IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CIVIL APPEAL CASE NO. 82/2020**

In the matter between:

Muzi P. Simelane **Appellant**

Versus

The Chief Justice of ESwatini **First Respondent**
The Government of ESwatini **Second Respondent**
The Attorney-General **Third Respondent**

Neutral Citation: *Muzi P. Simelane v The Chief Justice of ESwatini and 2 Others (82/2020) [2022] SZSC 34 (4th August, 2022)*

Coram: MJ Dlamini JA, JP Annandale JA, SJK Matsebula JA, JM Currie AJA and MJ Manzini AJA

Heard: 9th June 2022

Delivered: 4th August 2022

CASE SUMMARY

Appeal against judgment by Full Bench of the High Court – Refusal to hear applicant on application of the doctrine of "unclean hands" – High Court – approached to set aside a letter by the Chief Justice of ESwatini whereby attorney Simelane was barred from appearing before any Court in ESwatini on account of contempt of court arising from his failure to pay over proceeds of civil judgment to former client – Legal points raised by appellant focussed on right of – audience by first respondent's attorney and propriety of answering affidavit deposed to by Registrar on behalf of first respondent – Both points dismissed – Applicability of doctrine of clean hands as held by High Court confirmed on appeal – Costs ordered in favour of first respondent, on the ordinary scale –

JUDGMENT

Annandale JA

[1] The latest chapter in the ongoing saga of litigation by the appellant originates from the non-payment of the fruits of a successful action wherein Beauty Build Construction obtained a judgment in its favour. At the time, it was represented by MP Simelane attorneys, with the appellant being its alter ego. When the capital sum of E 487 992, 35 was not paid over to the client, the latter felt obliged to institute legal proceedings against its former attorney. The purported defence which was raised but rightly rejected by the Court was that Beauty Build Construction was not a legal entity, and thus disentitled to the proceeds of the judgment in its favour.

[2] Multiple legal challenges to avoid accounting for and payment to the former client of MP Simelane Attorneys, or the appellant himself, have been enrolled for adjudication over the years, commencing with a High Court Judgment in December 2015 wherein Beauty Build Construction successfully sued for payment of what was due to it. Subsequently, appeals and reviews followed one another. In the course of litigation, the appellant was held to be in contempt of court, which finding remains in place.

[3] In an application for a review of an appeal judgment adverse to the appellant, which was not successful, a full bench of the Supreme Court (per Dr BJ Odoki JA) remarked that: "... *the conduct of the [respondent] in presenting a dishonest defence that its client was fictitious and in delaying to pay to the [applicant] money collected on its behalf from the Government of Swaziland for several years is dishonourable and disgraceful conduct which is an abuse of the court process...*" (See Beauty Build Construction v Muzi P. Simelane and 2 others (68/2015) SZSC 30 [2015] (24th September, 2018) at para 31).

[4] Thereafter, with reference to various adverse judgments of the Supreme Court dated the 10th November 2015, 30th June 2016, 15th May 2017 and the 23rd August 2017, his Lordship the Chief Justice of ESwatini wrote to the appellant on the 9th April, 2018. In paragraph 7 thereof, it was stated:

> "*In exercise of the powers vested in me by sections 139(5) and 142 of the Constitution, your law firm and yourself are hereby barred from appearing before any court in Swaziland until you purge your contempt*".

[5] It is this barring from appearing in the Courts of ESwatini which was sought to be challenged in the court *a quo*. There, on an averred basis of utmost urgency, an application was made to seek a *rule nisi* that:

2.1 "The notice of the 11th April 2019 (sic) barring the applicant from appearing before all the courts of ESwatini should not be declared to be unconstitutional, unlawful and invalid.

2.2 Such a directive as described in (2.1.) above should not be set aside as being of no force and effect.

3. Staying execution of the directive/letter pending the finalisation of this application.

4. Granting costs to applicant on an attorney and own client scale.

5. Granting applicant further and or alternative relief."

[6] The incorrect date of the letter is of no consequence. The letter is indeed dated the 9th April 2018, whereas the imprint of the date stamp at the end thereof reads the 11th April 2018.

[7] The gist of the application to set aside the letter was firstly, that the attorney was not given a hearing prior of the issuance of the notice. In his contestation, it refers to a non-hearing by his Lordship, the Chief Justice, prior to him acting as he did. However, the notice was predicated on multiple hearings of the attorney's matter in various courts, with four such

adverse hearings and findings by the Supreme Court referred to in the letter itself.

