15] The applications for (A) Condonation and (B) Bail, are supported by the affidavit of only one of the prospective Applicants. No supporting nor confirmative affidavit was filed by or for the Second Applicant. It was first in the replying affidavit which was filed as long ago as the 24th September 2021, in which both Applicants saw fit to each sign their joint affidavits.

[16] The Respondent took issue with this sought relief in that it is not an incidental matter to the main appeal as it seeks the same relief as the merits of the main appeal itself. Should it be granted, it would then render this Court *functus officio*, since a value judgment would by necessity have to be made. The transcribed evidence, further material and so on would need to be considered and decided by this Court, essentially acting as a Court of first instance. The main appeal itself would then never be decided because it would have been overtaken by events.

[17] Advocate Van Vuuren, who appeared on behalf of the Applicants, was at an obvious disadvantage during the hearing. He did not draft the papers which were presented in Court. He conceded without further ado that any new applications before this Court should be regarded as *pro non scripto* and be given no more thought. I agree that this is the best manner in which to dispose of the so called "bail application" and would order that any reference to the bail application as contained in the "Certificate of Urgency" as well as prayer 3 of the Application for Condonation for the late filing of the Notice of Appeal dated the 14th September 2021, be struck from the record.

[18] Before I revert to the requirements of a condonation application which are crucial to the first part of these proceedings, a technical issue. No application for the consolidation of the two main matters was made. However, following the enrolment of the appeal against the judgment of the 6th August 2021, a subsequent application to release the Applicants on bail due to new facts and circumstances which was unsuccessful in the Court below also ended up before us. A separate appeal altogether, but under the same case number. We decided to entertain all of the matters placed before us. The "main" or "first" appeal is thus against the judgment of 6th August 2021, which declined release on bail. It is denoted with an "A" suffix. "B" is in relation to the appeal

against the judgment of the 14th September 2021, the so called "*functus officio*" judgment. Hence "Criminal Appeal Case No. 19 A & B of 2021".

[19] The law on what is required in an application for condonation of the late filing of proceedings, especially so with the Notice of Appeal, the gateway to the hearing of an appeal, is well settled. The frequency with which condonation applications precede the hearing of appeals in this jurisdiction is a matter of concern. Our Supreme Court, the apex Court of the land, functions under well established and well-known Rules of Court, and precedent drives the necessary elements of the application through the previously decided cases.

[20] In Mfanukhona Maduma and Two Others versus Junior Achievement Swaziland (105/2017) [2018] SZSC 31 (2018), the unanimous Court held at [9]: -

> "There are a plethora of authorities regarding the requirements to be met by a party applying for condonation. The Courts have formulated a triad-test in order to grant condonation namely: that as soon as a party becomes aware of the omission or commission the party must launch the application for condonation [and in that] application the party must address the prospects of success of his or her case and that a reasonable explanation for such an omission or commission must be provided. (See De Barry Anita Belinda and A G Thomas (Pty) Ltd Appeal Case

No. 30/2015 and the other cases referred to in that Judgment)" (emphasis added).

[21] It is of particular and fundamental importance and consequence that the motivation for leave depends in the main on the prospects of success, in the event that a judicial discretion is sought to be exercised in favour of the applicant. It is fundamentally important that the prospects of success must be pointed out and enumerated upon, and that it be an integral part of the supporting affidavit. It does not suffice to attempt to incorporate it by reference to any other documentation.

[22] In Mfanukhona (*supra*):

> "... the Court had to decide whether there was an appeal pending before it in view of the fact that the Notice of Appeal was filed out of time contrary to Rule 8 (1). The late filing of the Notice of Appeal had not been condoned by the Court. In a unanimous judgment, the Court came to the conclusion that;
>
> (a) the Registrar of the Supreme Court ought not to have accepted the Notice of Appeal filed out of time in the absence of leave to do so being first granted by the Court; and as

(b) the late filing had not been condoned by the Court, the appeal was improperly before the Court and virtually non-existent" (as quoted with approval by another unanimous judgment in Thandie Motsa and 4 others v Richard Khanyile and Another (69/2018) [2019] SZHC 42(17 June 2019).

[23] In the latter case of Motsa v Khanyile, the Supreme Court decided the matter in circumstances much like the present. There, it ordered that the Record of Appeal was filed erroneously and contrary to the Rules. It resulted in the appeal being deemed to be abandoned in terms of Rule 30 (4). It went even further and added that the appeal itself is dismissed. Though I may have issues with the latter part of the Order, fact remains that non-compliance with the Rules may well have serious consequences.