[8] Apart from the *audi alteram partem* complaint, the appellant contended that the letter constituted" "... [a] gross human rights violation in that it purports to deprive me of the right to practice a profession of my choice, per Section 32 (1) of The Constitution". "Section 22 (1) of the Constitution still allows for me to be heard and treated justly and fairly. I was not heard", is an ongoing refrain herein.

As part of the basis for imposing the ban, the 1st Respondent stated that he was empowered by sections 139 (5) and 142 of The Constitution, in other words, that he was exercising his Administrative Powers.

[9] Over and above this, it was said that Sections 139 (5) and 142 of the Constitution does not empower the Chief Justice to bar an attorney from appearing in the Courts, thus violating his constitutional rights.

[10] Furthermore, the applicant contended that in any event, contempt proceedings could not have been taken in the first place since the judgments referred to by his Lordship the Chief Justice were judgments sounding in money and therefore not enforceable by contempt proceedings. If so needed, it was in the exclusive domain of the Law Society to discipline attorneys for misconduct and not the Chief Justice. In all, it was his view that the letter of barring him from appearing in the courts was *prima facie*

unlawful and an abuse of power and authority, constituting a gross violation of his fundamental rights as entrenched in the Constitution.

[11] In what is termed a "Preliminary Answering Affidavit", the Registrar of the Supreme Court stated that she is duly authorised to answer on behalf of the first respondent, the Chief Justice of ESwatini, since the relevant issues at stake pertains to the exercise of Constitutional and Administrative Powers of the Chief Justice. She is also the Secretary of the Judicial Service Commission and she is also the Administrative Head of the Judiciary. The appellant takes issue with the admissibility of her affidavit. I will soon revert to this aspect.

[12] Justifiably, the Registrar decried the severe time constraints imposed by the appellant (applicant at the time). The abridgment of timelines due to alleged extreme urgency resulted in only three working hours within which to deal with the matter, despite the applicant having known for a considerable time that the current challenge to the letter of bar was envisaged.

[13] The main issue which was raised as prelimmary point of law, and which found its way to the *ratio decidendi* in the impugned judgment of a full bench of the High Court, relates to the propriety of the applicant, now appellant, to litigate in the courts while he is in contempt of court. The doctrine of "Clean Hands" was held out to be, and so accepted by the Court *a quo*, that a person who is in contempt of an order the court cannot seek to drink from the "pure fountains of justice" until such time that his contempt has been purged.

[14] As long ago as March 2019, the Supreme Court reaffirmed its previous judgments which obliged attorney Simelane to comply with its earlier orders, and it also issued an order for his committal to gaol. The Registrar, on behalf of the Chief Justice, aptly stated the position as follows:

"*The flagrant disregard of an order of the highest court by applicant is a matter of sufficient gravity to warrant that the applicant should not be accorded a hearing until such time that he has purged his contempt.*

At the centre of this issue, is whether a person who does not have clean hands, having deliberately and mala fide *defied an order of court, and thereafter can now [be allowed to] approach the court and be heard. It is submitted that by permitting the applicant to be heard, the court would be stultifying its own processes and condoning the conduct of a person who has persistently and consistently defied an order of court for a period of three (3) years.*

The applicant's defiance of the order of court has undermined the cause of justice and should not be condoned. The court is therefore enjoined to refuse to entertain the application until such time that the applicant has purged his contempt. The applicant has with respect treated the courts and by extension, the halls of justice with disdain and should not be allowed when it suits him to require that the same courts accord him justice."

[15] Further preliminary legal points were taken on behalf of the first respondent which relate to the complaint assessment by the Commission

on Human Rights and Public Administration/Integrity, established under Section 163 of our Constitution. The applicant filed a complaint assessment report in the matter between Muzi Percy Simelane and MCB Maphalala CJ (N.O.) which considered it to be appropriate for the Honourable Chief Justice to withdraw his letter of the 9th April 2018, which barred attorney Simelane from appearing in the courts of ESwatini. However, prior to the investigation and report of the 28th May 2020, Mr Simelane instituted another case in the High Court. This was under case number 1390/2018, dated the 30th august 2018.

[16] In that matter, the relief that was sought is virtually *verbatim* the same as that which was sought in the matter currently on appeal. That matter has not yet been decided partially due to the recusal of two judges of the High Court, but it has also not been withdrawn. It remains *lis pendens* to date. Section 165 (3) of the Constitution which deals with the powers of the Commission reads that:

> "165(3): the commission shall not investigate –
>
> (a) a matter which is pending before a court."