[24] In the present matter it is not the record which matters, but the source of origin to bring an appeal before this Court. It commences with a Notice of Appeal, but as shown, it could also readily result in the end of the road. In Debbie Sellstrohm vs Ministry Housing and Urban Development and 4 Others (25/2014) [2018] SZSC (27th February, 2017), it was stated in paragraph [7] that:

"It has repeatedly been stressed by this Court that legal practitioners are enjoined to "forthwith" apply for condonation of late filing as soon as it becomes apparent that exigencies of a situation has become such that deadlines will not be timeously met. Paramount in deciding an application for condonation of non-compliance with the Rules is the prospects of success in the main matter".

It continues at paragraph [10-11]:

"Alas – the non-production of the Appellant's heads of argument was overshadowed by the woefully inadequate application for re-instatement to motivate the relief. Most notable is the absence of a setting out of the potential prospects of success in the appeal itself, if it came to be heard. I reiterate the importance of persuading the Court that is should grant condonation because the appeal is meritorious. As best as can be, it should be demonstrated that there is at minimum a reasonable chance that the impugned judgment may be overturned on appeal.

In addition, good prospects of success militate against the delay in the course of bringing the condonation application for adjudication. A longer delay can more readily be

accommodated when there are stronger chances of a successful appeal. The inverse hereof is obvious".

[25] In favour of the Applicants, it is recorded that they indeed forthwith and without undue delay filed their application for condonation as soon as they became aware of the need to do so. In my view it successfully assists them to overcome the hurdle of explaining the delay as was highlighted and featured in Simon Musa Matsebula v Swaziland Building Society, Civil Appeal No.17 of 1998; Dr Sifiso Barrow v Dr Priscilla Dlamini and the University of Swaziland (09/2014) [2015] SZSC 09 (09/12/2015) at paragraph 16 and other case law and precedent in numerous likewise instances.

[26] The prospects of success in an intended appeal are of paramount importance in an application to condone the late filing of the very same intended appeal. A bold and unsubstantiated statement of anyone's belief that there are reasonable prospects that another Court would have come to a different conclusion or that the facts do not support the judgment, simply does not suffice. The prospects of success must be spelled out and accompanied by what and how it is intended to demonstrate on appeal that there exists at least a "sporting chance" of having success on appeal. It is that which could

persuade the Court to indeed open the door and allow the appeal to be heard on its merits.

[27] In Rustenburg Gearbox Centre v Geldmaak Motors cc t/a MEJ Motors 2003 (5) SA 468 (T), it was held:

> "In para 14 at 419 the Appellant simply submits that it has good prospects of success on appeal. (See also para 4.2 at p 21 of the notice of motion of 21 February 2003.) That is not sufficient. What is required is that the deponent should set forth briefly and succinctly the essential information that may enable the Court to assess the appellant's prospects of success. A bald submission unsupported by any factual averments is not good enough to discern what the prospects of success are in this matter".

[28] I agree with the *dictum* in Rustenburg Gearbox. If an applicant for the condonation of the late filing of an appeal wishes to obtain such relief, he has to convince the Court that if all other factors are on board, his prospects of successfully prosecuting the intended appeal justify that it be heard. A relaxation of the Rules which have peremptory time frames within which to perform certain tasks may be afforded in deserving cases. In Ronald Mosemantla Somaeb v Standard Bank Namibia Ltd Case No 26 of 2014, the learned Chief Justice of Namibia, Shivute JP, said at paragraph [21]:

"It is incumbent on every litigant to comply with Rules of Court in view of the fact that Rules of Court serve a specific purpose. In Molebatsi v Federated Timbers (Pty)Ltd 1996 (3) SA 92 (B) quoted with approval in S v Kakololo 2004 NR 7 (HC) at 10C-E the following was stated (at p 96 G-H):

"The Rules of Court contain qualities of concrete particularity. They are not an aleatoric quality. Rules of Court must be observed to facilitate strict compliance with them to ensure the efficient administration of justice for all concerned. Non-compliance with the said Rules would encourage casual, easy going and slipshod practise, which would reduce the high standard of practise which the Courts are entitled to in administering justice. The provisions of the Rules are specific and must be complied with; justice and the practise and administration thereof cannot be allowed to generate into disorder.

Rules of Court cannot be applied selectively in the sense that they are bound to be complied with only by a certain group of persons engaged in litigation in our Courts."

[29] In our Courts, all persons are treated equally before the law, present Applicants included. It would not be proper for this Court to now embark on an exercise of any sort, if it is for instance intended to determine if the personalities of the Applicants add any value to the equation. Their erstwhile attorney of record emphasised their political freedoms, constitutionally required oversight over the other (two) arms of Government, their undying devotion to democracy as envisaged by themselves, a growing concern amongst themselves and their followers as to who must appoint the Prime Minister. Even if their attorney and at least the First Applicant are in agreement that charges against them have been trumped up, there still remains the question as to just how such serious allegations are intended to be substantiated in the course of their appeal? If it so happened that the stated prospects of success on appeal sufficiently justified the appropriate relief, the matter would then have been ordered to proceed on appeal.

[30] Learned and respected counsel for the Applicants, as said above, was at a disadvantage in that he did not draft the relevant (initial) papers filed of record. He inherited badly pleaded papers and had to do as best as he could to salvage. Wisely, the stated requirements for successful applications such as the one at hand, were not challenged. Instead, a novel and innovative approach was followed. To make up for the shortcomings in the non-stated prospects of success in the intended appeal, we were now urged to elevate the

concept of "The interests of justice" to a level where it would trump the old approach. "The interests of justice" were sought to be spelled out in their condonation application, under cover of a "Certificate of Urgency", by their attorney of record.

[31] The most unfortunate gist of their depositions to persuade us is that the interests of justice suffice almost automatically to have their appeal against the refusal of their release on bail to be heard. They argue that it is enough to condone their late filing, even in the patent absence of the possible alternative and easy remedies to extend time limits, which they did not use.

[32] By all accounts, their stated prospects of success on appeal rest upon an acceptance that their contrasting and incontrovertible political views resulted in them being wrongly accused and prosecuted on trumped up charges, almost indefinitely incarcerated and wrongly refused to be released on bail.

[33] Applicants counsel faced the dilemma of trying to persuade this Court that in the absence of stated and persuasive prospects of success as has been pronounced upon in our case law, all is not lost. Instead, he relied upon the "interest of justice" to be overwhelmingly present and capable of overriding the usual requirements. If so, it should then trump and substitute the need to

show good prospects of success in the intended appeal, dependent upon the granting of condonation, or not.

[34] The matter of Prime Minister of Swaziland & Others v Maseko and Others, Civil Appeal No. 73 of 2016, upon which the Applicants rely, is entirely distinguishable from the present matter. It was decided on a very different set of facts and legal issues. There, it was held that "... the interest of justice" required the intended appeal to be disposed of in one way or another. At the time, the shoe was on the other foot and the Court was critical of problems caused "... due to the confusion that seems to have reigned at the Office of the Attorney-General". That is not how it is now.

[35] Regard must be given to the papers under which this application has been brought to Court. Apart from irrelevant and oftentimes objectionable offensiveness, with the added references to their various Constitutional Rights and wanting to "oversee" the other arms of Government, they simply do not even almost meet the well-established requirements of having their application considered with any measure of favour. These requirements cannot now be jettisoned and trumped by the averred interests of justice.

[36] It is for these reasons that I must conclude that the application for the condonation of the late filing of the Notice of Appeal against the judgment of

the 6th August 2021 ought to be dismissed. As per our long-established practice, no costs order is considered or made.

[37] I now turn to the second part of the matter before us which emanates from two separate applications previously made in the High Court during the course of their ongoing trial and subsequently to the belated attempt to file a Notice of Appeal and condonation application. Both matters were dated for hearing on the 26th July 2021 and placed for determination before the learned trial judge, who also dismissed their initial application for release on bail. Both of these applications contained a prayer for their release on bail upon such terms and conditions as the Court would deem fit.

[38] The initial judgment by Dlamini J in which she dismissed the first application for bail was dated the 6th August 2021. It was unsuccessfully sought to be appealed, as is set out above. Soon after a Notice of Appeal was belatedly filed, with the explanation that they first wanted to "explore their other options" in the High Court, another bail application was filed. Judgment followed on the 14th September 2021. Therein, the Court *a quo* ordered that: "Bail application is dismissed". No costs were ordered.

[39] It is against this second judgment that an appeal was promptly noted. Records, authorities and heads of argument were filed in due course and the

appeal was enrolled for the same date and under the same case reference number as the first matter.

[40] The six Grounds of Appeal are formulated as follows: -

1. The Court *a quo* erred in finding that it was *functus officio*; (Para 52).
2. The Court a quo erred in finding that there was no need to make a consideration whether they were new grounds (Para 52).
3. In finding in Paragraph 52 that the Court is *functus officio*, the Court Order dismissing the Bail Application is bad in law.
4. The Court in fact did consider the new facts filed in the second bail Application (Para 3, 23).
5. The Court *a quo* misdirected itself in finding that Applicant's Counsel argued that the Court did not make factual findings against the Applicants (Para 38).
6. The Court *a quo* erred in finding that the Court was precluded from hearing an Application on new facts with reference to the cases of Shongwe v Rex (26/2015) [2012] SZSC and Moyo v Rex 469/2015 [2016] SZHC.