[17] We are not aware as to whether or not the commission was alerted to the pending matter in court where the same issue of the letter by the Honourable Chief Justice was the cause of complaint, the same issue between the same parties in the pending matter, and subsequently the same issue between the same parties which was brought to court in the matter now on appeal. We do not know if case number 1390/2018 has since been withdrawn or not. If not, there are adverse ramifications in the present matter on an application of *lis pendens* as well as the commission's

investigation and report. In the latest application, attorney Simelane relies heavily on the commission's finding to support the relief he prayed for.

[18] However, the judgment under appeal is not founded upon an acceptance or rejection of the commission's investigations. It did not take the matter any further. Nor did the allegations of violations of fundamental rights as guaranteed under the constitution play any role in the hearing by the High Court. No pronouncement of these issues was made since it did not come up for consideration.

[19] Instead, the court *a quo* rather decided that in order to be heard in a court of law, a litigant had to approach it with clean hands and presently, the applicant was in contempt of the court orders pronounced against him. He has not purged his contempt and therefore could not seek relief from the same courts whose orders he did not comply with. Therefore, the merits or otherwise of his application could not be considered or pronounced and decided upon.

[20] In its judgment, the High Court traced the history of the ongoing matter, commencing with Beauty Build Construction (Pty) Ltd vs MP Simelane Attorneys, Civil Case number 387/2013, wherein the applicant was ordered to pay a sum of money, interest and costs. When the matter was taken on appeal, the Supreme Court made and order by consent of the parties, on essentially the same terms as was ordered in the High court. Costs were now ordered in a fixed agreed amount, apart from the additional costs arising from the appeal. This was done on the 18th May 2016.

[21] Astonishingly, the appellant before us thereafter sought the Supreme Court to review its previous order, which was made by consent! On the 15th May 2017, the ill-advised application for a review was dismissed. Yet again he persisted in flogging a long dead horse, so to speak, and sought to have a review of the dismissed review. This was yet again dismissed in August 2017.

[22] With the matter remaining unresolved, Beauty Build Construction, the former client of MP Simelane Attorneys, obtained an order which declared the appellant to be in contempt of court, in September 2018. A period of thirty days imprisonment was imposed, but suspended on condition of compliance with the consented order. This lifeline was not taken up and subsequently, on the 1st March 2019, the court yet again found Mr Simelane to be in contempt of its previous orders. Eventually, in order to avoid committal to prison, the appellant paid the capital sum of E547 992, but sadly the payment of interest and costs was left in abeyance. It remains so until now.

[23] It is against this backdrop of repeatedly refusing to comply with orders of the High Court and the Supreme Court, in both its appellate and review jurisdictions, coupled with adverse orders of being in contempt of court and incarceration, though conditionally suspended, that his Lordship the Honourable Chief Justice decided to take further steps. By that time, through being made aware of the situation, the Law Society of ESwatini did not deal with the matter of Mr Simelane. Nor did the Attorney-General take any remedial action. He continued to practise law under the style of

MP Simelane Attorneys as if nothing was amiss, despite the still unresolved dark cloud emanating from the Beauty Build Saga.

[24] His Lordship the Honourable Chief Justice wrote to Mr Simelane on the 9th April 2018. He set out the reasons why he acted as he did and barred both Mr Simelane and his law firm from appearing before any court in ESwatini until the contempt was purged. It is this letter which gave rise to the attempted challenge to it before a full bench of the High Court, some sixteen months later. Following well motivated reasons for its conclusion, a full bench of the High Court then issued a unanimous order on the 28th October 2020. It found that the appellant approached the Court with dirty hands, wherefore he could not be heard by the Court. The application was dismissed, with costs. It is this order which is now on appeal before us.

[25] The appellant comes on appeal to the Supreme Court with ten stated grounds of appeal, formulated thus:

"1. The ban was issued by the 1st Respondent on the basis of section 139 (5) and 142 if the Constitution. As part of the preliminary enquires that the Court *a quo* made including that of establish (sic) of dirty hands, it *erred* by not establishing whether the 1st Respondent could lawfully exercise administrative powers over an attorney who does not consist of (sic) the Judiciary per section 139 of the Constitution.

2. The Court *a quo* erred to dismiss the entire application without first affording the Appellant the opportunity to purge the alleged

contempt. The Court should have rather stayed the determination of the application pending resolving the alleged unclean hands.

3. The Court failed to take into account that the very ban which was sought to be set aside was issued without due process per section 33 (1) of The Constitution. Consequently, its continued existence could not be justified under any basis of a fair hearing rubric.

4. The Court erred in law and fact by holding that the doctrine of dirty hands was applicable as the litigation therein had not been finalized involving Beauty Build construction (PTY) LTD, Supreme Court Case No. 68/2015 to then demand compliance with an Order that was being challenged. That would render every appeal/review process to be in the same category of dirty hands because they would be seeking to alter the decision of the Court *a quo*.

5. The Respondent's attorneys having set down the very Beauty Build Construction (Case No.68/2015) matter on 20th October 20202, which was postponed to the first session of 2021(sic). The Court should have found the there was a pending review as proof such existence of the review was filed with the Court *a quo*.

6. Since the Answering Affidavit filed on behalf of the 1st Respondent was being challenged and the right of audience of the 1st Respondent attorneys had not been established (...sic). That role to represent public officials is reserved to the Attorney General per section 77 of

[26] It is immediately clear that a number of the stated grounds of appeal are without any merit. For instance, although the appellant wanted the High Court to pronounce that the letter of Bar was to be set aside, the court did not entertain any such enquiry. It did not consider the merits of the application at all. Unless the Supreme Court was to now embark on a hearing of the application as a Court of first instance in the course of dealing with an appeal, the contents, justification and barring of the appellant from appearing in any court resulting from the letter by the First Respondent dated the 9th April 2018, cannot pass muster as a ground of appeal. It was not decided upon by the Court *a quo*. Consequently, the first, third and eighth stated grounds of appeal cannot be entertained on appeal.

[27] The second ground of appeal decries the absence of yet another opportunity to purge the appellant's contempt. This most disingenuous and spurious attempt to negate the impugned judgment flies in the face of the appellant's contentions, over a protracted period of time and again on appeal, that he is in fact not in contempt at all. His very selective reading of various orders by this Court is in stark contrast with the *de facto* position in which he has plunged himself. To now say that the court erred by not affording him an opportunity to first purge the "alleged' contempt, and that the court should have stayed the determination of his application "pending resolving the alleged unclean hands", is entirely far-fetched.

[28] Accordingly, the second ground of appeal also stands to be dismissed without further ado. It begs the rhetorical question of just how many opportunities the appellant needs to purge his contempt.

[29] The fourth and fifth grounds of the appeal overlap to the extent that both cover the same error. Both are without merit.

[30] It seems to me, though not clearly so stated, that the appellant wants to rely on a so-called pending review application which would have rendered a finding of dirty hands nugatory. It holds out that if an order is challenged on review or appeal it would render it into "the same category of dirty hands because they would be seeking to alter the decision of the Court *a quo*." This is stated to be so because if litigation has not been finalised, compliance with an order under challenge cannot be demanded. The appellant takes it further by stating in the application, that the Court *a quo* should have found that indeed there was a pending review application and as such, it could not have held that he approached the court with dirty hands.

[31] I confess to being unable to follow exactly what the appellant actually wants to convey in these two grounds of appeal. At best, and in favour of the appellant, I take it that what he means to say is that compliance with an order cannot be required of him in the event that an application for a review of that order judgment and order has been filed. It also seems to me that the aspect of taxation of costs might have been another trigger to apply for a review.

[32] In its judgment, the Court *a quo* stated in paragraph 16 of its judgment that:

"The applicant also contended that taxation could not go ahead since there is a pending review at the Supreme Court. This allegation was disputed by Mr. Jele who maintained that no such review was served on his office or filed at the Supreme Court. Applicant's attorney was asked in court to produce a copy but could not produce one. After conclusion of arguments on the 28th September 2020, the Applicant filed further submissions to which he attached what appeared to be a draft application for review. The document is not signed on behalf of the applicant nor has it been served upon the 1st respondent. Although spaces for insertions of the date and time for hearing the application are provided for, no such date or time has been inserted. This leads only to one conclusion; there is no review application pending before the Supreme Court."

[33] Even if the High Court erred in this regard, which I do not think it did, it must be recalled that the matter been Beauty Build Construction (Pty) Ltd and MP Simelane has been in the Courts on many occasions. It has also been taken on review where the appellant emerged with yet another unfavourable outcome.

[34] It is furthermore by now settled law, at least for now, that the same matter reaches the end of the road once a judgment on appeal has been dealt under the review under provisions of Section 148(2) of the Constitution. Otherwise put – there can be no second review of the same matter – See for instance Dlamini and Another v NATCOM and Another (39 of 2014) [2016] SZSC (30th June 2016), Henwood v Henwood and Another (10 of 2018) [2019] SZSC 59 (11th September 2019) and the Ghanian Supreme

Court case of Abdulai Yusif Fansah Muhammed v The Attorney-General and others [2016] GHASC 66. Which has recently been referred to with approval and followed by this court.