[41] This second application for release on bail was filed hot on the heels, so to speak, of their Notice of Appeal against the dismissal of the first application.

The "Certificate of Urgency" by their attorney, Mr. T.R. Maseko, makes no mention of the first dismissal, nor of the noted appeal. It sets out their personal circumstances to a very limited extent but details various Constitutional and other rights, some political beliefs and the perceived unfair, non-existent and trumped-up charges. The affidavit of the two Applicants sets out in some detail all of the relevant factors normally found in applications of this nature, and some more. It even includes the manner in which a prime minister is to be appointed, extending to their duty of oversight over the other two arms of government, which includes the judiciary itself. Each refers to the unbearable detriment that they have suffered since their incarceration. Business losses, unpaid wages, family and health problems. These are some of the so-called "new facts".

[42] I need not detail this any further, nor to deal with the extensive and detailed opposition by the Respondent. This is so because right before the hearing of this "second bail application with new facts" would have commenced, the learned trial judge issued a directive that the litigants were required to address the Court, prior to a hearing and decision on the merits of the application, on whether or not she was *functus officio*. If so, she would not hear and decide the matter, nor the application to strike out. If not so, she would then firstly decide the interlocutory application, wherein the Respondent applied to have certain matter struck out. I cannot find any more details of the "Application

to strike out" apart from brief mention of it in paragraph 25 of the judgment. As it turned out to be, the Court made no pronouncement on the interlocutory application to strike out. When the matter continued, according to the judgment, the Court first heard submissions on the legal point of *functus officio*.

[43] Thereafter, promptly five days later, a written judgment was handed down. In it, the learned judge diligently and comprehensively refers to argument and authorities as presented by counsel. She then made a determination after consideration of an analysis of various precedents through the case law and ultimately concluded that: -

> "In the result, there is no need for this Court to make a determination whether there are new grounds for the present bail application. I find that this Court is *functus officio*. Applicants' remedy, if any, lies not with this Court but elsewhere in this regard".

[44] The main issue in this appeal lies against the finding of being *functus officio*. *Functus officio* is a Latin expression that translates into "having performed his or her office". The concept of *functus officio* has existed for many centuries. The Roman jurist Ulpian (C.170-228AD) had written about it. His Edict was later usurped into Justinian's Digest, the largest compilation of doctrinal commentaries in the western world from which all later western

legal systems borrowed. According to Ulpian, after a judge has delivered his judgement, he immediately ceases to be the judge [in that matter]. The gist of Ulpian's words on the matter is: "A judge who has given judgment, either in a greater or a smaller amount, no longer has the capacity to correct the judgment because, for better or for worse, he will have discharged his duty once and for all". *Functus officio* lends finality to the conduct of proceedings by marking a definitive end point to it. A valid and final decision, as defined by the law of *functus officio*, is the summit of all judicial, arbitral, and tribunal proceedings. If not, there would be no end to the case. The law of *res judicata* is a close cousin in the family of valid and final decisions. The doctrine and law of *functus officio* also enables effective appeal and review. Preclusion from changing a decision is necessary to ensure a stable basis for appeal and judicial review. If it was possible to revisit and amend, change or correct for whatever reason, one could only imagine the horror of continuously shifting sands in an appeal record. (See S.P. Wong of the Canadian Bar Association's Review 543 for an excellent paper on this doctrine).

[45] The Applicants based the success of their rejuvenated application for release on bail on what could be summarised as "New Facts", a significant change in their circumstances to allow the Court to re-assess their plight and come to a different conclusion as previously. The same judge of the same Court was thus effectively sought to be tasked with something akin to a review of her

own previous decision. To add another ingredient to the mix, this application was preceded for well over a week by the purported filing of a Notice of Appeal against the very same judgment which the applicants now want to have decided. Adding further to the confusion, the Applicants erstwhile attorney of record sought to "import through the backdoor", a piggy-back fresh application for bail, to be decided by the Supreme Court in its appellate jurisdiction, as a supposed ancilliary matter. In effect, it was to be the third bail application in a row.

[46] The first and foremost ground of appeal is of decisive importance in most of the remaining grounds of appeal. It is the gateway through which the other aspects have to move in order to even come up for consideration. Most of the legal arguments in both the Court below and in this Court, were devoted to issues surrounding a second bail hearing based on new facts, or changed circumstances, whether it depends upon a previously granted bail order, now sought to be modified, whether the authorities are on equal footing in both fact and local statutes vis-à-vis other jurisdictions with persuasive value and the interpretation of locally decided and binding cases on the subject. It goes on and on.