[35] Simply put: when a full bench of the Supreme Court has pronounced itself on review, it will not thereafter again review its own judgment. The appellant cannot now want to be excused from compliance with the adverse orders against him on the basis of *lis pendens* as umbrage under a second or further review of his matter, even if such an application has not yet been heard.

[36] Accordingly, the fourth and fifth grounds of appeal also stand to be dismissed.

[37] The seventh ground of appeal is equally unmeritorious. The question of whether interest must also be paid has long ago been put to rest. In the course of an appeal, the Supreme Court endorsed an order which was made by consent between Beauty Build and attorney Simelane. On the 18th May 2016, the order reads in part: "...Interest on the above said capital amount at the rate of 9% *per annum* calculated form 2nd November 2011."

[38] When this matter was taken on review by the present appellant, the court dismissed his application for review, with the result that the order in respect of his obligation to pay interest remains in place. It is disingenuous to now come in the course of this appeal and contend that the "High Court erred by purporting to rule on an issue of interest which the Supreme Court had

not pronounced upon as the Supreme Court ruled that the payment in issue was not for a debt *simpliciter*. Consequently, it cannot incur interest."

[39] In its judgment, the Court *a quo* aptly dealt with this flawed contention of not being liable for the payment of interest anymore. On an analysis of the relevant orders, it correctly concluded that the obligation to pay interest (and costs) has never been rescinded or dispensed with. On the contrary, the order to also pay interest on the capital sum (is as costs) well as cost has repeatedly been entrenched. In favour of the appellant, the Court came to his rescue by requiring the capital amount to be paid within a stipulated period of time. This was to avoid him being imprisoned forthwith. The Supreme Court most certainly did not absolve him from paying either interest or costs. Fortunately, payment of the capital sum was thereafter timeously made. However, to date the order in respect of payment of interest has still not been complied with. Also, it seems that the appellant is recalcitrant to pay the accumulated costs too. As far as we know, no taxation has yet been done and the appellant stated in a letter to the taxing master, which was quoted in full by the Court below, that due to "the pending review", taxation must be held in abeyance. He concluded by stating that:

"*We have heard of situations where the opponents tend to request for a court order interdicting the taxation from proceeding. No court order is necessary in this (sic) circumstances, it is a matter of procedural law.*"

[40] This yet again demonstrates a recalcitrant and obstinate attitude by the appellant insofar as compliance with Court Orders or the indifference to

contempt thereof is concerned. Obviously the seventh ground of appeal also stands to be dismissed.

[41] The only two issues which remain for consideration are contained in the sixth ground of appeal. These are the ability or legal standing of the registrar to depose to the answering affidavit of the first respondent, and the ability or legal standing of the attorney instructed by the first respondent to represent him in these legal proceedings.

[42] His Lordship, the Honourable Chief Justice was taken to task by the appellant regarding an administrative function which he performed in the course and scope of his duties as the Head of the Judiciary. He was cited as the First Respondent, "The Chief Justice of ESwatini". Notably, not "Nomine Officio" as suffix. The office of Chief Justice of ESwatini is the constitutionally acknowledged position of the head of the Judiciary, one of the three "arms of Government". He acted in his official capacity when he wrote letter which barred the appellant and his law firm from appearing in courts of law until his contempt was purged. He certainly did not order him to be removed from the roll of admitted attorneys.

[43] It is this letter of the 9th April 2018 which was sought to be set aside on various grounds in the application now under appeal. Both the Government of ESwatini and the Attorney-General were also cited, as second and third respondents. Neither reacted at all, with no Notices or opposing papers filed by either. At least the Attorney-General could have stated his position in the matter, especially because previous judgments in this saga had been referred to his offices due to his formal role in aspects

relating to the conduct of attorneys. Also, when the propriety of a private firm of attorneys representing the first respondent became an issue while it was contended that only the Attorney-General, as principal legal advisor of the Government, was able to represent the Chief Justice. It would be inappropriate for this Court to speculate upon the reasons for the non-reaction by the Attorney-General in this matter.

[44] The appellant argues that it was not possible or appropriate for the Registrar of the Supreme Court to have filed an answering affidavit and have it considered by the High Court. The other side of the coin would be the question as to whether or not it would be appropriate for his Lordship the Honourable Chief Justice to file an answering affidavit deposed to by himself where he is cited as respondent in a matter like this. I think not. In my view, it is highly undesirable for the Chief Justice of any jurisdiction to take the role of a witness in any cause, especially so when he or she acted in their official capacity as holder of the office of Chief Justice. It might well be that at some or other stage a witness who deposed to an affidavit might be called to give oral evidence and then be subjected to cross-examination. I do not think that it would auger well, for obvious reasons. However, it is not my own view which will carry the day, but it is the legal position as espoused in the precedents and case law which matters.

[45] It is telling that the appellant has not referred this Court to any legal authority which would preclude the deponent of the answering affidavit to be limited to the first respondent personally. In contrast, Mr Jele, whose authority to appear in these proceedings as well as the court below was also disputed by the appellant, referred us to the case of Ganes and Another v

Telecom Namibia Ltd 2004 (3) SA 615 (A) where the Supreme Court of Appeal of South Africa in a unanimous judgment (per Streicher JA) held at paragraph 19 that:

> "*.. In my view it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised*".

[46] It is irrelevant as to whether or not the deponent to the answering affidavit was the author of the letter which was addressed to the appellant. Mr Jele correctly argued that an objection cannot be taken against a respondent and those who have been delegated by him that he lacks the necessary authority to depose to an answering affidavit. It is after all the applicant who has brought the respondent to court to answer. He therefore cannot then turn around and state that he does not have the requisite standing to oppose the application. It is up to a respondent to firstly choose if he or she or it wants to oppose any application and if so, in which manner to do so. If he chooses to oppose and file an answering affidavit, it is also up to him as to who the deponent to that affidavit is to be.

[47] It is only where legal proceedings are instituted by legal *personae* that the authority of an entity is required of a deponent to a founding affidavit to do so. In Griffiths and Inglis (Pty) Ltd v Southern Cape Blasters (Pty) Ltd 1972 (A) SA 249 (C), it was stated:

> "I proceed now to consider the case of an artificial person, like a Company or Cooperative Society. In such a case there is judicial

precedent for holding that objection may be taken if there is nothing before the court to show that the applicant has duly authorised the institution of notice of motion proceedings.... Unlike an individual, an artificial person can only function through its agents and it can only take decisions by the passing of resolution in the manner provided by its constitution.

"... It seems to me, therefore, that in the case of an artificial person, there is more room for mistakes to occur and less reason to presume that it is properly before the court or that proceedings which purport to be brought in its name have in fact been authorised by it..."

[48] Indeed, it is common cause that neither the first respondent nor the deponent to the answering affidavit instituted the proceedings. The first respondent chose to have the answering affidavit deposed to by another, a person with direct and personal knowledge of the matter at hand. She is also the secretary of the Judicial Service Commission and administrative head of the Judiciary. As such, she is eminently able to have deposed to the answering affidavit on behalf of the first respondent who acted in his formal and official capacity when he issued the letter under complaint.

[49] Accordingly, this part of the 6th ground of appeal stands to fail.

The second point in this final ground of appeal concerns the status of the attorney who appeared on behalf of the first respondent. It is equally a challenge without merit.

[50] A cornerstone of our judicial system, at least in the formal courts of ESwatini, is that a litigant is entitled to legal representation. In both civil and criminal matters, people are able to be represented by admitted attorneys and advocates of their choice. Legal representatives are professionals who have studied law and have served their articles of clerkship under the supervision of established legal practitioners or the office of the Attorney-General, passed their bar exams and were duly admitted as attorneys of the High Court. The only limitation insofar as choice of attorney is concerned is where *pro-deo* counsel is appointed for impecunious persons who are criminally accused of murder and suchlike crimes, but even then, such persons still have the right to rather instruct a private legal practitioner of their own choice.

[51] In the present matter, the first respondent with concurrence of the Judicial Service Commission, decided to mandate the firm of attorneys practising under the name and style of Robinson Bertram Attorneys, based in Mbabane. Certain individual members of this firm were specifically named to appear and represent his Lordship, the Honourable Chief Justice who is cited as the first respondent, both in the High Court and the subsequent appeal. Mr Zwelethu D. Jele, a senior partner of Robinson Bertram Attorneys, ably quit himself of his task. This included the settling of affidavits, filing of court documents in both courts and presenting well prepared argument.