[47] However, before any of the contentious issues were placed before the learned judge, she prudently and wisely sought counsel's input on *functus officio*. As

was to be expected, their views were entirely different, each with reliance on authorities to support their respective views. This determination is entirely different from any of the merits to re-open and hear the Applicants for bail, whether our law has accommodation for such re-visiting of bail aspects in a repeated but fresh refusal, or a change of mind which would result in their release. All of this would depend on whether the Court was *functus officio*, or not. From what has been stated above in this regard, it would be conclusive and final, inevitably resulting in a refusal to hear the matter at all, refraining from consideration afresh or from any other point of departure from the prior pronouncement, or even going so far as to determine the applicability of a renewed application such as at hand. She held that there is a distinction as to whether the variation of a bail order which was refused is akin to the variation of bail conditions only in the event that bail had already been granted. Otherwise put, the learned judge applied her mind to consider whether a Court is able to re-visit the terms of a bail order already granted but now to allow a variation of the terms of that order, on the basis of new facts brought before the Court. On the other hand, whether such same new facts could cause the original refusal of bail to be rescinded by the same judge or Court and replaced with a fresh order which now allows bail.

[48] The Applicants sought to persuade the Court to follow the latter option. They rely on certain *dictae* in South African case law which at first blush seem to

support their position. However, every case also requires that regard be given to the context and factual situation at hand, and a broader understanding than a mere extract from the authorities. For instance, Theron JA said in Prinsloo v The State (613/2013) [2013] ZASCA 178 (29 November, 2013) at para 9 that:

> "At the hearing of the appeal, counsel for the respective parties were agreed that the judge in the Court below had erred in finding that he was functus officio. A judicial officer is not only entitled, but obliged to hear a bail application based on new facts. Section 65 (2) of the Criminal Procedure Act 51 of 1977 expressly states that an appeal will not lie in respect of new facts unless such new facts have been placed before the judicial officer against whose decision the appeal has been brought..."

In her judgment, the learned Dlamini J said that:

> "On reading the case, it is clear that the judicial officer in the Court *a quo* did not give any opportunity to the parties to address the Court on *functus officio*. He merely summoned Counsel to his chambers and ruled without any submission that he was *functus officio*. Further, when the matter was enrolled in the Supreme Court of Appeal before Theron JA, both Counsel agreed that the Court *a quo* was erroneous in holding that it was *functus officio*. In other words, both in the Court *a quo* and the appellate Court, the issue of a second bail application based

on new facts was not fully canvassed as no arguments to and from were made. Worse still, in the present case, both Counsel did not argue that the South African penal code enjoyed similar wording as Section 96 (18) and (19) of our CP & E".

[49] I cannot fault the reasons why the Court *a quo* distinguished Prinsloo from the present matter. Nor can I fault the manner in which she applied and distinguished the case of Sibusiso Bonginkosi Shongwe v Rex (26/2015) [2012] SZSC 04(29th July, 2015. Therein, Maphalala ACJ (as he then was) dealt with it as follows:

> "The appeal against the judgment of Justice Hlophe is both misconceived and misdirected. It is common cause that both Judge Mabuza and Justice Hlophe heard the bail applications in the Court *a quo* as judges of the High Court. After Justice Mabuza had made findings against the Appellant that he was a flight risk, likely to interfere with Crown witnesses as well as police investigations, the Court *a quo* was *functus* officio, and the bail application could not be heard by another judge of the same jurisdiction. It is trite law that judges of the same jurisdiction are not competent to review each other. The remedy available to the Appellant was lodging an appeal before the Supreme Court".

[50] The initial bail application which was dismissed by necessity required consideration, evaluation and determination by the Court, based on all available evidence, argument, authorities and law in order to conclude and order as she did. That was the end of the road for anything to do with bail and Dlamini J. She is still continuing with the criminal trial of the two Applicants. As it happened, an appeal was indeed noted against the refusal of bail, and it has already been dealt with above.

[51] In my considered view, it would cause havoc in our judicial system if judicial officers may recall or revisit matters in which they have previously refused bail, whether or not that very same order is still subject to a noted appeal, and then entertain "new facts and circumstances in a fresh bail application" and maybe come to a different conclusion. Jettison of the *functus officio* doctrine, disposing of finality in legal decisions, forgetting about *res judicata* and such maladies cannot be a part of our legal system, jurisprudence and the administration of justice.

[52] In Sibusiso Shongwe (*supra*) it was also held that:

> "Where a Court hearing a bail application has made specific findings refusing bail, an accused person is precluded from lodging a subsequent bail application before the same Court on the pretext that

> new facts exist. The Court is *functus officio* and has no jurisdiction to entertain the matter"

It continued:

> "The 'new facts' or change of circumstances should be invoked in circumstances where bail has already been granted and the application is only intended to vary the bail conditions. Otherwise, the subsequent bail application would offend the general principle of our law that once a Court has pronounced a final order of judgment, it becomes *functus officio* and cannot therefore alter, correct or supplement its judgment".