[52] When the applicant *a quo* noticed that Mr Jele of Robinson Bertram Attorneys acted on behalf of the Chief Justice *qua* first respondent, he sought to challenge his right to appear on behalf of his client. Virtually

simultaneously with the filing of the preliminary answering affidavit, the applicant filed a Notice on terms of Rule 7 (1). Therein, it disputed the authority of Robinson Bertram Attorneys to act on behalf of the first respondent and required of the said attorneys to file a power of attorney to indeed so act.

[53] Rule 7 (1) (as amended in 1990) does not require the automatic filing of a power of attorney to act as attorney for a litigant, but the authority to do so may be disputed within ten days after it has come to the attention of another party. Unless the attorney acting on behalf of the litigant satisfies the court that he is authorised to act as such, he has to cease acting or appearing for the client. Rule 7 (4) requires the power of attorney to be signed by or on behalf of the party giving it. Sub-rule (5) exempts the Attorney-General from filing a power of attorney, likewise with any attorney instructed by him in writing (or by telegram). Possibly, it might nowadays also be done by e-mail.

[54] When the authority of the first respondent's attorney to represent him in Court was challenged, it was incumbent upon the attorney who appeared for His Lordship the Honourable Chief Justice, being the first respondent to establish that he acted as he did. In order to do so, he filed a resolution which was taken at a meeting of the Judicial Service Commission on the 17th August 2020. His Lordship the Honourable Chief Justice is the chairperson of the Commission. This date is almost immediately after the application under case number 1508/20 was filed, the case which is now under appeal. The resolution is clear: it mandates and authorises Robinson Bertram Attorneys, including Mr Z Jele, to represent the first respondent

in the urgent application brought by the applicant, now appellant. It includes authority to defend and oppose the matter and take any other steps as may be necessary and it also includes provision for fees and disbursements. In all regards, it authorises the attorney of record, Mr Jele, to do whatever needs to be done in order to oppose and defend the matter.

[55] I cannot find reference to the contestation under Rule 7 by the Appellant in the judgment by the Court *a quo*, or of any indication that the appellant pursued his contention that it is only the Attorney-General who was entitled to represent the first respondent. In the event that it was an issue of note, one would have expected some reference to it, or a finding, in the impugned judgment. In the absence of a transcript of argument in the High Court, it remains speculative if this point was indeed raised or whether it first surfaced on appeal. Fact is that the full bench of the High Court made no finding on this aspect: was Mr Jele entitled to appear for the first respondent or was the Attorney-General the one who was able to do so.

[56] Interestingly though, the Attorney-General is a party to the proceedings, cited as the third respondent. As such, all pleadings were served on his office in Mbabane and he was aware of the point taken by the applicant in his replying affidavit. Therein, in paragraphs 3.14 to 3.23, the applicant detailed the reasons why he is of the view that Robinson Bertram Attorneys could not appear for the first respondent, but that it could only be done by the third respondent, the Attorney-General.

[57] If it was so that the Attorney –General held the same view, or even if not, it was incumbent upon him, as officer of the court and as a party to the

proceedings, to have filed relevant pleadings in the matter. He chose to not file any papers at all.

[58] To underscore the misconception as apprehended by the appellant, he states in paragraph 3.23 of his founding affidavit that the first respondent's attorneys were served with a Notice to file a Power of Attorney to act on behalf of the Attorney-General (sic) and that they have not done so. This contradicts the wording of the Rule 7 (1) Notice, that they were required to file a power of attorney for the first respondent, not the Attorney-General as stated in the replying affidavit. This material misconception needs no further elaboration.

[59] The fallacy of the argument by the appellant is due to a misinterpretation of section 77 of the Constitution. Firstly, because section 77 (3) (a) designates the Attorney-General as principal legal advisor to Government, the appellant regards the word "principal" as meaning that no other attorney may represent the Government in the courts or in any legal proceedings to which Government is a party (77(5)(c)).

[60] While it is true that the Government of ESwatini is a party and cited as the second respondent, it is not the Government who issued the letter of bar. This was done by the first respondent, the Chief Justice of ESwatini. The Attorney-General was welcome to represent the Government, but he chose not to participate in the matter or to file any pleadings at all. The Attorney-General is also an *ex-officio* member of the Cabinet (73 (3) (b) of the Constitution). Apart from being a member of the executive branch of

Government, he is also a legal advisor to Parliament, the legislative branch of Government.

[61] It is common cause that our Constitution recognises three arms or branches of Government, to wit the Executive, Legislature and Judiciary with especially the judiciary being independent of the other two arms of Government. To now argue that a member of the executive and legal advisor of the legislature is the one and only person who may represent the head of the judiciary, takes it too far. The Judiciary, being independent of the other arms of Government, is headed by His Lordship, the Honourable Chief Justice of ESwatini. He acted as such when he issued the letter of the 9th April 2018 to the appellant and who is now sought to be taken to task for having done so.