[53] Our Criminal Procedure and Evidence Act actually provides for subsequent applications before a Court of the same jurisdiction with a view to amend the amount of bail or supplement any bail conditions. Sections 96(18) and (19) which regulate this expressly, state that such subsequent applications, whether at request of the prosecutor or accused, are in respect of matters where bail has already been granted, not refused. Otherwise, it would be tantamount to allowing a Court which is already *functus officio*, to review its own decision of dismissal of a bail application. The learned judge below was indeed duty bound to find that she was *functus officio*.

[54] It is for these reasons that I would order the first ground of appeal, which was against the finding of *functus officio*, to be dismissed.

[55] The second ground of appeal is equally unmeritorious. The Appellants state that "The Court *a quo* erred in finding that there was no need to make a consideration whether there were new grounds".

[56] From the aforestated reasons as to why the Court was unable to reopen the matter, or review it, being *functus officio*, it is immaterial as to whether or not the second bail application which was presented to the Court was founded on new facts, circumstances or any other new considerations. Once the Court disposed of the first bail application, it was out of its hands. A final and appealable order was made and indeed an appeal was sought to be prosecuted. The noted appeal rests in its entirely on the shoulders of the judge or Court being *functus officio*. Once that is so, it is the end of the matter.

[57] It would be folly for the Appellants to say that the Court made an appealable error in not deciding if there indeed exist new facts or circumstances. It is not possible to make such a finding in the absence of an ability to determine the matter, even if entirely new facts do exist. She was entirely correct to refrain from making such determination. It is quite clear that the Court was aware of the contents of the application before her. She obviously had to read it in order to see if she was able to deal with it, or not. Her judgment also reflects a summary of what they wanted the Court to consider in their favour.

However, no finding or decision was made in respect of the merits of the matter.

[58] No criticism is to be entertained in this regard. If, to be contrary, the Court actually and factually embarked on a determination and finding on the issue of new facts, it then would have been an error. A finding of *functus officio* precludes a finding on the merits, whether or not the further application is granted or dismissed. I will soon revert to this.

[58] The fourth ground of appeal is unfounded. The Court is taken to task for having actually considered the new facts contained in the second application for bail, but the judgment does not bear it out. As already stated, it was incumbent upon the Court to familiarise herself with an application brought before her for adjudication. Logically, she cannot simply blank or mask out all of the material on which the application is founded before the actual hearing takes place. She decided to transpose the gist of the material which was placed before her into the body of the judgment, a summary of that which was presented for adjudication. It is normal practise. What the applicants now contend is that the learned judge in the Court below erred by also "considering" the "new facts". Specific reference is made to paragraphs 3 and 23 as support for this contention. The first of these reads:

"3. On the 19th August, 2021, the applicants filed with the Registrar of this Court a second bail application deposing that there were new grounds and the applicants stated as follows with regard as to when the new facts arose:

"We *respectfully state that since our arrest on July 25, 2021, and the refusal by the Honourable Court to release us on bail there have been new developments in our circumstances, warranting the filing of this renewed application.* These facts are set fully herein below".

Paragraph 23 of the judgment reads: -

"23. A lengthy and comprehensive reply was filed at the instance of the applicants. They did not detract from their founding affidavit. They ferociously challenged respondent's deposition that their founding affidavit did not disclose new facts".

[59] In this ground of appeal, the contentious "error" which was supposedly committed was to have "considered" the new facts. To "consider" means to reflect on, to think about with a degree of care or caution; to treat in an attentive way; to give some thought to; to treat or give regard to (Websters Dictionary of the English Language, 3rd Edition 1993). To consider is not the actual decision making which can only follow after a consideration, or a finding based on the evaluation of whatever was considered in the decision-making process. A decision can only be made after consideration, but *in casu*,

the learned judge appears to have only base glossed over the purported new facts, but did not base her decision on this.

[60] The two paragraphs quoted above cannot by any stretch of the imaginations found an appealable error, a reason to set aside the finding by the learned judge that she was enabled to evaluate and decide the new application for bail because she was *functus officio*.

[61] The third ground of appeal differs. It is said that in finding herself to be *functus officio*, the order by the Court to dismiss the application is bad in law.

[62] In my respectful view, this is correct. In order to allow or dismiss an application, or an appeal for that matter, it requires of the decision maker or judge an application of the mind to the matter at hand. The facts and law have to be evaluated and ultimately be accepted or rejected. It is a process based on reasoning, logic, legal principles and precedent, a legal conclusion which is derived from the matter which was placed before the Court for judicial pronouncement. As already stated above, the legal finding by a Court of Law to decide the fate of a matter like this presupposes that the Court is indeed vested with the jurisdiction and ability to apply a judicious mind and come to a justified and fact-based conclusion.

[63] However, when a Court is *functus officio*, the judicial decision-making process is being precluded from being exercised by that judge. If not, there will be no end or finality in law and a conundrum will be created. Otherwise put and applied to this matter, a finding of *functus officio* on the one hand is incompatible with either allowing or dismissing the matter.

[64] In a careful reading of the judgment by the Court *a quo*, the *ratio decidendi* is clearly focussed on whether the Court was able to deal with the application at all, and not whether there were indeed new facts which called for a re-opening or re-hearing of the application for release on bail. I have already concluded that the finding of being *functus officio* is sound in law and that it was correct. I am unable to find that the learned Judge came to a value-based decision on the merits of the application before her. Nor could she have done so under the prevailing circumstances.

[65] However, her judgement ultimately concluded with an order that the bail application is dismissed. It seems to me that it was done *per incuriam*, an error in the Order itself, contrary to the written judgment. Appropriately, the order would have been to remove the matter from her roll, having declined to hear it because she legally could not do so.

[66] This appeal must therefore partially succeed to the extent that the order of dismissal be expunged and corrected by ordering removal from the roll.

[67] The fifth ground of appeal is entirely without merit and cannot influence the outcome of this appeal. The Appellants seek to criticise the Court because she would have misdirected herself in "finding that applicant's counsel argued that the Court did not make factual findings against the Applicants".

[68] In context, the matter was not before Dlamini J. in order to review her previous findings in the first or initial bail application. Whether or not certain factual findings were made does not detract from the task she was sought to perform, namely to reconsider her previous refusal and substitute it with a fresh one, to now release the Applicants.

[69] In her Judgement, with reference to the earlier Judgment of the 6th August 2021, the Court dealt with this issue of factual findings. In paragraph 40 she said:

> "I found that the bare denial of the applicants translated into no evidence to be put on the scales of justice against the evidence of the respondent that was put on the same scales. Nothing controverted the evidence adduced by the respondent which was put on the scales of justice by this Court. The upshot of it is that the evidence by the

respondent that the applicants were a flight risk posed a danger to national security, the public relied on the Courts to protect it and their properties, inter alia was accepted as likely or probable and certainly not as a fact (as this is the duty expected of a judicial officer in bail matters) against the applicants by reason that it stood unchallenged in law".

[70] However, the determinative point was not if previously made factual findings were wrong or right, or if indeed so made. Instead, fact remains that the first bail application was dismissed, for whatever reasons. The task in the new application was for precisely the same relief, but said to be one which was based on new facts, to be decided by the same judge of the same Court. Meanwhile, an appeal against the first judgment had already been noted but not yet heard nor decided.

[71] The Court *a quo* did indeed make specific and stated findings in the initial bail application. It resulted in a conclusion that their application stood to be dismissed, a final and appealable decision, not open for re-visitation by the same Court in order to review or re- decide the matter. The learned judge referred to a decision of this Court in Maxwell Mancoba Dlamini and Another v Rex (46/2014) [2014] SZSC 09 (9th July, 2015) where Maphalala ACJ, as he then was, held that:

"Where a Court makes specific findings refusing bail, it is not open to the same Court in a subsequent bail application to review its own decision under the guise of new circumstances. The Court becomes functus officio, and, the matter should be taken up on appeal. It is only the appeal Court which could deal with the specific finding of the Court a quo. On the other hand, it is open to the Court of first instance to vary its decision with regard to bail conditions where bail was granted".

[72] It seems to me that some confusion might have surreptitiously affected the issue of a previous order on bail and when it is possible for the same judge to re-visit the initial order. The key to open a re-consideration by the same Court is when that Court has previously granted a bail application in the same case. Sections 96 (18) and (19) (a) of our Criminal Procedure and Evidence Act provides as follows: -

"96 (18) Any Court before which a charge is pending in respect of which bail has been granted, may at any stage, whether the bail was granted by that Court or any other Court, on application by the prosecutor, add any further conditions of bail".

"96 (19) (a)-Subject to the provisions of this Act-

(a) Any Court before which a charge is pending in respect of which bail has been granted may, upon the application of the prosecutor or the accused, subject to the provisions of Section 95 (3) and 95 (4), increase or reduce the amount of bail so determined, or amend or supplement any condition imposed under subsection (15) or (18) whether imposed by that Court or any other Court ...".