[62] In my considered view, it would be tantamount to making a mockery of the independence of the judiciary if its head chooses to instruct a private firm of attorneys to appear in court proceeding against him, but may not exercise his choice. Instead, the appellant argues that he may only and exclusively so be represented by the third respondent, the Attorney-General, who is an *ex-officio* member of cabinet and legal advisor to parliament. It is untenable. This part of the sixth ground of appeal equally stands to be dismissed.

[63] In closing, the real and actual issue for consideration is whether the full bench of the High Court was correct in closing the doors of justice in the face of the appellant and not giving him an audience on the merits of his application. As stated above, the plethora of adverse judgments against

him in the ongoing Beauty Build Construction Saga of litigation have one thing in common – his conduct was held to be reprehensible and he has repeatedly been ordered to pay the capital sum of money, interest thereon and costs. To date, he has still not paid either interest or costs. He has also been found to be in contempt of court, so much so that direct imprisonment has been imposed, which was conditionally suspended. By all accounts, he has not yet purged his contempt, but still wants to vindicate his perceived injustices in the same courts which he has held in contempt. His application was dismissed with costs by the High Court, and rightly so. It was held that he approached the Court with dirty hands, and that finding cannot be faulted on appeal. Until such time that the appellant has purged his contempt, his usual right to approach the Courts of Justice in this kingdom shall be held in abeyance.

[64] To this effect, Rose Innes J as (as he then was) stated the following in Di Bona v Di Bona & Another 1993 (2) SA 682 (CPD) at 688 C-D and F-G.

> *"The general rule is that orders of Court must be obeyed. Were this not so, the protection of the rights of persons and the resolution of disputes by recourse to the Court which is established for that purpose, would be of little, if any effect and the community would be deprived of the proper administration of justice. Contempt of an order of Court is therefore a grave matter.... The consequences of the rule are that anyone who disobeys an order of Court is in contempt of Court and may be punished by arrest of his person and by committal to prison and, secondly, that no application to the Court by a person in contempt will be entertained until he or she has purged the contempt."*

[65] In Photo Agencies (Pty) Ltd v The Royal Swaziland Police & Another 1970-76 SLR 398 at 407C, Nathan CJ, quoting with approval from Mulligan v Mulligan 1925 WLD 164, had this to say:

> *"Before a person seeks to establish his rights in a court of law, he must approach the Court with clean hands; where he himself, through his own conduct makes it impossible for the processes of the Court (whether civil or criminal) to be given effect to, he cannot ask the Court to set its machinery in motion to protect his civil rights and interests. Were the Court to entertain a suit at the instance of such a litigant it would be stultifying its own processes".*

[66] He then proceeded to dismiss the application before him, based on an application of the doctrine of dirty hands.

[67] In dealing with this very issue, Lord Denning made the following timeless remarks in Hadkinson Vs Hadkinson [1952] 2 ALL ER 571 at 574-5: -

> *"It is a strong thing for a Court to refuse to hear a party to a cause and it is only to be justified by grave consideration of public policy. It is a step which the Court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing a compliance. Applying this principle I am of the opinion that the fact that a party to a cause has disobeyed an order of court is not of itself a bar to his being heard, but if his disobedience is such that so long as it continues it impedes the course of justice in the cause by making it more difficult for the*

Court to ascertain the truth or to enforce the orders which it may make, then the Court may, in its discretion, refuse to hear him until the impediment is removed or good cause is shown why it should not be removed."

[68] The same applies to the appellant – either he purges his contempt, or he remains with "dirty hands" and without a right to approach the courts for relief.

[69] Regarding costs: even though the appellant sought a punitive costs order on the scale of attorney and own client against the first respondent, and even though there might well have been scope to apply it inversely, I think that it would unduly strain the appellant to yet again bear the onus of such costs orders against him, especially so with their accumulative effect.

[70] In the event, the appeal is ordered to be dismissed, with costs on the ordinary scale.

JP ANNANDALE

Justice of Appeal

I agree

MJ Dlamini
Justice of Appeal

I agree

SJK Matsebula
Justice of Appeal

I agree

JM Currie
Acting Justice of Appeal

I agree

MJ Manzini
Acting Justice of Appeal

For the Applicant: TR Maseko Attorneys

For the Respondent: Mr Z D Jele of Robinson Bertram Attorneys, Mbabane.