[73] Clearly, it is where bail has already been granted when the Court is empowered to order a variation of the conditions of release or a variation of the amount paid or yet to be paid, *etcetera*. In the appeal before us, no bail has been granted, which otherwise would have brought it into the ambit of the enabling statute. It would only then have been appropriate to have followed the course which the Appellants took, to file a second application based on new facts which have since become available and applicable. It then would have served its intended purpose, namely to ameliorate strict conditions of bail such as previously ordered reporting somewhere, the amount of bail, sureties and whatever else comes into play.

[74] In the course of deciding the matter and concluding that she was unable to hear and determine the application because she was *functus officio*, the learned judge below referred to and applied the eloquently and accurately stated position of our law, as per Fakudze J. in Matthias Moyo v Rex

(469/2015) [2016] SZHC 35 (26th February, 2016) at paragraph 12, 13, and 16:

> "I need not give any interpretation to the above quotation per Maphalala ACJ, as he then was, in Maxwell Dlamini (*supra*) because it is clear and unequivocal. It clearly states that new facts can only be invoked to vary bail conditions and not cause a new application to be filed based on the alleged new facts.
>
> Since this Court is a lower and inferior Court to the Supreme Court, it is duty bound to follow the decisions of the Supreme Court."

The learned Justice ended:

> "The introduction of new facts should only be invoked where the application is meant to vary bail conditions where bail has been granted. They cannot be used to re-open a closed case".

[75] The Applicants seek refuge under the wings of Shongwe v Rex (26 of 2015) [2012] SZSC 04 (29th July 2010) and Moyo v Rex 469 of 2015 [2016] SZHC 35 (14th March 2016) to say that the Court erred by finding itself precluded from hearing a new application, based on new facts, despite the authorities referred to above. These cases, as well as the other authorities upon which reliance was placed by the applicants in pursuit of having their matter successfully entertained, are all distinguishable from the present appeal. For instance, the remarks made by an imminent jurist such as Mohammed AJ (as

he was at that time in Namibia), in S v Acheson 1991 (2) SA 805 (NMHC) where he referred to a scenario where an appeal from the Magistrate's Court had previously been dismissed and in a subsequent second appeal, it was unsuccessfully argued that the same Court cannot again deal with the new appeal, based on new facts. Shongwe also differs to the extent that a very different scenario and set of facts presented itself.

[76] In view of the overwhelming weight of authorities which are to the point and applicable herein, I cannot conclude otherwise than that these remaining grounds of appeal also stand to be dismissed.

[77] In passing and before concluding with the order herein, an unprecedented incident presented itself. In the course of writing this judgement, after it was reserved, the attorney for the Applicants/Appellants caused a document titled "Supplementary Heads of Argument" to be placed before us in chambers. No leave was sought at the time of the hearing in open Court, nor subsequently, to do so. It was forthwith returned to the Registrar, but a day later we received a letter from Mr. Simelane in which it was sought to admit the supplementary heads, without any further ado. The Director of Public Prosecutions then filed another letter in which he contests the unprocedural approach, and objected to his alleged assent. Needless to say, this Court does not function in such a *liassez faire* fashion with procedure and form having been firmly

established over the years. We have not read nor given any regard to the contents of the so called "Supplementary Heads of Argument" by the Appellants/Applicants.

[78] To top it all, still while in the process of drafting this judgment, we noted with grave concern that the social media, (Swaziland News, 16 April 2022), driven from outside our jurisdiction, has severely scandalised this Court. Impropriety, collusion and judicial compromise is touted. Worse, equally unfounded allegations of division and undermining ethics by the members of this bench are also presented as the truth. His Lordship the Honourable Chief Justice is not spared either.

[79] Yellow journalism at its worst has not deterred this Court from exercising its constitutional, ethical and legal functions without fear or favour, according to law.

[80] In conclusion, the Orders on Appeal are:

1. Judgment dated the 6th August 2021:

1.1 The application for condonation of the late filing of an appeal is hereby ordered to be dismissed.

1.2 The appeal is ordered to be struck off the roll. It may be re-instated upon obtaining leave of this Court.

2. Judgment dated the14th September 2021:

2.1 The appeal against the judgment herein, dated the 14th September 2021, is partially successful.

2.2 The order of "Bail Application Dismissed" is set aside and substituted with an order of "Application Removed from the roll due to Court being *functus officio*".

3. Amended Notice of Appeal struck off the roll, not to be pursued without leave of this Court.

4. New Application for bail struck off the roll, not to be pursued without leave of this Court.

5. No costs orders are made.

J.P. ANNANDALE
JUSTICE OF APPEAL

I agree

S.J.K. MATSEBULA
JUSTICE OF APPEAL

I agree

J.M. CURRIE
ACTING JUSTICE OF APPEAL

For the Appellants: J.L.C Van Vuuren – Instructed by Simelane

For the 1st Respondent: Thabo Dlamini & M. Nxumalo